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CASES

ON

THE GENERAL PRINCIPLES

OF THE

LAW OF

PRIVATE CORPORATIONS

SELECTED AND ARRANGED WITH NOTES

BY

HORACE L. WILGUS, M. Sc.

Professor of Law in the University of Michigan

IN TWO VOLUMES

VOLUME I

"A substantial and compendious report of a case rightly adjudged doth produce three notable effects; *first*, it openeth the understanding of the reader and hearer; *secondly*, it breaketh through difficulties; and *thirdly*, it bringeth home to the hand of the studious, variety of pleasure and profit; I say it doth open the window of the laws, to let in that gladsome light, whereby the right reason of the rule (the beauty of the law) may be clearly discerned; it breaketh the thick and hard shell, whereby with pleasure and ease, the sweetness of the kernel may be sensibly tasted, and adorneth with variety of fruits, both pleasant and profitable, the storehouses of those by whom they were never planted nor watered."

LORD COKE, in Preface to 9th Report.

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PREFACE.

MR. JUSTICE SWAYNE said the Common Law is "Reason dealing by the light of experience with human affairs"; and Mr. Justice Holmes says "The life of the law has not been logic; it has been experience." This work is designed to furnish those interested in the study of Corporation Law,—whether practitioner, teacher or student,—such material from the original sources, and in such order, as will show how reason and experience have dealt with the subject. Effort has been made in the selection to secure the best expression of the underlying reason or theory; to place these in such order as to develop, in a natural way, the general theory of Corporation Law, set forth in the table of contents; to insert such notes as will present a more comprehensive view of some of the topics; and to furnish, in chronological order, such a list of cases bearing upon the principles as will enable the investigator to make a reasonably complete study of the same.

The editor has had no special theories to advance, but some effort has been made to bring back into light, and put in their proper places, the "personal" and "franchise" theories of corporate existence, so much obscured by the "collection of individuals" theory in the excellent works of Mr. Morawetz and Mr. Taylor.

The Law of Corporations cuts across nearly the whole body of the Law. In addition, intricate and peculiar relations arise between a corporation and the State, the Promoters, the Members, the Officers, the Creditors, or others, as well as amongst themselves. Recently the volume of corporate litigation has been enormous, resulting in numerous discordant decisions of inordinate length. All these make the choice of illustrative cases on the subject especially difficult. During the four years of preparation, many thousand cases have been examined and compared in order to make this selection. Some topics are not here worked out in such detail as in other collections; but

many others, such as, the Corporation as a Franchise, Constitutional Limitations on the Power to Create, Functions of Promoters, Subscriptions, Incorporation, Organization, Corporations De Facto and By Estoppel, Name, Power to Sue and Be Sued, Taxation, Visitation, National Corporations, the National Government and State Corporations, etc., etc., not found, or merely touched upon, in other works, are here given due prominence. An appendix of forms is also added. By continual cross references, many cases have been used to do double service, and thereby add to the completeness of the view.

It is believed that a constant reference by the student to the outline given in the table of contents will be of material service in helping him to understand and appreciate the bearing and relation of the cases to one another and to the general theory of corporation law.

Acknowledgments are due to Oscar Bader, Esq., R. G. Schulder, Esq. and Mr. H. F. Jacobs, for help in reading proof and verifying citations.

The work is submitted to the judgment of those who have occasion to use it, with the hope that it may be found of service.

H. L. W.

ANN ARBOR, MICHIGAN,
February 1, 1902.

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CASES

ILLUSTRATING

THE GENERAL PRINCIPLES

OF THE

LAW OF PRIVATE CORPORATIONS

PART I.

THE IDEA OF A CORPORATION.

CHAPTER 1.

DESCRIPTION AND CLASSES.

ARTICLE I. DEFINITIONS AND TESTS.

Sec. 1. Definitions.[1] A PERSON[2]: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."

1819. Chief Justice Marshall, in Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, on 636.

A COLLECTION OF INDIVIDUALS[3]: "The word 'corporation' is but a collective name for the corporators or members who compose an incorporated association; and where it is said that a corporation is itself a person, or being, or creature, this must be understood in a figurative sense only."

1886. Victor Morawetz, Law of Private Corporations, 2d ed., § 1, *et seq.*

A FRANCHISE[4]: "A corporation is a franchise created by the king."

c. 1745. Comyn's Digest, Franchise (F) F. 1.

[1] Angell & A. Corp., §§ 1-65; Beach, § 1; 1 Bl. Com., *467; Boone, ch. 1; Clark, ch. 1; Cook, ch. 1; Elliott, §§ 1-20; Field, ch. 1; Grant, p. *1-*9; 2 Kent Com., p. *267; 1 Kyd Corp., Int.; Taylor, ch. 1-5; 1 Thomp., ch. 1.

[2] See §§ 6-15 *infra*, and note, p. 72.

[3] See §§ 16-21 *infra*, and note, p. 109.

[4] See §§ 22-29 *infra*, and note, p. 157.

Sec. 2. Tests. As to whether a particular institution is a corporation or not the tests are:

(1) "The merging of the individuals composing the aggregate body into one distinct, artificial existence."

WARNER AND RAY v. BEERS.[1]

BOLANDER v. STEVENS.

1840. IN THE COURT FOR THE CORRECTION OF ERRORS. 23 Wendell (N. Y.) Reports, pp. 103–190.

[In the first above entitled cause, the declaration commenced in the name of "Joseph D. Beers," described as "President of the North American Trust and Banking Company, an association doing business in the city of New York, under and by virtue of an act of the legislature of the state of New York, entitled 'an act to authorize the business of banking,' passed April 18th, 1838, who prosecutes for and on behalf of the said association;" and then was set forth in the usual form a count on a promissory note by the third endorsee against Warner and Ray, as endorsers. The declaration also contained the common money counts, and the *insimul computassent*, alleging the debts to have arisen, and the promises to have been made to "the said association," and concluded with the words "to the damage of the said association of five hundred dollars; and therefore the said plaintiff, as president as aforesaid, brings suit," etc.

The declaration in the second suit was like the preceding, except that it contained only the common money counts, and the count on the *insimul computassent*. To these declarations, demurrers were put in by the defendants respectively. In the first suit, the following cause, among others, of demurrer was assigned, viz.:

V. The institutions or associations authorized and intended to be created by the act entitled "An act to authorize the business of banking" are corporations or bodies politic, and the act expressly allows the creation of an indefinite and unlimited number of such corporations, at the pleasure of any persons who may associate for that purpose. The act is, therefore, a violation of the ninth section of the seventh article of the constitution of this state, and is absolutely void.

The defendant in the second cause also interposed a demurrer assigning special causes similar to the special causes in the first count; the fourth special cause being in these words: "For that the act in the declaration mentioned, entitled 'An act to authorize the busi-

[1] Statement of facts partly omitted. Arguments omitted. Opinions by Bradish, president of the senate, Walworth, chancellor, and Root, senator, omitted; also, part of the opinion of Senator Verplanck. A brief analysis of each of the opinions given in this case is given in a note by the reporter on pp. 103–105.

ness of banking,' so far as the same proposes to authorize this suit, is a violation of the provisions of the constitution of this state respecting the creations of incorporations, and is void; and also that the said act is void, because the same did not receive the assent of two-thirds of all the members elected to the legislature of this state, by which legislature the said act purports to have been passed."[1]

The two demurrers were brought to argument before the supreme court, at the January term, 1840, and judgment given in both cases for the plaintiffs. The court referred, for the reasons of the judgment, to the opinions delivered by Chief Justice Nelson, Mr. Justice Bronson and Mr. Justice Cowen, in the case of Thomas v. Dakin, 22 Wendell 9 *et seq.*[2] Both causes were removed by writs of error to the court for the correction of errors, and were brought on to argument on the 18th February, 1840.]

By SENATOR VERPLANCK. The decision of these causes seems to me to depend wholly upon that of the question, whether or no associations with constitutions, powers and incidents, similar to those authorized under the general banking law, are bodies corporate and politic; or, in other words, whether the general banking law of 1838 is void, because it was not passed with the express assent of two-thirds of all the members of the legislature.

The supreme court think that they "must, on these records, presume the general banking law to have been passed by two-thirds of all the members of the legislature." Judge Cowen adds: "We must clearly do so until the fact is denied by plea. The requisite constitutional solemnities must always be presumed to have taken place until the contrary shall be clearly shown. Should the defendant withdraw his demurrer, and plead specially that the law in question did not receive the assent of two-thirds as required by the constitution, it will then be in order to pass upon the validity of such an objection." Judge Bronson concurs more briefly to the same effect.

Now, it appears to me that this point was rightly presented on the demurrers in these cases, so as to authorize and demand the decision of the court. * * *

From our official knowledge of the facts of the law—from those facts being spread out on our journals—from the actual inspection of the record by some of us, we all well know that the act was *not* passed by the vote of two-thirds of each house of the legislature. We must then meet directly, and settle the question whether the associations formed under the general banking laws are, or are not, "bodies politic and corporate."[3]

[Definition—Artificial personality.]—What, then, is the strict definition of the phrase *bodies politic and corporate?*

Definitions differ in their character according to the nature of the thing to be defined. * * *

[1] See *infra*, p. 373.
[2] *Infra*, p. 19.
[3] For statement of provisions of the general banking law of 1838, see Thomas v. Dakin, *infra*, p. 21.

Strict and essential definitions can generally be given of the terms of positive jurisprudence, and particularly so in the extremely technical and artificial system of the ancient English law. This is remarkably the case, for instance, in regard to our common law terms of real estate, as fee, lease, warranty, grant, covenant, reversion, remainder, etc.; all of which are defined precisely and essentially, not explained by mere attributes. *Bodies corporate* belong to that system, and thence do we immediately derive them. What, then, is a body corporate? What is its necessary and *essential* meaning? "It is called a body corporate," says Lord Coke, "because the persons composing it are made into one body." "It is only *in abstracto*, and rests only in contemplation of law." 10 R. 50. So again, he says, 1 Inst. 202, 250, "Persons capable of purchasing are of two sorts—*persons* natural created of God, and *persons* created by the policy of man, as persons incorporated into a body politic." If, leaving the quaint scholastic teaching of the father of English law, we come to the clearer and directer sense of our own Marshall, we find the same prevailing idea. "A body corporate is an artificial being, invisible, intangible, existing only in contemplation of law. Being the creature of law, it possesses only the properties conferred upon it by its charter. Among the most important of these are immortality, and, if the expression may be allowed, *individuality*." 4 Wh. R. 636; 1 Peters' R. 46. Again; "It is precisely what the act of incorporation makes it; derives all its powers from that act, and is capable of exerting its faculties only in the manner which that act authorizes." "Within the limits of the properties conferred by its charter, it can," says Blackstone, "do all acts as natural persons may." "In corporations," says Prof. Woodeson, "individuals are invested by the law with a political character and personality, wholly distinct from their natural capacity." "A corporation," says Kyd on Corporations, 13, "is not a mere capacity, but a political person in which many capacities reside." Thus, then, the essential legal definition that covers the whole ground, and expresses the very essence of the being of a body corporate, is this: "*It is an artificial legal person, a succession of individuals, or an aggregate body considered by the law as a single continuous person, limited to one peculiar mode of action, and having the power only of the kind and degree prescribed by the law which confers them.*" Such is the established notion of our common law. Such, too, as far as I can trace it, is the doctrine of the modern civil law, as modified by the jurisprudence of the European continent. "Communities that are lawfully established (*i. e.*, corporations)," says Domat, one of the great teachers of the ante-revolutionary French civil law, "are in the place of *persons*, and their union, which renders common all their interest, makes them to be considered as *one single person*." Domat, Civil Law, Lib. 1, tit. 15. To the same effect a somewhat older Italian civilian speaks, Oldradus De Ponte, as quoted by Sir Robert Sawyer, in his very able and learned argument in the case of the city of London, 8 St. Tr. 1175. "*Licet non habent veram personam, habent personam fictione juris.*" So the older

German jurisprudence, as founded on the Roman law, also held the idea of *personality* as essential to corporations. Heineccius, one of the most distinguished civilians of that school in the last century, in his instructive essay on the legal history of the corporate *guilds* or societies of trade so common in Germany, speaks of this personality as an attribute of all corporations. "*Universitates et contrahere possunt et delinquere, quippe quae moraliter unam representant personam.*" De Collegiis Opificum, in Germania, cap. 77, § 19. This doctrine of the modern civilians of France, Italy and Germany, may be traced up even to the jurists of the Code and Pandects. "*Personæ vice fungitur municipium et decuria.*" Pan. 1, 22, *de fide juss.* I do not cite these civilians as direct authorities, but mainly to show how deeply and generally this pervading idea of legal personality and artificial individuality entered into and formed the characteristic of all corporate bodies, in those systems of law which might indirectly affect or govern our own, or tend to influence even the popular use of our legal terms.

So far was this principle of corporate personality carried in our old common law that reasons were expressly assigned why a corporation could not be excommunicated or punished for crime. "Because it has no soul," said Lord Coke, which, however ludicrously it may now sound, was but saying quaintly, and in the style of that day, what in modern times would be expressed by saying that a corporation, being an artificial and not a moral person, must be incapable of guilt. The very able argument in the celebrated historical case of the charter of London, in 1682, went a good deal into these refinements, and it was held on one side that a political person had a mind and reason, according to Lord Chief Justice Hobart, and that its reason was expressed by its by-laws, whilst the attorney-general (whom Bishop Burnet has egregiously wronged in calling him "a hot, dull man"), argued most acutely, as well as very learnedly, in support of the capacity of a corporation to incur political, if not moral, guilt and punishment.

All these, it is true, are refinements of technical reasoning, in a taste and fashion of thought which have passed away; but they prove conclusively how strong and undoubted was that legal principle of personality upon which these mere inferences and nice distinctions were founded.

In order to continue the existence of such an artificial person, perpetual succession is ordinarily necessary, though it was not strictly essential, for it may be confined to any given number of lives in being. holding in a sort of corporate joint tenancy, of which I think examples may be found. As a legal person, it has only the powers and properties specifically conferred upon it; and can possess and exercise no others, except such as are absolutely necessary to the exercise of the powers expressly given. This is the enactment of our revised statutes, which, as our revisers rightly said in their report on that title of the law, is "declaratory of a principle of law frequently recognized by our courts, and which it was deemed useful to confirm by legislative authority." To these are added certain legal incidents

by the common law, also declared in our statute, and common to all corporations, as to sue and be sued, hold and convey real and personal property, to appoint officers for its services, and to make by-laws for the management of its affairs. To these more important rights, the law adds the external evidence of a name and a common seal. This last, though apparently a matter of form, is not without effect any more than the legal consequences of seals to instruments in England and this state, so widely different from those of other legal systems, where the distinction between sealed and unsealed instruments is unknown. It is only through a common seal and name that any grant of lands or covenant touching them can be made by a corporation.

[**Powers incidental to corporate existence.**]—There are several very useful and beneficial accessary powers or attributes, very often accompanying corporate privileges, especially in moneyed corporations, which, in the existing state of our law, as modified by statutes, are more prominent in the public eye, and perhaps sometimes in the view of our courts and legislatures, than those which are essential to the being of a corporation. Such added powers, however valuable, are merely accessary. They do not in themselves alone confer a corporate character, and may be enjoyed by unincorporated individuals.

Such a power is the *transferability of shares*, whereby investments may be made, without the owner losing the future control of his funds under changes of circumstances. Such, too, is the *limited responsibility* by which the stockholder, having once fairly paid up his share of the capital, is exempted from further personal liability. So, too, the convenience of holding real estate for the common purposes, *exempt from the legal inconveniences of joint tenancy or tenancy in common.* Again, there is the continuance of the joint property for the benefit and preservation of the common fund, *indissoluble by the death or legal disability* of any partner. Every one of these attributes or powers, though commonly falling within our notions of a moneyed corporation, is quite unessential to the legality of a corporation, may be found where there is no pretense of a body corporate, nor will they make one if all were combined, without the presence of the essential quality of legal individuality. This distinction has been observed and marked by Mr. Kyd, Kyd on Corporations, 13, with logical acuteness and precision: "A corporation is a political person, capable, like a natural person, of enjoying a variety of franchises. It is to a franchise as the substance to its attribute. It is something to which many attributes belong, but *it is itself something distinct from those attributes.*"

Thus, the transferability of shares is not essential to a corporation. For instance, it does not enter into the constitution of our chartered colleges, academies, hospitals and other corporate institutions founded by public endowment, or private beneficence. It does not enter into the charters of incorporated scientific and literary societies for mutual benefit or charity, in the funds of which the members have a beneficial in-

terest. On the other hand, such a right of transfer may be incorporated into partnership articles, and become a fundamental condition of them. The general rule, in absence of any express stipulation, is indeed the reverse of this, and in practice it is comparatively rare amongst us. Hence it has become common to consider such transferability as a clear indication of a corporate character. "We have seen," says Collyer on Partnership, 647, "that *in common cases* a partner is precluded from assigning his interest to a stranger, so as to make that stranger a partner. To prevent this rule from affecting the stockholder of a trading company, there must be provision in the deed of settlement enabling each stockholder to assign or transfer his share." He then adds the limitations rendered necessary in England by the Bubble act, which has no corresponding statute here, and the conclusion of the English decisions is that, by the common law, shares may be made transferable absolutely. King v. Webb, 14 East 406; Pratt v. Hutchinson, 15 East 515; Nichols v. Crosby, 2 Barn. & Cres. 814. See also other cases collected by Wordsworth on Joint Stock Companies. Again, the joint stock companies authorized by statutes in England are avowedly and confessedly not corporations; and, there, says Wordsworth on Joint Stock Companies, 183, "It is the object of all companies to render their shares as negotiable as possible, so that in fact the restrictions imposed by the deed of settlement upon the transfer of shares are generally very few, and seldom extend beyond requiring the transferer's name, etc., being registered in the books of the company. The language of two or three of the later acts of parliament is specially worthy of attention on this subject. They declare, as strongly as words can declare legislative intention, that *transferability of shares*, and the consequent succession, can be authorized in common law copartnerships, without giving to such companies any corporate existence, or rendering them less copartnerships in the strict legal sense of the term. In the statute of 6 Geo. IV, ch. 42, it is enacted, "that it shall be lawful for any member of any such society or *copartnership*, their respective executors, administrators or assigns, to sell and *transfer* any share or shares, or portion or portions of, or the entire stock or interest which any such member may possess in such society or *copartnership*, and the property or funds thereof, subjected to such regulations and restrictions as may be required by the constitution of such society or copartnership." This statute is entitled "An act for the better regulation of *copartnerships* of certain bankers in Ireland." The preamble and recitals, and all the sections speak of these banking firms as mere copartnerships. This strongly marked and repeated recognition of them as such, in the very sections authorizing that transferability and its consequent succession, which have been insisted on as infallible marks of corporate character, leave no doubt in my mind as to the intention and understanding of the British parliament, that in authorizing associations with these and other powers similar to those granted by our banking law, they were not creating bodies politic or corporate.

But this is not all; parliament has not left this meaning and inten-

tion to be a matter of inference. In 1838, another act was passed amendatory of the one just cited, and of another in relation to bankers in England, which gave similar powers. That amendatory statute, after reciting and referring to the titles of these prior acts, adds in the preamble, "and whereas, it is expedient that the said act should be amended, so far as relates to the powers enabling any such copartnership, *not being a body corporate*, to sue any of its own members, and the powers enabling any member of any such copartnership, *not being a body corporate*, to sue the said copartnership. Be it therefore enacted, etc., that any person now being, or who hereafter may be, a member of any copartnership carrying on the business of banking under the provisions of the said recited acts may commence and prosecute any action," etc.

There can then be no reasonable doubt, that in these most deliberately considered and very technically drawn acts of parliament, recognizing copartnerships as having transferable stock, and giving them the authority of suing in the name of their officers and other persons, similar to those of the associations formed under our act, no bodies corporate were intended or supposed to be created.

But, on this head of transferability we need not rely upon English authority alone. We have as strong authority in our own usages and decisions.

In the articles of the Merchants' Bank Association, before our restraining act, a similar transferability of shares was provided, and these articles have the authority of Alexander Hamilton for their validity. I shall have occasion to refer to them more fully hereafter.

So again, in the case of the Albany Exchange, before it received its present charter, the validity of the partnership or joint stock company for a public enterprise, with transferable shares, was expressly recognized. *By the court*—Cowen, J.—"The objection taken on the argument, that this association was illegal, as being in the nature of a corporation, issuing scrip and providing for a *transfer of stock*, is not well founded. The act of association in this way is, we think, properly characterized by the exception taken at the trial. It constitutes a partnership valid, as being formed for the purposes of a lawful, honest enterprise." Townsend v. Goewey, 19 Wendell 427. The learned judge then refers to, and adopts, the authority of Collyer on Partnerships, p. 624, and the cases he cites.

Again, this transferability may be found in many sorts of trusts. A well-known instance of this may be seen in the Tontine of New York, originally built for the purposes of a merchants' exchange. It is a trust of real estate, with transferable shares as personal property; it was originally settled by the most eminent counsel of this state, and its validity has been attested by nearly fifty years' experience, during which, above two hundred shares have passed through courts, assignments, insolvencies, bankrupt commissions, distribution of estates, etc., without their legal transferability having ever been impeached. See printed articles of the Tontine, N. Y., 1793.

In both of these last examples, as in other instances of trusts and partnerships, lands were held exempt by operation of law from the legal incidents of joint tenancy or tenancy in common, and the estate continued for the common purposes. This has been noted as a mark of corporate character; yet most corporations are limited in the extent of its exercise, some are expressly excluded from the privilege, and very many exist legally without its actual exercise or enjoyment.

The *non dissolution by death* or by legal disability is also noted in the opinion of the supreme court in these cases as a mark of a corporate body. But that also may be found in the trusts just mentioned, and others of a similar nature, and it may be adopted as an article of ordinary partnership. It is the settled law of England that it may be stipulated that death shall not dissolve the partnership, and further, that the executors of the deceased shall become partners. Collyer on Partnership, p. 5, 648; Pease v. Chamberlain, 2 Vesey Rep. 33; Haggerman v. Spears, 7 Pick. Rep. 235; Wrexham v. Huddleton, 1 Swanst. 514.

Again, a common *name* has been regarded as a corporate criterion. To this Lord Ellenborough gives a full answer in Rex v. Webb. "As to the fourth point, that the subscribers have presumed to act as if they were a body corporate—how is this made out? It was urged that they assumed a common name, that they have a committee, etc. But are these the unequivocal evidence and characteristics of a corporation? How many unincorporated assurance companies and other descriptions of persons are there that use a common name, and have their committees, general meetings and by-laws? Are these all illegal? Or which of these particulars can be stated as being of itself the distinctive and peculiar criterion of a corporation?" Thence he infers that "these subscribers have not acted peculiarly as a body corporate." Rex v. Webb, 14 East's Rep. 406.

But, perhaps, in the general and popular understanding, the most familiar distinction between corporate bodies and common partnerships, or other joint undertakings, is the *exemption of the associates from personal liability* beyond the actual amount of their respective proportions of the capital. The regarding this very frequent and important incident of a corporation as an essential characteristic seems not to be confined to popular opinion. Judge Cowen says, in the decision of the cases now before us: "Among other peculiar privileges conferred on these associations, and not enjoyed by natural persons, I allude to that of the exemption of members from personal liability for debt. This is mentioned by Angell & Ames, in their treatise, as peculiar to a private corporation; they notice it as a striking characteristic between a corporation and a partnership." Yet our own statute of limited partnerships affords sufficient evidence that an alteration of the existing law may be made by statute, so as to exempt from personal liability beyond the stipulated share in the joint funds, for the debts of a firm, without the remotest thought of converting such firms into bodies corporate. Besides, the right of making a contract, whereby those who tender it stipulate not to be bound beyond

the amount of some specific pledged fund, must be a natural right growing out of the very nature of contracts. If a company, or association, or an individual, offers to contract to make certain payments only to the amount of certain specific funds, and others choose to accept that contract on those conditions, there can be nothing to prevent the validity of such a contract, except some positive rule of law founded on policy or an arbitrary enactment. In the absence of such a restriction, it is and must be good. Such a limitation, then, must be binding on all who accept the conditions. The policy of our law and the usages of business have, indeed, rightly fixed the presumption the other way, so that the stipulation and the burden of proof of the limited indebtedness are thrown upon those who expect to be benefited by them. This right has been substantially admitted by the highest tribunals in Great Britain, in the case of Minnett v. Whinnery, 3 Brown's Parl. Cas. 323, and it was held to be good by Lord Ellenborough, in Alderson v. Clay, 1 Camp. 404. The doctrine has been received as settled law by one of the best elementary writers of the day, often cited by our own supreme court. "When a creditor," says Collyer on Partnership, 214, "has notice, that by an arrangement between partners, one of them, though appearing to the world as a partner, shall not participate in the loss, and shall not be liable for it, the creditor will be bound by the arrangement."

The original articles of the Merchants' Bank, in the city of New York, as an unincorporated association, with limited *liability*, as well as *transferable shares*, which were read in argument by Mr. Kent, have the great professional authority of Alexander Hamilton, who prepared them, and of the many eminent men who joined in them, and whose professional distinction gives to their approbation the character of a sort of judicial sanction; whilst the restraining act passed soon after proves, as was unanswerably argued, that the legislature and its legal advisers considered such a voluntary association, thus restraining its own liability, not as a violation of common law, but merely as contradicting the financial policy of the state.

A similar analysis of such of the customary accessary powers of specially chartered moneyed corporations, as from being most conducive to ends of profit or convenience are ordinarily considered as the essential qualities constituting corporations, will show, that all such powers or incidents are merely convenient and desirable authorities or modes of action, added to and engrafted upon the creation of a body politic; not the legal attributes absolutely essential to a corporation, and denoting its existence as such.

Amongst us, as in England, bodies politic or corporate may exist where the ultimate personal liability is still retained. The personal liability is indeed suspended in such cases, and for a time merged in that of the artificial corporate person; but there may be an ulterior recourse to the corporators when the former fails. Many corporate banks in other states are so constituted, and with us some chartered companies for insurance, etc., some for an indefinite, others to a limited extent beyond the capital. Corporate bodies may exist also

without transferability of the rights of the corporators; for a large majority of our literary and charitable, as well as all our municipal corporations, are so. On the other hand, by our own common law as it would exist now, independently of statutory restrictions, associations might be formed and trusts created, having every one of the above enumerated characteristics, which have been insisted upon as essential to a corporation, except that personality which I before stated as forming its strict and necessary essential legal definition. The present joint stock companies of England afford pregnant examples, showing how many of these attributes may be embodied in voluntary associations which are confessedly not corporations.

In fact the line may be very faint, and depending wholly upon the purely legal and technical character conferred, whether a joint stock association or a trust, freed by law from certain positive restraints imposed by our modern statutes, be a corporation or not. The Tontine trust, before mentioned, is managed by directors annually elected by stockholders; its real estate is held by trustees, continuing their trust from hand to hand, during the lives of the original nominees and the survivors of them, with transferable shares, and wholly without personal liability. For the reasons already stated, the eminence of the counsel (the late R. Harrison) who prepared the trust, and the frequency with which its legal character must have passed in review before lawyers and courts, and always without objection, it may well be regarded as sanctioned judicially. It is a valid trust. Add to it a legislative charter, making the associates a body corporate and no more, what then is the effect? Simply to give a different technical character, an artificial *individuality* in Chief Justice Marshall's phrase, a different mode of standing in courts.

Such was the actual history of the Albany Exchange. It was a joint stock company, formally decided to be valid. 19 Wendell's Rep. 427. A year or two after (1837), it appears by our statute book to have been incorporated, but there is probably but little difference, besides the greater convenience of the corporate body, between the former organization and the present.

The trusts specially permitted by an act of last year, Statutes of 1839, ch. 174, for the benefit of that singular people called *Shakers*, were nothing more than exemptions from the recent restrictions of trusts. They were authorized to continue, enlarge and manage their property, by trusts, as they had done before the change in that title of our law effected by the revised statutes. Had the law, in addition to this, made every Shakers' United Society a body corporate, without otherwise varying the original trust, the only change would have been the conversion of a trust into an artificial legal person, with the same effect substantially as to the interests of those beneficially interested.

Our act for general religious incorporations regulates the incorporation of churches of all religious denominations (other than those provided for in the first and second sections) by trustees, who are to be a body corporate.

Those who have had occasion to look into the mode in which dis-

senting religious trusts are held in England, as I presume they were, in the same manner, in New York when a colony, will, I think, perceive that our statute adds little more than a convenient corporate character to powers elsewhere, and formerly here, exercised under trusts.

All these considerations lead me to the conviction that, for the purpose of constitutional interpretation, we must look to the strict legal meaning of the phrase *body politic or corporate*, and not to those circumstances or adjuncts, which amount only to the descriptions of the manner in which such bodies are very frequently constituted when used for purposes of profit. If this be regarded as a very strict rule of interpretation, let it also be remembered, that it is applied where such strictness is most appropriate, in the interpretation of a provision, restraining the general sovereign power of the state expressing the public will through a majority of the people's representatives.

There is yet another rule of interpretation, which it is proper to state before proceeding to examine whether the associations organized under the banking law are or are not corporations.

Corporate rights are well defined by Chancellor Kent and others to be "franchises or peculiar privileged grants," of the nature of incorporeal property. Such franchises, when they are granted for pecuniary or other purposes valuable to private interests, are of the nature of monopolies, and are always granted exclusively by the sovereign power, directly or indirectly. It is a well-known fact, admitted on all sides, that it was part of the policy and intent of our amended constitution, to prevent, by a constitutional and fixed limitation of the legislative authority, the influence of corruption or interest upon the legislature, as well as the abuse of political favoritism, and the dangerous union of political with pecuniary power. The clause so designed, though so general in its terms as to include even academies and village corporations, it is not doubted, referred in its policy wholly to the monopoly privileges of chartered capital, and especially to banks.

Here, then, in my view, arises another branch of inquiry; and the two distinct objects of examination are these: (1) Do these banking associations fall within the right legal definition of the word "bodies politic or corporate," as before explained and established? (2) Do they come within the policy and intent of the framers of the constitution or of the people who ratified it?

[Test of corporate existence.]—*The most peculiar, and the strictly essential characteristic of a corporate body, which makes it to be such, and not some other thing in legal contemplation, is the merging of the individuals composing the aggregate body into one distinct, artificial individual existence.* Now this is *not* found in the associations under the act. *A corporation* can sue and be sued only by its corporate name. It can act only according to the letter of the law creating it. "It derives all its powers from that act," says Chief Justice Marshall, "and is capable of exercising its faculties only in the manner which that act authorizes." It has no natural powers

which, in its discretion, it may exercise or not. It can exercise none of those other powers, and possesses none of those other rights which the individuals composing it could possess and exercise, were it a mere society or partnership. Not so as to these *associations*. By this act, suits on behalf of such associations *may* be brought in the name of the president. Persons having claims against the company *may* maintain their actions against the president. But there is no reason, except that of mere convenience, why the association may not also sue and be sued under their several real names, as other partners may. This reason of convenience, it is obvious, would not apply where the company was composed of a few persons, as if, for example, one of our great banking firms were to come under the law.

It was indeed argued that the technical construction, which gives to *may* the meaning of *must* or *shall*, applies here. But that construction holds only when there is a previous duty, to which the statute adds some new power or authority, as in the case of a public officer; or where from other reasons it is manifest that (to use Judge Story's words) "the legislature meant to impose an absolute duty, not to give a discretionary power;" otherwise, as he says, "the ordinary use of language must be presumed to be intended, unless it would defeat the provisions of the act." 1 Peters' Rep. 64. The ordinary popular discretionary sense of the word *may* is also the ordinary legal one. The other is the exception. In our revised statutes, the words *may* and *shall* are so used and distinguished. So they are in our annual legislation, as when it is said of a company that it *may* hold real estate, *may* take a certain rate of tolls, *may* borrow money.

Moreover, here the right to sue and be sued as other partners is a common law right, and can not be taken away by mere implication. "A statute made in the affirmative, without negative words," say the highest authorities, "does not take away the common law." 2 Inst. 200. See also Dwarris on Statutes 637, and the authorities there referred to. * * *

Again, these associations do not act by a corporate name and seal, but by another mode familiar to our law. They can contract through their president, as a limited partnership must through its general partner. They are authorized to sue and be sued through him; as Judge Cowen observes: "The power of the legislature to give a right of action to one man in his own name for a debt due to another, has always been exercised from our earliest legal history, and it is now too late to call it in question." I refer to the several legislative and judicial authorities which he has collected in his opinion on these cases. They can not hold real estate as a corporation does, or contract concerning it by their own name and common seal; but, like partnerships, they can have an equitable and beneficial interest in land. Collyer, 70, 76. Their president takes as a trustee, and the associates are but beneficiaries.

How then are these associations to be regarded in legal contemplation?

I assent fully to the conclusive reasoning of the counsel, who

chiefly pressed this part of the argument (Mr. Kent), that they are copartnerships relieved from the inhibitions of the restraining act, and thus allowed to carry on banking business under certain conditions. The policy of the state has prohibited its citizens from issuing paper for circulation as money, or from associating together for certain banking purposes. 1 R. S. 711. It reserved those privileges for corporate banks. The act to authorize the business of banking repealed that prohibition *pro tanto*, as to all individuals or companies who would comply with its conditions. The associations in question are partnerships complying with those conditions, and thus exempted, as any other citizens may be on the same terms, from the operation of a statutory restraint of general right, which is still binding on all who will not comply with the conditions. This is so far in close analogy to the law of special partnership, where exemption from the general liability imposed by the law is tendered to all who comply strictly with the provisions of the statute. The articles and certificate in this act correspond to the certificate setting forth the names of partners, amount of capital, time of termination and nature of business, required by the title of "Limited Partnerships," 1 R. S. 764, and with the articles which every such copartnership must have. The general partner there is authorized to transact business and contract for the rest; so, though with less authority, is the president here. The mode of suing and being sued is precisely the same in both cases. * * *

On the question being put, *shall these judgments be reversed?* all the members of the court, with but a single exception (*twenty-three* being present), voted in the *negative*. Whereupon the judgments of the supreme court were affirmed. The court thereupon adopted the following resolutions:

1. "Resolved, That the law entitled 'An act to authorize the business of banking,' passed 18th April, 1838, is valid, and was constitutionally enacted, although it may not have received the assent of two-thirds of the members elected to each branch of the legislature." This resolution was adopted by a vote of 23 to 1.

2. "Resolved, That the associations organized in conformity with the provisions of the act entitled 'An act to authorize the business of banking,' passed April 1, 1838, are *not* bodies politic or corporate, within the spirit and meaning of the constitution." This resolution was adopted by a vote of 22 to 3.

Sec. 3. Tests. (2) The legislative intent.

THE PEOPLE, Ex Rel. WINCHESTER, Etc., Respondent, v. COLEMAN Et Al., Commissioners of Taxes, Etc., Appellants.[1]

1892. Court of Appeals, New York. 133 N. Y. 279–287, 37 Am. & Eng. Corp. Cas. 1, 31 N. E. 96.

Appeal from order of the general term of the supreme court, in the first judicial department, made February 13, 1891, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at special term, vacating an assessment.

This was a proceeding by certiorari to review the action of the commissioners of taxes and assessments of the city of New York, in imposing an assessment upon the capital stock of the National Express Company, a joint-stock company, of which the relator is treasurer, for the year 1888.

The facts, so far as material, are stated in the opinion.

Finch, J. The relator was taxed upon its capital on the ground that it had become a corporation within the meaning of the provision of the Revised Statutes, which enacts that "all moneyed or stock corporations deriving an income or profit from their capital or otherwise, shall be liable to taxation on their capital in the manner hereinafter prescribed." (1 R. S., title 4, ch. 13, part 1.) The company was formed as a joint-stock company or association in 1853 by a written agreement of eight individuals with each other, the whole force and effect of which, in constituting and creating the organization, rested upon the common law rights of the individuals and their power to contract with each other. The relation they assumed was wholly the product of their mutual agreement and dependent in no respect upon the grant or authority of the state. It was entered into under no statutory license or permission, neither accepting nor designed to accept any franchise from the sovereign, but founded wholly upon the individual rights of the associates to join their capital and enterprise in a relation similar to that of a partnership. A few years earlier the legislature had explicitly recognized the existence and validity of such organizations, founded upon contract and evolved from the common law rights of the citizens. (Laws of 1849, ch. 258.) That act provided that any joint-stock company or association, which consisted of seven or more members, might sue or be sued in the name of its president or treasurer, and with the same force and effect, so far as the joint property and rights were concerned, as if the suit should be prosecuted in the names of the associates. But the act explicitly disclaimed any purpose of converting the joint-stock associations recognized as existing into corporations by a section prohibiting any such construction. (§ 5.) In 1851 the act was amended in

[1] Arguments omitted.

its form and application, but in no respect material to the present inquiry. There is no doubt, therefore, that when the company was formed and went into operation the law recognized a distinction and substantial difference between joint-stock companies and corporations, and never confused one with the other, and that the existing statute which taxed the capital of corporations had no reference to or operation upon joint-stock companies or associations.

But two things have since occurred. The legislature, while steadily preserving the distinction of names, has with equal persistence confused the things by obliterating substantial and characteristic marks of difference, until it is now claimed that the joint-stock associations have grown into and become corporations by force of the continued bestowal upon them of corporate attributes. It is said, and very probably correctly said, that the legislature may create a corporation, without explicitly declaring it to be such, by the bestowal of a corporate franchise or corporate attributes, and the cases of banking associations are referred to as instances of actual occurrence. (Thomas v. Dakin, 22 Wend. 9;[1] Bank of Watertown v. Watertown, 25 Wend. 686; People v. Niagara, 4 Hill 20.) It is added that such result may happen even without the legislative intent, and because the gift of corporate powers and attributes is tantamount to a corporate creation. It is then asserted that a series of statutes, beginning with the act of 1849, has ended in the gift to joint-stock associations of every essential attribute possessed by and characteristic of corporations (Laws of 1853, ch. 153; Laws of 1854, ch. 245; Laws of 1867, ch. 289); that the lines of distinction between the two, however far apart in the beginning, have steadily converged until they have melted into each other and become identical; that every distinguishing mark and characteristic has been obliterated, and no reason remains why joint stock associations should not be in all respects treated and regarded as corporations.

Some of this contention is true. The case of People, ex rel. Platt, v. Wemple (117 N. Y. 136), shows very forcibly how almost the full measure of corporate attributes has, by legislative enactment, been bestowed upon joint-stock associations, until the difference, if there be one, is obscure, elusive and difficult to see and describe. And yet the truth remains that all along the line of legislation the distinctive names have been retained as indicative and representative of a difference in the organizations themselves. As recently as the acts of 1880 and 1881, which formed the subject of consideration in the Wemple case, the legislature, dealing with the subject of taxation and desiring to tax business and franchises, imposed the liability upon "every corporation, joint-stock company or association whatever now or hereafter incorporated or organized under any law of this state." It is significant that the words "or organized" were inserted by amendment, and evidently for the understood reason that joint-stock

[1] *Infra*, p. 19.

companies could not properly be said to be "incorporated," but might be correctly described as "organized" under the laws of the state. This persistent distinction in the language of the statutes I should not be inclined to disregard or treat as of no practical consequence, when seeking to arrive at the true intent and proper construction of the statute, even if I were unable to discover any practical or substantial difference between the two classes of organizations upon which it could rest, or out of which it grew, for the distinction so sedulously and persistently observed would strongly indicate the legislative intent, and so the correct construction.

But I think there was an original and inherent *difference between the corporate and joint-stock companies* known to our law which legislation has somewhat obscured, but has not destroyed, and that difference is the one pointed out by the learned counsel for the respondent, and which impresses me as logical and well supported by authority. *It is that the creation of the corporation merges in the artificial body and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force.* The idea was expressed in Supervisors of Niagara v. People, 7 Hill 512, and in Gifford v. Livingston, 2 Den. 380, by the statement that the corporators lost their individuality and merged their individual characters into one artificial existence; and upon these authorities a corporation is defined on behalf of the respondents to be "*an artificial person created by the sovereign from natural persons and in which artificial person the natural persons of which it is composed become merged and non-existent.*" I am conscious that legal definitions invite and provoke criticism, because the instances are rare in which they prove to be perfectly accurate; and yet this one offered to us may be accepted if it successfully bears some sufficient test. In putting it on trial we may take the nature of the individual liability of the corporators on the one hand and of the associates on the other, for the debts contracted by their respective organizations, as a sufficient test of the difference between them, and contrast their nature and character.

It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts, because it alone contracts them, except as that natural and necessary consequence of its creation is modified in the act of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty, or affirmatively retains and preserves what would have been the common-law liability of the members from the destruction involved in the corporate creation. In other words, the individual liability of the members, as it would have existed at common law, is lost by their creation into a corporation, and exists thereafter only by force of the statute, upon some new and modifying conditions, to some partial or changed extent, and so far preventing, by the intervention of an express com-

mand, the total destruction of individual liabilities which otherwise would flow from the inherent effect of the corporate creation. The penalties sometimes imposed are, of course, new statutory liabilities which never at common law rested upon the individual members. The retained liability occasionally established is in the nature and a parcel of such original liability, as we had occasion to show in Rogers v. Decker, 131 N. Y. 490, but is retained by force of the express command of the statute, and in that manner saved from the destruction which otherwise would follow the simple creation of the corporation. Ordinarily, these individual liabilities exist upon other than common-law conditions, and make the corporators rather sureties or guarantors of the corporation than original debtors, since in general their liability arises after the usual remedies against the corporation have been exhausted. But where that is not so, the invariable truth is that the creation of the corporation necessarily destroys the common-law liability of the individual members for its debts, and requires at the hands of the creating power an affirmative imposition of new personal liabilities or a specific retention of old ones from the destruction which would otherwise follow. Exactly the opposite is true of joint-stock companies. Their formation destroys no part or portion of their common law liability for the debts contracted. Those debts are their debts, for which they must answer. Permission to sue their president or treasurer is only a convenient mode of enforcing that liability, but in no manner creates or saves it. The statute of 1853 did interfere with it. That act required, in the first instance, a suit against the president or treasurer, and so a preliminary exhaustion of the joint property. But that act was modal, and determined the procedure. It suspended the common-law right, but recognized its existence. We so held in Witherhead v. Allen, 4 Abb. Ct. App. Dec. 628, and at the same time said that the associations were not corporations, but mere partnership concerns. Even that mode of procedure has been modified by the Code, §§ 1922, 1923, so that the creditor, at his option, may sue the associates without bringing his action against the president or treasurer. These last and quite recent enactments show that *the legislative intent* is still to preserve and not destroy the original difference between the two classes of organizations; to maintain in full force the common-law liability of associates, and not to substitute for it that of corporators, and preserving in continued operation that normal and distinctive difference, to evince a plain purpose not to merge the two organizations in one or destroy the boundaries which separate them. *That intent, once clearly ascertained, determines the construction to be adopted, and may be the only reliable test in view of the power of the state to clothe one organization with all the attributes of the other.* The drift of legislation has been to lessen and obscure the original and characteristic difference. On the one hand, corporations have been created with positive provisions retaining more or less the individual liability of the members, and on the other the joint-stock companies have been clothed with most of the corporate attributes, but enough of the

original difference remains to show that our legislation not only carefully preserves the distinction of names, but sufficient, also, of the original difference of character and quality to disclose a clear intent not to merge the two.

We may thus see upon what the legislative intent to preserve them as separate and distinct is founded and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common law liability of the members for the debts, and requires the substitution of a new or retention of the old liability by an affirmative enactment which avoids the inherent effect of the corporate creation; in the other, the common law liability remains unchanged and unimpaired and needing no statutory intervention to preserve or restore it; the debt of the corporation is its debt and not that of its members, the debt of the joint-stock company is the debt of the associates however enforced; the creation of the corporation merges and drowns the liability of its corporators, the creation of the stock company leaves unharmed and unchanged the liability of the associates; the one derives its existence from the contract of individuals, the other from the sovereignty of the state. The two are alike but not the same. More or less, they crowd upon and overlap each other, but without losing their identity, and so, while we can not say that the joint-stock company is a corporation, we can say, as we did say in Van Aernam v. Bleistein, 102 N. Y. 360, that a joint-stock company is a partnership with some of the powers of a corporation. Beyond that we do not think it is our duty to go.

The order should be affirmed, with costs.

All concur.

Order affirmed.

Sec. 4. Tests. (3) The powers conferred.

THOMAS v. DAKIN.[1]

1839. IN THE SUPREME COURT OF NEW YORK. 22 Wendell (N. Y.) 9–112.

Chief Justice NELSON: This is an action brought by the plaintiff, as president of the Bank of Central New York, an association formed under what is familiarly known as the general banking law, passed April 18, 1838, to recover several demands due the institution.

The defendant has demurred to the declaration, and urges the unconstitutionality of the law by way of defense; and it is insisted, in his behalf: (1) That the associations formed under this law are *corporations;* and (2) That a general law authorizing the creation of these bodies is inconsistent with the ninth section of the seventh arti-

[1] Statement of facts, except what is given in opinions, is omitted; also arguments, and much of the opinions of Nelson, C. J., and Cowen, J.

cle of the constitution. On the part of the plaintiffs, it is urged in reply: (1) That the associations are not corporations; (2) That if they be, the act authorizing them may be passed by a majority *bill;* and (3) If within the ninth section, still the law may be passed by two-thirds of the members elected.

[**Test of Corporate Existence.**]—*Are these associations corporations? In order to determine this question, we must first ascertain the properties essential to constitute a corporate body, and compare them with those conferred upon the associations, for if they exist in common, or substantially correspond, the answer will be in the affirmative.* A corporate body is known to the law by the powers and faculties bestowed upon it, expressly or impliedly, by the charter; the use of the term *corporation* in its creation is of itself unimportant, except as it will imply the possession of these. They may be expressly conferred, and then they denote this legal being as unerringly as if created in general terms. It has been well said by learned expounders, that a corporation aggregate is an artificial body of men, composed of divers individuals, the *ligaments of which body are the franchises and liberties bestowed upon it*, which bind and unite all into one, and in which consists the whole frame and essence of the corporation.

[**Powers Incidental to Corporate Existence.**]—The "franchises and liberties," or, in more modern language, and as more strictly applicable to private corporations, the *powers and faculties*, which are usually specified as creating corporate existence, are: 1. The capacity of perpetual succession; 2. The power to sue and be sued, and to grant and receive in its corporate name; 3. To purchase and hold real and personal estate; 4. To have a common seal, and 5. To make by-laws. These *indicia* were given by judges and elementary writers at a very early day, since which time the institutions have greatly multiplied, their practical operation and use have been thoroughly tested, and their peculiar and essential properties much better understood. Any one comprehending the scope and purpose of them, at this day, will not fail to perceive that some of the powers above specified are of trifling importance, while others are wholly unessential. For instance, the power to purchase and hold real estate is no otherwise essential than to afford a place of business; and the right to use a *common seal*, or to *make by-laws*, may be dispensed with altogether. For as to the one, it is now well settled that corporations may contract by resolution, or through agents, without seal; and as to the other, the power is unnecessary in all cases where the charter sufficiently provides for the government of the body. The distinguishing feature, far above all others, is the capacity conferred, by which *a perpetual succession of different persons shall be regarded in the law as one and the same body, and may at all times act in fulfillment of the objects of the association as a single individual.*

In this way, a legal existence, a body corporate, an artificial being, is constituted; the creation of which enables any number of persons to be concerned in accomplishing a particular object, as one man.

While the aggregate means and influence of all are wielded in effecting it, the operation is conducted with the simplicity and individuality of a natural person. In this consists the essence and great value of these institutions. Hence it is apparent that the only properties that can be regarded strictly as essential, are those which are indispensable to mold the different persons into this artificial being, and thereby enable it to act in the way above stated. When once constituted, this legal being created, the powers and faculties that may be conferred are various—limited or enlarged, at the discretion of the legislature, and will depend upon the nature and object of the institution, which is as competent as a natural person to receive and enjoy them. We may, in short, conclude by saying, with the most approved authorities at this day, that *the essence of a corporation consists in a capacity:* (1) *To have a perpetual succession under a special name, and in an artificial form;* (2) *to take and grant property, contract obligations, sue and be sued by its corporate name as an individual;* and (3) *to receive and enjoy in common, grants of privileges and immunities.*

We will now endeavor to ascertain with exactness the powers and attributes conferred upon these associations by virtue of the statute. The first fourteen sections (1 to 14) prescribe the duties of the comptroller in furnishing notes for circulation, taking the required securities, etc. The fifteenth provides that any number of persons may associate to establish offices of discount, deposit and circulation. The sixteenth, that they shall make and file a certificate, specifying: 1. The *name* to be used in the business. 2. The *place* where the business shall be carried on. 3. The *amount* of capital stock and number of shares into which divided. 4. The *names of the shareholders.* 5. The *duration* of the association. The eighteenth confers upon the persons thus associating the most ample powers for carrying on banking operations, together with the right "to exercise such incidental powers as shall be necessary to carry on such business;" also to choose a president, vice-president, cashier and such other officers and agents as may be necessary. By the twenty-first and twenty-second sections, contracts, notes, bills, etc., shall be signed by the president and cashier; and all suits, actions, etc., are to be brought in the name of, and also against, the president for the time being; and not to abate by his *death, resignation or removal,* but to be continued in the name of the successor. Twenty-fourth section: The association may purchase and hold real estate, etc., the conveyance to be made to the president, or such other officer as shall be designated, who may sell and convey the same free from any claim against shareholders. Nineteenth section: The shares of capital stock to be deemed personal property, transferable on the books of the association; and every person becoming a shareholder by such transfer shall succeed to all the rights and liabilities of the prior holder. Twenty-third section: No shareholder to be personally liable; and the association is not to be dissolved by the *death* or *insanity* of any shareholder.

1. Upon a perusal of these provisions, it will appear that the asso-

ciation acquires the power to raise and hold for common use any given amount of capital stock for banking purposes, which, when subscribed, is made personal property, and the several shares transferable the same and with like effect as in case of corporate stock; to assume a common name under which to manage all the affairs of the association; to choose all officers and agents that may be necessary for the purpose, and remove and appoint them at pleasure. It will, hence, be seen, that although the association may be composed of a number of different persons, holding an interest in the capital stock, its operations are so arranged that they do not appear in conducting its affairs; all are so bound together, so molded into one, as to constitute but a single body, represented by a common name, or names (the knot of the combination), and in which all the business of the institution is conducted by common agents. In this way it purchases and holds real and personal property, contracts obligations, discounts bills, notes and other evidences of debt, receives deposits, buys gold and silver bullion, bills of exchange, etc., loans money, sues and is sued, etc. It is true some portion of the business is conducted in the assumed name, and some in the name of the president for the time being; but this in no manner changes the character of the body. A corporation may have more than one name; it may have one in which to contract, grant, etc., and another in which to sue and be sued; so it may be known by two different names, and may sue and be sued in either; and the name of the president, his official name, or any other, will answer every purpose. 2 Bacon's Abr. 5; 2 Salk. 451; 2 Salk. 237; Ld. Raym. 153, 680. The only material circumstance is, a name, or names, of some kind, in which all the affairs of the company may be conducted. So much, and no more, is essential to give simplicity and effect to the operation. An artificial being is thus plainly created, capable of receiving all the ample powers and privileges conferred upon the associations, and of managing their diversified concerns in an individual capacity. All business is to be conducted in a common or proper name.

2. This artificial being possesses the powers of perpetual succession. Neither *sale* of shares or *death* of shareholders affect it; if one should sell his interest, or die, the purchaser or representative, by operation of law, immediately takes his place. § 19. Nor can the insanity of a member work a dissolution. *Id.* Officers and agents for conducting the business of the association are secured. In case of vacancy, by death or otherwise, the place may at once be filled. § 18. For the entire duration, therefore, of the association, and which may be without limit, § 16, *sub.* 5, the whole body of shareholders, though perpetually shifting, constitute the same uniform, artificial being which is to be engaged through the instrumentality of officers and agents in conducting the business of the concern, and no member is personally liable. § 23. Then, as to the powers conferred, without again specially recurring to them, it will be seen at once that the associations possess all that are deemed essential, according to the most approved authorities, to constitute a corporate body. They

have a capacity: 1. To have perpetual succession under a common name, and in an artificial form. 2. To take and grant property, contract obligations, to sue and be sued by its corporate name in the same manner as an individual. 3. To receive grants of privileges and immunities, and to enjoy them in common. All these are expressly granted, and many more, besides the general sweeping clause, "*to exercise such incidental powers as shall be necessary to carry on such business*" (meaning the business of banking), under which even the seal and right to make by-laws are clearly embraced, if essential in conducting the affairs of the institution. * * *

By COWEN, J. Independent of authority and general reasoning, I have had very great difficulty, on a simple reading, to avoid seeing plain, direct and express enactments in the general banking law, conferring all the requisites demanded by counsel. 1. I read of a collective existence, *i. e.*, a body of men associated under a name conferred *mediately*, *i. e.*, through the certificate of association, by the sovereign power, which is the legislature. 2. As such collective existence, I read that the association has a standing in court, perhaps in its own name, or at least in the name of its president. It recovers judgments for debts due to it, and execution is levied on its property, upon a recovery against it. 3. I read of power to take and convey title to property, acquire and give rights; all this to be done, as it must be in every corporation, by its agents, but certainly in its collective name and designation; for the statute demands that the name which it assumes shall be used in all its dealings. 4. I shall have occasion to show that under a general provision of the act, there can be no doubt of its power to make by-laws. There are various considerations connected with this short view of the question, which may perhaps tend to the illustration, distinctness and strength of that view.

[Difference Between a Partnership and a Corporation[1]]—The associations formed under the act may, like our ordinary banks, elect their president, cashier and directors, confer on the latter as I have assumed and intend to show, the power to make and repeal by-laws, to regulate elections, and through their proper agents in the name of the association, to exercise all the other functions of our ordinary incorporated banking institutions. The latter are well known as aggregate moneyed corporations.

It can not be denied that a voluntary association or partnership might, temporarily, also elect the like officers and agents, confer upon them nearly the same powers, and perform about the same functions, without any charter or act of incorporation whatever. Collyer on Partnership, 621, Am. ed. 1834. There is, however, much difference between the power, duration and legal effect; a corporation aggregate is in law an individual entirely distinct from its members, each of whom may hold shares or interests in the corporation, legally transferable in virtue of its charter; whereas a voluntary association is made up of individuals not distinct from, but belonging in their own names and rights to the company. Their shares or interests are

[1] See p. 170, *infra*.

common to all; and, except so far as these may be made up of property in possession, they can not be transferred so as to create anything more than an equitable right in the assignee. Hence a voluntary company, asserting that it is possessed of stock transferable at the option of the holder, has been said to be punishable for pretending to act as a corporation. Collyer on Partnership, 624.

The members of a copartnership are joint tenants in the stock and all the effects of the company, and, on the death of each, his interest in the common choses in action, at law, survives to the other members, while his interest in the common land and choses in possession passes, as an undivided share, to his heirs or personal representatives. Collyer on Partnership, 4, 5, 68. The nature of these interests and the course of succession are, in some respects, modified by the court of chancery. Collyer on Partnership, 70, 71. All the members must, as we have in part before seen, be named in suits by or against the company, the right or liability to which, on the death of one, survives to all the others. Collyer on Partnership, 386, 395, 420, 427. Each is individually liable for the whole debts due from the company, Collyer on Partnership, 212, and may release and discharge all the debts due to them. Collyer on Partnership, 239. One may enter upon, use or otherwise control all the common property, real or personal; indeed, he may, in general, convert it to his own use, subject to an account. Collyer on Partnership, 211. All the remedies *inter se*, with few exceptions, are by action of account or bill in equity. Collyer on Partnership, 143. The firm can not, in general, sue or be sued by any one of its members, for this would involve the absurdity of a man being both plaintiff and defendant on the same record. Collyer on Partnership, 143, 644–5. Partnerships are dissoluble, not only by death or insanity, but by the bankruptcy of a member; a general sale of his partnership effects by execution; his attainder of felony, if it result in his civil death; an assignment by himself of all his interest, and the marriage of a partner who is a *feme sole*. Indeed, the better opinion is, that, however strong the provisions against a dissolution may be in the articles of copartnership, the whole concern may be dissolved at any time, by the act of a single partner, at his own mere pleasure. Even during the continuance of the partnership, he may interrupt its proceedings, by interdicting any single measure, though agreed on by a majority of the firm. At least this is generally so at law, and the power, it is apprehended, can be but partially qualified by a court of chancery. Collyer on Partnership, 58, § 2. 3 Kent's Comm., 53–4, 3d ed. It would seem clearly to follow, if it has ever been disputed, that any powers, though jointly conferred on others, as to act in the direction of affairs, or use a common seal, may be revoked at the pleasure of either partner.

Most of these incidents it is impossible for the partners to avoid by any stipulations in their articles of connection; and in proportion as any body of men is authorized by statute to hold property and sue and be sued without such incidents, they approach the character of a corporation. While they continue partners they are considered as natural

persons merely, as so many joint tenants or tenants in common, of all their property. In proportion as, by statute, they cease to be so they become an artificial person. These two are the only persons known to the law, according to the language of the great commentator, 1 Black. Comm. 123. "Persons," says he, "are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us. Artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic." In another part of his work, 1 Black. Comm. 467, he shows the advantages of corporations over partnerships or voluntary companies. He says: "Corporations are formed in order to preserve entire and forever those rights and immunities which, if they were granted only to those individuals of which the body is composed, would, upon their death, be utterly lost and extinct." In a mere voluntary assembly he admits the individuals that compose it might act up to the purposes for which they associated so long as they could agree to do so; "but they could neither frame nor receive any laws or rules of their conduct; none, at least, which would have any binding force, for want of coercive power to create a sufficient obligation; and when they are dispersed by death or otherwise, how shall they transfer their advantages to others equally unconnected with themselves?

"So, also, with regard to holding estates or other property, if land be granted for the common purpose to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purpose, but by endless conveyances from one to another, as often as the hands are changed. But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law; as one person, they have one will, which is collected from the sense of the majority of the individuals; this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws; the privileges and immunities, the estates and possessions of the corporation, when once vested in them, will be forever vested, without any new conveyance or new successions; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant." In this quotation, I have taken the words of Blackstone as he applied them, by way of example, to the case of a college in one of the English universities; and without quoting him literally throughout, have confined myself to such things as the learned author considers peculiar to every aggregate corporation. These are, in short, the receiving of peculiar laws and the making of by-laws for itself; perpetual succession, both as to its privileges and property; the having one will, as collected from the power of the majority to make by-laws; and the being but one per-

son in law, a person that dies not, but continues the same individual, though its parts may change. See, also, Ang. & Ames on Corp., 23. * * *

[The Idea of Perpetual Succession.]—The great and essential object to be attained by the creation of a corporation, is *continuity* (sometimes called immortality) and *individuality*; "properties," says Ch. J. Marshall, "by which a perpetual *succession* of many persons are considered as the same, and may act *as the single individual.* They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand." Dartmouth College v. Woodward, 4 Wheat. 636; Angel & Ames on Corp., 2. A peculiar sort of *individuality*, and a peculiar mode of *succession*, for a particular purpose, and not allowed by the general law to natural persons, enter into every definition of a corporation that I have seen. 1 Kyd on Corp., 2–3. With us there can be no recent creation of such an artificial person except by statute. 2 Kent's Comm., 276, 3d ed. No agreement of individuals can so far alter the nature of things; and, as we have seen of *persons*, there can be only two kinds, natural and artificial, so there can be but two modes in which property is transmitted by succession. The one takes place between natural persons, of which we have an example in descent on the death of the ancestor; the other is between predecessors and successors in a corporation aggregate or sole. The one may be called a natural, and the other an artificial succession; and it is evident that the latter can not exist independent of a corporation, any more than the former without natural persons. 1 Kyd on Corp. 2–3.

In the associations created by the banking law great care has been taken to introduce and maintain corporate succession in every part of the system. I have already endeavored to show that the beneficial interest in all its real and personal property belongs to any association formed under that law as an individual. If I have succeeded, it follows that such association is a corporation. The principle of succession is equally maintained in respect to the president for the purpose of receiving conveyances of real estate and selling it; and so when he acts as the organ of maintaining actions in right of the association and defending actions brought. All these rights, powers and duties pass in perpetual succession from president to president during the existence of the company. The president and his successors thus come to enjoy, in the nature of a sole corporation, a perpetual trusteeship in the real estate, and a perpetual power or control over it, together with the suits of the company. "From their having *perpetual succession*, and *suing and being sued* in their political character, single persons of both these descriptions have (without much propriety, as Mr. Kyd thinks) been uniformly, in the books of English law, called corporations." Kyd on Corporations, 19, 20. "A sole corporation, as its name implies, consists only of one person, to whom and his successors belongs that legal perpetuity, the enjoyment of which is denied to all natural persons." Angell & Ames on Corporations, 18,

19; 1 Black. Comm., 469. It need scarcely be remarked that the president of the banking associations in question comes fully within the general definition.

In England, sole corporations are mostly employed to hold in succession the rights and property of the ecclesiastical establishment; and it is said they can not take personal property in succession, but only real. Sole corporations are not common in the United States. Angell & Ames on Corp., 19, 20. But it is not perceived why an officer, or other person authorized to hold property, *real or personal*, to him and *his successors*, be not a sole corporation within the plain meaning of the definition. The chamberlain of London, who may take a recognizance to him and *his successors*, in his political capacity, in trust for orphans, was said to be a sole corporation in trust. Byrd v. Wilford, Cro. Eliz. 464. It was there said by Gawdy and Fenner, Js., that the chamberlain was a special corporation for that purpose; and an *obligation* may as well go in succession as *land*. So of the comptroller who takes an assignment of stocks, bonds and mortgages, to hold under the general banking law. Surely these would not, on his death, go to his executors. They are holden by him in trust, to pay the debts of the association; and would pass to his successors. He is equally a corporation sole, for this special purpose, according to the English definition. The supervisor of a town may sue or be sued. 2 R. S. 387, 8, §§ 96 and 100, 2d ed. Suppose he were authorized to hold lands and chattels to him and his successors, in trust for his town, would he not be a sole corporation, as the board of supervisors or loan officers are an aggregate corporation in respect to lands which they hold for the county? Denton v. Jackson, 2 Johns. Ch. R. 325. The grand test of a corporation is the mode in which property succeeds from one to another. When it does not go to the heirs of the holder as a natural person, it passes to the successor or successors, because it is holden in a corporate capacity. The holders are therefore said to be a person or body politic and corporate, in opposition to their natural capacity. Thus, all property must be holden by natural persons or corporations. If the property of an association under the general banking law be not holden in the natural capacity of the different members as partners, the only alternative remaining is a holding by corporations aggregate or sole. No third description of person is known to our law. None was known to the Roman law. See 1 Browne's Civil and Adm. Law, 141. None to any system of laws with which we are acquainted.

There are two cases in 1 Rolle's Abr., 515, which show still more distinctly that the president of an association and the state comptroller must be considered each as sole corporations. One is where a president of a college of physicians recovers, in that character, a penalty against a party for practicing without license. Another is where the master of an hospital recovers, in that character, the arrears of the annuity due to the hospital. On the death of either the interest in the judgment recovered passes to his successor, and not to his executor; and simply because the debt thus goes in succession, and

Toller says they are each a special or sole corporation like the chamberlain of London before mentioned. Toll. on Ex., ch. 4, § 3, p. 136, ed. of 1803. See also 1 Wms. Ex. 546, ed. of 1832. Atkins v. Gardener, Cro. Jac. 159. This matter is very fully illustrated in 2 Black. Comm., 431, 2. * * *

By BRONSON, J.: I concur fully in the opinions expressed by my brethren, that associations formed under the general banking law are corporations, and that the assent of two-thirds of all the members elected to each branch of the legislature was necessary to the passing of the act. But, as at present advised, I can not concur in the opinion that the legislature has the constitutional power, although two-thirds may assent, to provide by a general law for the creation of an indefinite number of corporations at the pleasure of any persons who may associate for that purpose.

It was conceded on the argument, that the demurrer does not reach the objection that the act was not passed by a two-thirds vote; and I have not, therefore, considered the question whether we can look beyond the statute book. A plea may render it necessary for us to pass upon that question.

Judgment for plaintiff.

Sec. 5. Tests. (4) But in foreign jurisdictions the powers conferred, rather than the legislative declaration, will control.[1]

EDGEWORTH v. WOOD, TREASURER OF THE UNITED STATES EXPRESS COMPANY.

1896. IN THE SUPREME COURT OF NEW JERSEY. 58 New Jersey Law (29 Vroom) 463–469, 3 Am. & Eng. Corp. Cas. (N. S.) 299, 33 Atl. 940.

On rule to show cause.

Argued at November term, 1895, before BEASLEY, chief justice, and Justices MAGIE and LUDLOW.

The opinion of the court was delivered by MAGIE, J. This is an action in tort in which plaintiff seeks to recover damages for injuries suffered by him by reason of his being run over, in a public street in Jersey City, by a wagon of the United States Express Company, negligently driven by a driver in the employ of that company. The jury having rendered a verdict for plaintiff, this rule to show cause why the verdict should not be set aside was allowed. Several reasons were filed in support of the rule, but only three have been urged in the argument. These only will be considered.

It is first contended that neither plaintiff's declaration nor the evidence produced by him discloses any liability on the part of Theodore F. Wood, treasurer of the United States Express Company, to answer for plaintiff's injuries, if inflicted as he claimed.

[1] See *note* (5) at end of Article I, *infra*, p. 32.

Plaintiff claims to have made out his case, in this respect, in the following manner: He produced proof that the United States Express Company was an association organized April 22, 1854, under the laws of New York, and having a principal place of business in the city of New York, and that Thomas C. Platt was its president and Theodore F. Wood its treasurer. He put in evidence chapter 238 of the laws of New York for the year 1849, and sections 1919, 1924 of the New York code of civil procedure, whereby it appeared that any association thus organized was expressly authorized to sue and to be sued in the name either of its president or its treasurer for the time being. Upon this he contends that he is entitled to an action against Wood, as treasurer, and as Wood is a resident of New Jersey, and was served with process here, that our courts, by comity, will recognize the liability to suit imposed by the laws of New York.

In opposition to this, it is contended on the part of defendant that if it be conceded that our courts will, by comity, adopt and enforce remedies against such associations, in the mode prescribed by the law of the state under which they came into existence, yet if the law of this state has furnished a mode of procedure by which remedies against such associations may be enforced, the rule of comity ceases and the mode of procedure provided by our laws must be pursued. The supplement to the Practice act, approved May 23, 1890 (Pamph. L., p. 353; Gen. Stat., p. 2592, § 342), is conceived by counsel to have furnished a mode of procedure under which this action could have been maintained against the United States Express Company.

By that act it is enacted that any "unincorporated company, stock company or association," consisting of two or more persons united for business purposes and having a recognized name, may be sued by that name in any action affecting the common property or the joint rights and liabilities of such company or association. Provision is made for the service of process and for the issue of an execution upon judgment in the same manner as upon judgments against corporations. If the United States Express Company is an unincorporated association, within the meaning of the act, it would seem that plaintiff could have brought his action under that act.

Questions concerning the nature of associations formed under the laws of New York, such as the United States Express Company, have been frequently considered in the courts of that state. The act of 1849 speaks of them as joint-stock companies or associations. By its certificate, this company calls itself a joint-stock company.

In the earliest case to which my attention has been directed, the question requiring solution was as to the relation between a shareholder and such a company. After an exhaustive review of the New York statutes on the subject, Judge Barnard declared that such companies had all the qualities of corporations, except that of having a common seal. His conclusion was that in a controversy between a shareholder and the company, he was not to be considered as a partner in a partnership, but the courts must deal with his relation follow-

ing the analogy of the law of corporations. Waterbury v. Merchants' Union Express Co., 50 Barb. 157.

In a later case, an action was brought by a shareholder in the same company against Fargo, its president, to recover for the loss of articles entrusted to it for transportation. The defense was that the owner of an interest in the company could not maintain such an action against it, which it was claimed was like an action by a partner against the partnership. The action was sustained by the court below. Westcott v. Fargo, President, 6 Lans. 319. Upon appeal, the opinion was delivered by Dwight, one of the commissioners of appeal. Upon a review of the statutes, he declared that the president or treasurer of one of these joint-stock companies or associations was to be regarded, for the purposes of an action against the company, substantially as a corporation sole; that such companies possessed some powers and privileges of corporations not possessed by individuals or partnerships, and that an action upon a liability of the company might be maintained by one of its members. Westcott v. Fargo, 61 N. Y. 542.

Later the United States Express Company, the very company whose officer is here sued, objected to the imposition of a tax upon its corporate franchises and business computable upon its capital stock, under an act taxing corporations, joint-stock companies and associations incorporated or organized under any law of the state. Its contention was that it was neither so incorporated nor organized. The right to impose the tax was sustained, Judge Danforth saying: "The agreement which brought many persons into one artificial body was so framed as to accomplish that end, and in proposing to conduct its affairs by the power given to it in the mode prescribed by the legislature, they must be deemed, for the purposes of the act in question, to be incorporated—that is, formed or united under the law of the state, whether the artificial body be termed a corporation, a joint-stock company or association." People, ex rel. Platt, v. Wemple, 117 N. Y. 136.

Questions have also arisen respecting the right to remove to the federal courts actions between the president or treasurer of such companies and other persons.

In New York, it was held, in a suit by Fargo as president of such a company organized in New York, that the company was to be considered like a corporation, a citizen of New York, and the action was removable to the United States court, if the other party was a citizen of another state. Fargo v. McVicker, 55 Barb. 437.

In the United States Circuit Court for the District of Michigan, Judge Brown (now justice of the supreme court) held that such a company formed in New York was to be deemed a citizen of New York without regard to the citizenship of its members. Maltz v. American Express Co., 1 Flip. 611.

In another case in the federal courts, the action was brought by Fargo as president of such a company against a citizen of a western state, and Judge Gresham held that such a company was a citizen of New York and could maintain an action in those courts, notwithstand-

ing the fact that some of its shareholders were residents of the state in which the defendant resided. Fargo v. L., N. A. & C. Ry. Co., 6 Fed. Rep. 787.[1]

In the case last cited and in some of the other cases, the conclusion reached has not been deemed invalidated by the fact that some of the New York statutes speak of such companies and associations as unincorporated.

In Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, the supreme court of the United States held that an English joint stock association, which was endowed with certain corporate powers, must be considered by our courts to be a corporation, notwithstanding the acts of parliament declared that such associations should not be held to be corporations.

[Test of Corporate Existence.]—*Whether an aggregation of individuals united in an artificial body is a corporation or not is to be determined rather by the faculties and powers conferred upon the body than by the name or description given to it.*

Upon this review, I have reached the conclusion that the United States Express Company is a corporate entity, empowered to sue and be sued, not, as is usual, in a corporate name, but in the name of designated officers. To such a corporation the act of 1890 does not apply, and this action was therefore properly brought against Wood as treasurer, whose *status* in the suit is not that of an individual but of a representative of the company.

This reason can not, therefore, prevail.

[Points of opinion relating to sufficiency of evidence are omitted.]

The rule to show cause should be discharged.

NOTES TO ARTICLE I.

1. **Definitions:** For the authorities favoring one or the other of the definitions given above, see notes to Articles II, III and IV, *infra*, pp. 72, 109, 157. Definitions of corporations will be found in the following cases: 1804, Head v. Providence Ins. Co., 2 Cranch (U. S.) 127, on 167; 1809, Bank of United States v. Deveaux, 5 Cranch (U. S.) 61; 1819, Trustees Dartmouth Col. v. Woodward, 4 Wheaton 518, on 636, 667; 1839, Thomas v. Dakin, 22 Wendell (N. Y.) 9, 70, 104, *supra*, p. 19; 1840, Warner v. Beers, 23 Wendell (N. Y.) 103, 123, 124, *supra*, p. 2; 1841, People, ex rel. Bank of Watertown, v. Assessors, etc., 1 Hill (N. Y.) 616, 620; 1844, Louisville C., etc., R. Co. v. Letson, 2 Howard (U. S.) 497, 552; 1860, The Ohio Ins. Co. v. Nunemacher, 15 Ind. 295; 1861, Ohio and Mississippi R. Co. v. Wheeler, 66 U. S. (1 Black) 286, 295; 1872, Railroad Commissioners v. P. & O. C. R. Co., 63 Maine 269, 277; 1872, Thompson v. Waters, 25 Mich. 214, 223; 1875, Board of Commrs. Tipp. Co. v. L. M. & B. R., 50 Ind. 85, 108; 1878, State v. M. L. S. & W. R. Co., 45 Wis. 579, 592; 1882, Balt. & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 330; 1890, United States v. Trinidad Coal & C. Co., 137 U. S. 160; 1898, Andrews Bros. v. Youngstown Coke Co., 86 Fed. R. 585.

2. **The New York Bank Cases:** The second resolution adopted by a vote of 22 to 3, in the case of Warner v. Beers, *supra*, p. 14, that the associations organized under the banking act of 1838, "are not bodies politic or corporate, within the spirit and meaning of the constitution," did not settle the law that

[1] These views have been substantially overruled in 1900, Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449.

such associations were not corporations for any purpose, but only that they were not so *"within the spirit and meaning"* of the constitution. See particularly 1841, People v. Assessors of Watertown, 1 Hill (N. Y.) 616, 618; 1845, De Bow v. People, 1 Denio (N. Y.) 9, 14; 1845, Gifford v. Livingston, 2 Denio (N. Y.) 380, 382; 1850, Gillet v. Moody, 3 N. Y. 485. The decisions, generally, after Warner v. Beers, treated these institutions for most purposes as corporations. The cases are: 1840, Parmly v. Tenth Ward Bank, 3 Edw. Ch. 395; 1840, Delafield v. Kinney, 24 Wend. 345; 1841, People v. Assessors of Watertown, 1 Hill 616; Bank of Watertown v. Assessors of Watertown, 25 Wend. 686; 1842, Willoughby v. Comstock, 3 Hill 389; 1842, People v. Supervisors of Niagara, 4 Hill 20; 1843, Leavitt v. Tylee, 1 Sandf. Ch. 207; 1844, Supervisors of Niagara v. People, 7 Hill 504; 1844, Boisegerard v. New York Banking Co., 2 Sandf. Ch. 23; 1844, Matter of Bank of Dansville, 6 Hill 370; 1845, Gifford v. Livingston, 2 Denio 380 (Court for Correction of Errors, overruling 1845, De Bow v. People, 1 Denio 9 (Supreme Court); 1848, Leavitt v. Yates, 4 Edw. Ch. 134; 1846, Sagory v. Dubois, 3 Sandf. Ch. 466, 485; 1848, Leavitt v. Blatchford, 5 Barb. 9; 1850, Cuyler v. Sanford, 8 Barb. 225; 1850, Gillet v. Moody, 3 N. Y. (Comst.) 479; 1851, Palmer v. Lawrence, 5 N. Y. (1 Seld.) 389; 1852, Talmage v. Pell, 7 N. Y. (3 Seld.) 328; Tracy v. Talmage, 18 Barb. 456; 1855, Gillet v. Phillips, 13 N. Y. (3 Kern.) 114; 1858, Leavitt v. Blatchford, 17 N. Y. 521; 1859, Codd v. Rathbone, 19 N. Y. 37.

3. **The Michigan Discussion:** Sec. 2, art. 12, of the constitution of Michigan, 1835, provided, "The legislature shall pass no act of incorporation, unless with the assent of at least two-thirds of each house." In 1837 (Sess. L. 1837, p. 76), an "Act to organize and regulate banking associations" was passed. The constitutionality of this act came before the United States circuit court for Michigan for adjudication in 1840, in the case of Falconer v. Campbell, 2 McLean C. C. (7th Circuit), 195; Federal Cases, 4620; 10 Myers' Fed. Dec., 18, *infra* p. 287; the question as to whether the act had received the required majority was argued, but it was held not properly raised by the demurrer. The court held the law constitutional; that the associations were corporations, and that an indefinite number might be created, or provided for, by one general act. In 1844, in the case of Green, receiver of bank of Niles v. Graves, 1 Douglass (Mich.) 351, the same points were argued before the supreme court of Michigan, and the law was held unconstitutional, because it attempted to *create corporations*, and an indefinite number of them at one time; this, it was held, could not be done, because the constitution meant to require a two-thirds vote in the creation of each and every corporation. This holding has been followed since, in regard to the banking act of 1837, but not extended to other general corporation laws. See 2 Doug. (Mich.) 160, 195; 1 Mich. 119, 120, 121, 482, 512; 2 Mich. 287; 5 Mich. 259; 13 Mich. 151; 16 Mich. 258, and 45 Mich. 510. Also 1849, Nesmith v. Sheldon, 48 U. S. (7 How.) 812.

4. **Later holdings:** Many of the same points have been discussed in the New York courts as to the nature of their joint-stock associations, as were in the bank cases. People v. Coleman, 133 N. Y. 279, *supra*, p. 15, is the best case. Others are: 1867, Waterbury v. Merchants' Union Express Co., 50 Barb. (N. Y.) 157; 1869, Fargo v. McVicker, 55 Barb. 437; 1875, Westcott v. Fargo, 61 N. Y. 542; 1886, Van Aernam v. Bleistein, etc., 102 N. Y. 355, 16 American and Eng. Corp. Cas. 103; 1889, People, ex rel. Platt, v. Wemple, 117 N. Y. 136, 29 American and Eng. Corp. Cas. 610; 1892, McCabe v. Goodfellow, 133 N. Y. 89, 37 American and Eng. Corp. Cas. 73.

5. **Note as to the fourth test above given:** This is qualified in many of the states by the rule that the decisions of the courts of the state creating the institution in question, as to whether it is a corporation or not, will be deemed controlling. See 1871, Taft v. Ward, 106 Mass. 518; 1880, Railroad Co. v. Pearson, 128 Mass. 445; 1883, Gleason v. McKay, 134 Mass. 419, *infra*, p. 167; 1895, Gregg v. Sandford, 12 C. C. A. 525, 65 Fed. Rep. 151, 48 Am. and Eng. Corp. Cas. 292. In Liverpool Insurance Co. v. Massachusetts, 10 Wall. (U. S.) 566, the supreme court applied the rule given as the fourth test above, and held an

English insurance company to be a corporation, notwithstanding the act of parliament under which it was created expressly provided it should not be so considered. This holding, however, was not necessary to the decision of the case. But in 1889, Chapman v. Barney, 129 U. S. 677, the same court held it would follow the decisions or the statutes of the states in which the institution was organized as to its nature. For further upon this point, see note to Article V, *infra*, p. 175; 1900, Great Southern F. Hotel Co. v. Jones, 177 U. S. 449.

ARTICLE II. THE CORPORATION AS A PERSON.

Sec. 6. For most purposes a corporation is considered as a person having, as such, rights, duties and liabilities.

"For by incorporation it acquires *jus personæ*, and becomes *persona politica*, and is capable of all civil rights *habendi et agendi*."

Per Attorney-General, *Quo Warranto*, v. London, 3–8 as given in Comyn's Digest, *Corporation*, under Franchises (F) F. 1. Also, 8 Howell's State Trials, p. 1039, on 1155.

(1) *And particularly, having rights:* (*a*) Under the common law.

TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA v. FOY AND BISHOP.[1]

1805. IN THE COURT OF CONFERENCE OF NORTH CAROLINA. 1 Murphy (N. C.) Reports 58–92, 3 American Dec. 672.

LOCKE, J., delivered the opinion of the court. The legislature of North Carolina, in the year 1789, granted to the trustees of the university "all the property that has heretofore or shall hereafter escheat to the state." And by another act, passed in the year 1794, they also granted, "the confiscated property then unsold." By an act passed in the year 1800, they declared, "that from and after the passing of this act, all acts and clauses of acts, which have heretofore granted power to the trustees of the University, to seize and possess any escheated or confiscated property, real or personal, shall be and the same is hereby repealed and made void.

"*And be it further enacted*, That all escheated or confiscated property which the said trustees, their agents or attorneys, have not legally sold by virtue of the said laws, shall from hence revert to the state, and henceforth be considered as the property of the same, as though such laws had never been passed."

[1] Statement of facts (except as given in opinion), arguments and dissenting opinion of HALL, J., omitted. Also parts of the opinion of the court by LOCKE, J.

The trustees of the university, in pursuance of the powers vested in them by the act of 1789, have brought this suit to recover the possession of a tract of land escheated to the state before the passing of the repealing act in the year 1800. The defendants have pleaded this repealing act in bar, by which they allege the power of the trustees to support this action is entirely destroyed. It is therefore now to be considered how far the trustees have title under the act of 1789, and in the next place, how far they are divested of that title by the repealing act of 1800.

[After holding the act of 1789 passed the title to the trustees, and some remarks as to the general constitutional provisions, proceeds:]

Some light will be thrown upon this subject by examining the nature of corporations, how property can be taken from them, and how they can be dissolved. Corporations are formed for the advancement of religion, learning, commerce or other beneficial purposes. They are either aggregate or sole, and created by grant or by law.

[Rights.]—When they are once erected, they acquire many rights, powers, capacities and some *incapacities*, 1 Black. 475, as (1) to have perpetual succession; and therefore all aggregate corporations have necessarily the power of electing members in the room of those who die, to sue and be sued and to do all other acts as natural persons; (2) to purchase lands and to hold them for the benefit of themselves and successors; (4) to have a common seal; (5) to make by-laws for the better government of the corporation. These corporations can not commit crimes, although their members may in their individual capacity. The *duties* of those bodies consist in acting up to the design for which they were instituted. Let us next inquire how their corporate property can be taken from them and how they may be dissolved. A member may be disfranchised or lose his place by his own improper conduct, or he may resign. A corporation may be *dissolved* by act of parliament, which is boundless in its operation; by the natural death of all its members, in case of an aggregate corporation; by surrender of its franchises into the hands of the king, which is a kind of suicide; by forfeiture of its charter through negligence or abuse of its franchises, in which case the law judges the body politic to have broken the condition on which it was incorporated, and therefore the incorporation to be void; and the regular course is to bring an information in the nature of a *quo warranto*, to inquire by what authority the members now exercise their corporate power, having forfeited it by such and such proceedings. 1 Black. 485; 3 Black. 263. None of these prerequisites have been done in the present case.

We are then led to inquire into the soundness of an argument greatly relied on by the defendant's counsel, that those who create can destroy. The legislature have not pretended to dissolve the corporation, but to deprive them of a part of the funds that were deemed to be vested in them, and to transfer those funds to the state. In England the king's consent to the creation of any corporation is absolutely necessary, either given expressly by charter or by act of par-

liament, where his assent is a necessary ingredient or implied by prescription. 1 Black. 472, 473. The king may grant to a subject the power of erecting a corporation; and yet it is the king that erects, the subject is but the instrument. 1 Black. 474. Where there is an endowment of lands, the law distinguishes and makes two species of foundation; the first, *foundatio incipiens*, or the corporation, in which sense the king is the founder of all colleges and hospitals; the other, *fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and who gives them is the founder. 1 Black. 481. The constitution directed the general assembly to establish this institution and endow it; then it would seem, from the principle upon which all this doctrine is predicated, that the constitution and not the legislature had erected this corporation, the legislature being only the agent or instrument whose acts are valid and binding when they do not contravene any of the provisions of the constitution. * * *

But one great and important reason which influences us in deciding this question is the 10th section of the bill of rights, which declares "that no freeman ought to be taken, imprisoned or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the law of the land." It has been yielded on the part of the defendants that if the legislature had vested an individual with the property in question, this section of the bill of rights would restrain them from depriving him of such right; but it is denied that this section has any operation on corporations whose members are mere naked trustees, and have no interest in the donation, and especially on a corporation erected for a public purpose. It is also insisted that the term, "Law of the Land," does not impose any restrictions on the legislature, who are capable of making the law of the land, and was only intended to prevent abuses in the other branches of government. That this clause was intended to secure to corporations as well as to individuals the rights therein enumerated, seems clear from the word "*liberties*," which peculiarly signifies those privileges and rights which corporations have by virtue of the instruments which incorporate them, and is certainly used in this clause in contradistinction to the word "liberty," which refers to the personal liberty of the citizen. We therefore infer that by this clause the legislature are as much restrained from affecting the property of corporations, as they are that of a private individual, unless the expression, "Law of the Land," should receive the construction contended for on the part of the defendant. It is evident the framers of the constitution intended the provision as a restraint upon some branch of the government, either the executive, legislative or judicial. To suppose it applicable to the executive would be absurd on account of the limited powers conferred on that officer; and from the subjects enumerated in that clause no danger could be apprehended from the executive department, that being entrusted with the exercise of no powers by which the principles thereby intended to be secured could be affected. To apply it to the judi-

ciary would, if possible, be still more idle, if the legislature can make the "*Law of the Land.*" For the judiciary are only to expound and enforce the law and have no discretionary powers enabling them to judge of the propriety or impropriety of laws. They are bound, whether agreeable to their ideas of justice or not, to carry into effect the acts of the legislature as far as they are binding or do not contravene the constitution. If then this clause is applicable to the legislature alone, and was intended as a restraint on their acts (and to presume otherwise is to render this article a dead letter), let us next inquire, what will be the operation which this clause will or ought to have on the present question? It seems to us to warrant a belief that members of a corporation, as well as individuals, shall not be so deprived of their liberties or property, unless by a trial by jury in a court of justice, according to the known and established rules of decision, derived from the common law, and such acts of the legislature as are consistent with the constitution—and although the trustees are a corporation established for public purposes, yet their property is as completely beyond the control of the legislature as the property of individuals or that of any other corporation. Indeed, it seems difficult to conceive of a corporation established for merely private purposes. In every institution of that kind, the ground of the establishment is some public good or purpose intended to be promoted; but in many, the members thereof have a private interest, coupled with the public object. In this case the trustees have no private interest beyond the general good; yet we conceive that circumstance will not make the property of the trustees subject to the arbitrary will of the legislature. The property vested in the trustees must remain for the uses intended for the university, until the judiciary of the country, in the usual and common form, pronounce them guilty of such acts, as will, in law, amount to a forfeiture of their rights or a dissolution of their body. The demurrer must therefore be allowed, and the plea in bar overruled.

[*Note.* It should be remembered this case was decided before the case of Trustees of Dartmouth College v. Woodward, 4 Wheat. (U.S.) 518, *infra*, p. 708.]
Note. The rights of corporations is the subject of chapter 12, *infra*, p. 914.

Sec. 7. Same. (*b*) Under the United States constitution.

THE RAILROAD TAX CASES.

COUNTY OF SAN MÁTEO v. SOUTHERN PACIFIC R. CO.[1]

1882. In United States Circuit Court, District of California. 13 Federal Reporter 722–782, with note 782–789.

[Action to recover taxes and penalty of the Southern Pacific Railroad Company, a corporation formed under the laws of California.

[1] Case taken to supreme court of the United States; settled and disposed of, 116 U. S. 138. See, also, Santa Clara County v. Southern Pacific R. Co., 118 U. S. 394, on 396. Statement of facts condensed. Only so much of the opinions as bears directly on the rights of corporations under the 14th amendment of the United States constitution is given.

By the California constitution all property, with certain exceptions, is to be taxed according to its value; but in ascertaining the value of property owned by individuals the amount unpaid of any mortgage upon it is to be deducted from the assessed value, and the tax levied on the balance, as against the owner. "The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county," are to be assessed at their actual value and apportioned to the various municipal subdivisions in proportion to mileage, without any deductions for any mortgages on the property. Also, the statutes provide for notice and hearing by the parties affected before the assessment is complete, in all cases except railroads operated in more than one county.

The railroal company contended: (1) That the assessment, because no deductions for mortgages were allowed, as in other cases, had the effect of denying it the equal protection of the laws guaranteed by the 14th amendment of the United States constitution. (2) Also, that the fact that no notice was provided for, deprived it of its property without due process of law, contrary to the same amendment.

The county contended: (1) That the state's authority to tax is unlimited except by the United States constitution. (2) That the United States constitution did not forbid the classification of property for taxation. (3) That the 14th amendment did not apply. (4) *That corporations were not persons within the meaning of the amendment.* (5) That the statute requiring a statement of property by the railroad company was sufficient notice; and (6), that the provisions relative to taxation of railroads are to be treated as conditions upon the continued existence of the corporations.]

FIELD, J. * * * The fourteenth amendment of the constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. What ever the state may do, it can not deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to every one on similar terms—in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances.

Unequal exactions in every form, or under any pretense, are absolutely forbidden; and, of course, unequal taxation, for it is in that form that oppressive burdens are usually laid. It is not possible to conceive equal protection under any system of laws where arbitrary and unequal taxation is permissible; where different persons may be taxed on their property of the same kind, similarly situated, at different rates; where, for instance, one may be taxed at 1 per cent. on the value of his property, another at 2 or 5 per cent., or where one may be thus taxed according to his color, because he is white, or black, or

brown, or yellow, or according to any other rule than that of a fixed rate proportionate to the value of his property. * * *

If we may now look at the scheme of taxation prescribed by the constitution of California for the property of railroad companies, we shall perceive a flagrant departure from the rule of equality and uniformity so essential to equality in the distribution of the burdens of government. Whenever an individual holds property incumbered with a mortgage he is assessed at its value, after deducting from it the amount of the mortgage. If a railroad company holds property subject to a mortgage, it is assessed at its full value, without any deduction for the mortgage; that is, as though the property were unincumbered. The inequality and discriminating character of the procedure will be apparent by an illustration given by counsel. Suppose a private person owns a farm which is valued at $100,000, and is incumbered with a mortgage amounting to $80,000; he is, in that case, assessed at $20,000; if the rate of taxation be 2 per cent., he would pay $400 taxes. If a railroad corporation owns an adjoining tract worth $100,000, which is also incumbered by a mortgage for $80,000, it would be assessed for $100,000, and be required to pay $2,000 taxes, or five times as much as the private person. There is here a discrimination too palpable and gross to be questioned, and such is the nature of the discrimination made against the Southern Pacific Railroad Company in the taxation of its property. Nothing can be clearer than that the rule of equality and uniformity is thus entirely disregarded. * * *

Is the defendant, being a corporation, a person within the meaning of the fourteenth amendment, so as to be entitled, with respect to its property, to the equal protection of the laws? The learned counsel of the plaintiff and the attorney-general of the state take the negative of this question, and assert with much earnestness that the amendment applies, and was intended to apply, only to the newly-made citizens of the African race, and should be limited to their protection. * * *

In the Dartmouth College case it was urged that the charter of the college was not a contract contemplated by the constitution, because no valuable consideration passed to the king as an equivalent for the grant, and that contracts merely voluntary were not within the prohibition. But Chief Justice Marshall, after showing that the charter was a contract upon a valuable consideration, said:

"It is more than possible that the preservation of rights of this description was not particularly in view of the framers of the constitution when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule when established, unless some plain and strong reason for excluding it can be given." And again, "the case being within the words of the rule must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of

the instrument, as to justify those who expound the constitution in making it an exception." 4 Wheat. 644.

Following that authority, we can not adopt the narrow view for which counsel contend, and limit the application of the prohibition of the fourteenth amendment to legislation touching members of the enfranchised race. It has a much broader operation. It does not, indeed, place any limit upon the subjects, in reference to which the states may legislate. It does not interfere with their police power. Upon every matter upon which previously to its adoption they could act, they may still act. They can legislate now, as they always could, to promote the health, good order and peace of the community; to develop their resources, increase their industries and advance their prosperity; but it does require that in all such legislation hostile and partial discrimination against any class or person shall be avoided; that the state shall impose no greater burdens upon anyone than upon others of the community under like circumstances, nor deprive anyone of rights which others similarly situated are allowed to enjoy. It forbids the state to lay its hand more heavily upon one than upon another, under like conditions. It stands in the constitution as a perpetual shield against all unequal and partial legislation by the states, and the injustice which follows from it, whether directed against the most humble or the most powerful; against the despised laborer from China, or the envied master of millions. * * *

Private corporations are, it is true, artificial persons, but, with the exception of a sole corporation, with which we are not concerned, they consist of aggregations of individuals united for some legitimate business. In this state they are formed under the general laws; and the civil code provides that they "may be formed for any purpose for which individuals may lawfully associate themselves." Any five or more persons may by voluntary association form themselves into a corporation. And, as a matter of fact, nearly all enterprises in this state requiring for their execution an expenditure of large capital are undertaken by corporations. They engage in commerce; they build and sail ships; they cover our navigable streams with steamers; they construct houses; they bring the products of earth and sea to market; they light our streets and buildings; they open and work mines; they carry water into our cities; they build railroads, and cross mountains and deserts with them; they erect churches, colleges, lyceums and theaters; they set up manufactories, and keep the spindle and shuttle in motion; they establish banks for savings; they insure against accidents on land and sea; they give policies on life; they make money exchanges with all parts of the world; they publish newspapers and books, and send news by lightning across the continent and under the ocean. Indeed, there is nothing which is lawful to be done to feed and clothe our people, to beautify and adorn their dwellings, to relieve the sick, to help the needy and to enrich and ennoble humanity, which is not to a great extent done through the instrumentalities of corporations. There are over 500 corporations in this state; there

are 30,000 in the United States, and the aggregate value of their property is several thousand millions.[1]

It would be a most singular result if a constitutional provision, intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation. We can not accept such a conclusion. On the contrary, we think that it is well established by numerous adjudications of the supreme court of the United States and of the several states, that *whenever a provision of the constitution, or of a law, guarantees to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents.*

The case of the Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven, 8 Wheat. 464, furnishes an apt illustration of this doctrine. The sixth article of the treaty of peace with Great Britain of 1783, provided that there should be "no future confiscations made, nor any prosecutions commenced, against any person or persons for or by reason of the part which he or they may have taken in the present war, and that no person shall on that account suffer any future loss or damage, either in his person, liberty or property." An English corporation claimed the benefit of this article with reference to certain lands in Vermont granted to it before the revolution, which the legislature of that state had undertaken to give to the town where they were situated. It was contended that the treaty only applied to natural persons; that it did not embrace corporations, because they were not persons who could take part in the war, or could be considered British subjects; but the position was held to be untenable. The court, speaking through Mr. Justice Washington, said that the argument proceeded upon an incorrect view of the subject, and referred to the case of United States v. Deveaux, 5 Cranch 86, to show that the court, when necessary, will look beyond the name of a corporation to reach and protect those whom it represents.

The constitution, in defining the judicial power of the United States, declares that it shall extend to "controversies between citizens of different states;" and in the case referred to by Mr. Justice Washington, the question arose whether a corporation composed of citizens of one state could sue, in the circuit court of the United States, a citizen of another state, and it was held that it could. In deciding the question, the court, speaking through Chief-Justice Marshall, said:

"However true the fact may be that the tribunals of the state will administer justice as impartially as those of the nation to parties of every description, it is not less true that the constitution itself either entertains apprehension on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and

[1] The number of corporations here stated is much less than the number actually existing. There are over 5,000 corporations in California alone.

citizens, or between citizens of different states. Aliens or citizens of different states are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision because they were allowed to sue by a corporate name. That name, indeed, can not be an alien or a citizen, but the persons whom it represents may be the one or the other, and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate names, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution of the national tribunals. Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction."

The same point was presented in another form in the case of Marshall v. Baltimore & O. R. Co., 16 How. 326. There the question was whether a citizen of one state could sue in the circuit court of the United States a corporation of another state, and a similar conclusion was reached. After referring to the clause of the constitution extending the judicial power of the United States to controversies between citizens of different states, the court proceeded to consider the objections urged to treating a corporation as a citizen, so far as it might be necessary to protect the corporators.

"A corporation," observed Mr. Justice Grier, speaking for the court, "it is said is an artificial person, a mere legal entity, invisible and intangible. This is no doubt metaphysically true in a certain sense. The inference, also, that such an artificial entity 'can not be a citizen' is a logical conclusion from the premises, which can not be denied. But a citizen who has made a contract and has a controversy with a corporation may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons; that his writ has not been served on an imaginary entity, but on men and citizens, and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant partners.

"The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing and being sued in a fictitious or collective name. But these important faculties, conferred on them by state legislation, for their own convenience, can not be wielded to deprive others of acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism, which deals subtly with words and names, without regard to the things or persons they are used to represent."

The fifth amendment to the constitution declares that—

"No person shall be held to answer for a capital or otherwise infa-

mous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

From the nature of the prohibitions in this amendment it would seem, with the exception of the last one, as though they could apply only to natural persons. No others can be witnesses; no others can be twice put in jeopardy of life or limb, or be compelled to be witnesses against themselves; and, therefore, it might be said with much force, that the word "person" there used in connection with the prohibition against the deprivation of life, liberty and property without due process or law, is in like manner limited to a natural person. But such has not been the construction of the courts. A similar provision is found in nearly all of the state constitutions; and everywhere, at all times and in all courts, it has been held, either by tacit assent or express adjudication, to extend, so far as their property is concerned, to corporations. And this has been because the property of a corporation is in fact the property of the corporators. To deprive the corporation of its property, or to burden it, is in fact to deprive the corporators of their property or to lessen its value. Their interest, undivided though it be, and constituting only a right during the continuance of the corporation to participate in its dividends, and on its dissolution to receive a proportionate share of its assets, has an appreciable value, and is property in a commercial sense, and whatever affects the property of the corporation necessarily affects the commercial value of their interests. If, for example, to take the illustration given by counsel, a corporation created for banking purposes acquires land, notes, stocks, bonds and money, no stockholder can claim that he owns any particular item of this property, but he owns an interest in the whole of it, which the courts will protect against unlawful seizure or appropriation by others, and on the dissolution of the company he will receive a proportionate share of its assets. Now, if a statute of the state takes the entire property, who suffers loss by the legislation? Whose property is taken? Certainly, the corporation is deprived of its property; but at the same time, in every just sense of the constitutional guaranty, corporators are also deprived of their property.

The prohibition against the deprivation of life and liberty in the same clause of the fifth amendment does not apply to corporations, because, as stated by counsel, the lives and liberties of the individual corporators are not the life and liberty of the corporation.

Nor do all the privileges and immunities of citizenship attach to corporations. These bodies have never been considered citizens for any other purpose than the protection of the property rights of the corporators. The *status* of citizenship, entitling the citizen to certain

privileges and immunities in the several states, does not belong to corporations. The special privileges which citizens acquire by becoming incorporated in one state can not, therefore, be exercised in another state without the latter's consent, as was held in Paul v. Virginia, 8 Wall. 168, although such consent will generally be presumed in the absence of positive prohibition.

Decisions of state courts, in harmony with the views we have expressed, exist in great numbers. But it is unnecessary to cite them. It is sufficient to add that in all text writers, in all codes, and in all revised statutes, it is laid down that the term "person" includes, or may include, corporations; which amounts to what we have already said, that whenever it is necessary for the protection of contract or property rights, the courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in its name. *All the guaranties and safeguards of the constitution for the protection of the property possessed by individuals may, therefore, be invoked for the protection of the property of corporations. And as no discriminating and partial legislation, imposing unequal burdens upon the property of individuals, would be valid under the fourteenth amendment, so no legislation imposing such unequal burdens upon the property of corporations can be maintained.* The taxation, therefore, of the property of the defendant upon an assessment of its value, without a deduction of the mortage thereon, is to that extent invalid.

[The remainder of the opinion of Justice Field, holding that notice was absolutely essential, and that the constitutional provisions relating to taxation were not conditions as to the continued existence of the corporations, is omitted.]

We are satisfied that the assessment upon which they were levied is invalid and void, and judgment must be accordingly entered on the demurrer for the defendant, and, by stipulation of parties, the judgment must be made final.

SAWYER, C. J., *concurring*. The facts of this case are fully stated by Mr. Justice Field, and need not be repeated here. The questions presented are of the gravest character, and of the utmost importance to the people of California. While I concur, generally, in the conclusions and in the line of argument adopted by my associate, I shall also state as briefly as I reasonably can, considering the gravity of the questions discussed, my conclusions upon the points involved.

1. In my judgment, the word "person" in the clause of the fourteenth amendment to the national constitution, "No state shall * * * deprive any person of life, liberty or property without due process of law, nor deny to any *person* the equal protection of the law," includes a private corporation. It must, at least, through the corporation, include the natural persons who compose the corporation, and who are the beneficial owners of all the property, the technical and legal title to which is in the corporation in trust for the corporators. The fact that the corporators are united into an ideal legal entity, called a cor-

poration. does not prevent them from having a right of property in the assets of the corporation which is entitled to the protection of this clause of the constitution. Nor does the intervention of this artificial being between the real beneficial owners and the state, for the simple purpose of convenient management of the business, enable the state, by acting directly upon the legal entity, to deprive the real parties beneficially interested, of the protection of these important provisions. In the language of Mr. Pomeroy, one of the counsel, which I adopt: "Whatever be the legal nature of a corporation as an artificial, metaphysical being, separate and distinct from the individual members, and whatever distinctions the common law makes in carrying out the technical legal conception between property of the corporation and that of the individual members, still, in applying the fundamental guaranties of the constitution, and in thus protecting the rights of property, these metaphysical and technical notions must give way to the reality. The truth can not be evaded that, for the purpose of protecting rights, the property of all business and trading corporations is the property of the individual corporators. A state act depriving a business corporation of its property without due process of law does, in fact, deprive the individual corporators of their property. In this sense, and within the scope of these grand safeguards of private rights, there is no real distinction between artificial persons, or corporations, and natural persons."

[Remainder of opinion of Sawyer, J., omitted.]

Note. The rights of corporations is the subject of chapter 12, *infra*, p. 914.

See also numbers *10*, *18* and *21*, in note to Crafford v. Board of Supervisors, etc., 87 Va. 110, *infra*, pp. 56–57, § 10.

As to right not to give incriminating evidence see 1901, Re Davis, 168 N. Y. 89, 56 L. R. A. 855.

Sec. 8. Same. (2) *And subject to duties:* (*a*) Of a public nature.

THE STATE, EX REL. BLAKE ET AL., v. THE N. E. RAILROAD CO.[1]

1856. IN THE COURT OF APPEALS OF SOUTH CAROLINA. 9 Richardson (S. C.) Law 247–254, 67 American Dec. 551.

[Rule against the railroad company to show cause why mandamus should not issue commanding the removal of obstructions placed in New Market and Vardell creeks, alleged to be navigable, and provide proper viaducts or use steamboats for crossing water-courses, so as not to obstruct navigation, as required by the charter of the company.]

Report by GLOVER, J. [who, after holding the streams were navigable, proceeded]:

The last inquiry suggested by the answer of the respondents is,

[1] Part of report of Glover, J., and arguments, omitted.

whether a writ of mandamus is the proper remedy. The removal and abatement of a public nuisance is generally effected by indictment, which affords, in most cases, an ample and a satisfactory remedy; but it does not follow that a mandamus will not be issued where an indictment may be sustained. *The cases referred to in the argument show that the remedy by mandamus has been adopted to compel a corporation to do its duty to the public and to individuals.* In its form, the writ commands the performance of some act or duty therein specified, the execution of which is consonant to right and justice. (3 Steph. Com. 681.) Although railways have become important for public travel and transportation, yet they are private corporations, enjoying large privileges, and should strictly comply with the provisions of their charters. The public is interested in their successful operation, and their usefulness should not be impaired by any unnecessary restraints; but they must not be permitted to abuse the powers granted, and should be held to a strict performance of the duties enjoined. If the nuisance be abated by a removal of the track of the road or the piles which sustain it, the public would suffer in the temporary delay in destroying the connection. Whereas, the remedy by mandamus does not destroy the road or delay its operations, but commands the company to fulfill its duty to the public by pursuing the directions prescribed by their charter for crossing rivers and watercourses.

The remedy by mandamus has been often used in England, in cases not unlike the present. The Eastern Counties Railway Company obtained an act of Parliament for making a railway from London to Norwich and Yarmouth, and it appearing doubtful if the company intended to extend their road to the points indicated, a mandamus was issued calling upon them to complete the whole line of road pursuant to the provisions of the act. (Reg. v. Eastern Counties Railway Company, 1 vol. Railway and Canal Cases.) Lord Denman, C. J., delivering the judgment of the court, says: "This interference is occasioned by inferior courts or persons refusing to proceed in some course prescribed by law, and not in consequence of any misapprehension or error in their course, provided they have entered upon it. And accordingly, if it had appeared that the company were substantially complying with the terms of their undertaking, there would have been at once a satisfactory answer to that application." The writ, in this case, was issued at the instance of stockholders; but it has also been granted to command a railway company to increase the height of a bridge erected by them over a public carriage road, according to the provisions of their act of Parliament. (Tapp. on Man. 243.) The remedy by mandamus will embarrass the company less in the progress, completion or use of their road than an indictment to abate and remove the obstructions complained of. The result of an indictment would be the punishment of the company by fine, and this might not afford to the public the relief which is sought, to which they are entitled, and which the railroad company are required by the provisions of their charter to afford. It is no objection to this mode

of relief, that the relators have another remedy, especially when that remedy is not so convenient, complete and beneficial. (Tapp. on Man. 24.)

"It is, therefore, ordered that a writ of mandamus issue." * * *

The defendants appealed, and moved this court to set aside the order granting the mandamus, on the ground, *inter alia.*

3. That if the respondents have committed a nuisance, mandamus is not the proper remedy. * * *

The opinion of the court was delivered by

GLOVER, J. The appellants have abandoned all the grounds in support of their motion, except the third, which submits that if they have committed a nuisance mandamus is not the proper remedy.

It is not necessary for the decision of this question to trace the writ of mandamus from its first institution to the present time, and to inquire how far it has been enlarged as a remedial process to advance justice and right. Its earliest application seems to have been suggested in aid of that clause of Magna Charta, which declares that "*Nulli negabimus aut differemus justiciam vel rectum*" (10 Mod. 48). There never has been any disposition to abridge the use of the writ of mandamus in cases where it is applicable as a remedy either by the action of the courts or by the legislature.

The general doctrine so earnestly insisted on by the appellant's counsel, that where there is a specific legal remedy the writ will not be granted, or, if granted, will be quashed, is fully sustained by reason, and by the authorities to which the court has been referred. But this general rule has been restricted to cases where the specific legal remedy is equally convenient, complete and beneficial.

The writ of mandamus has always been regarded as an appropriate remedy to enforce the performance of duties by artificial bodies. In the case of the King v. The Bishop of Chester (1 T. R. 396), Buller, J., says: "It is peculiarly the duty of this court to see that the powers created by the king's charter are properly exercised." How far an indictment is a specific remedy, was considered in the case of The King v. The Commissioners of Dean Inclosure, 2 M. & Sel. 80. The commissioners had neglected to obey an order of the sessions directing them to set out a road as a public road, and it was held that indictment would not be a specific remedy, that is, such as the case demands, for it was a proceeding in *pœnam* for the past, and not a remedy for the future. It is admitted that if indictment be equally convenient, beneficial and effectual, and such as the particular case demands, the court will not grant the mandamus. King v. Severn and Wye Railway Company, 2 Barn. & Al. 646. This is not the ordinary case of an obstruction placed in a highway which may be abated as a nuisance by indictment; but the obstruction of a highway by a railway, and in the free use of both, the public interest is involved. It is therefore important that in the application of a remedy, public travel and transportation should not be stopped or checked, either on the highway or railway. "It ought to be the concern of a court of justice to take care that whilst they are granting a remedy to one, they do not at

the same time expose others to great inconveniences, and likewise that the remedy be such as may prove effectual." (10 Mod. 48.) The relators do not require that the railway shall be destroyed, but that the corporation shall exercise the powers granted in the manner prescribed by their charter—not that they shall be punished by fine or otherwise, but that they shall do their duty to the public. This is a reasonable request, and can not be enforced by indictment without exposing the railway company to great inconvenience, and in the end it would not prove such a remedy as the case demands. Corporate bodies must be compelled in the performance of their duties to discharge their public obligations.

This court is of opinion that a writ of mandamus is an appropriate remedy to compel the defendants in crossing "rivers or other watercourses," to pursue the mode prescribed by their charter. The other grounds having been abandoned, the court has not considered the questions which they suggest. Since the writ of mandamus was granted an act has been passed by the general assembly, and has been brought to the notice of the court, which declares, "that the existing structure of said railway at the points of intersection of said road with the creeks known as New Market and Vardell's creeks, is hereby declared to be lawful, and the said company is hereby authorized to cross said creeks without drawbridges or other provision for the navigation of the same." This enactment necessarily supersedes the writ. It is therefore ordered, that the motion be dismissed, and that all further proceedings on the writ be restrained.

O'Neall, Wardlaw, Withers, Whitner and Munroe, JJ., concurred.

Motion dismissed.

[See note, p. 55.

Note. The duties and liabilities of corporations will be the subject of later chapters. See *infra*, chs. 13–17, pp. 914–1766.

Sec. 9. Same. (*b*) And of a private nature.

RIDDLE v. THE PROPRIETORS, ETC., ON MERRIMAC RIVER.[1]

1810. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 7 Mass. Reports 169, 5 American Dec. 35.

[Action on the case against the proprietors of a canal who were bound by their incorporation to construct their canal deep and wide enough for rafts of a specific size to pass through when the river below was navigable for craft of the same size. The proprietors negligently permitted the canal to become out of repair to such an extent that the plaintiff in attempting to transport a raft of the proper size, after paying the toll exacted, was unable to do so, and after his raft grounded he returned home for the purpose of waiting until there

[1] Statement of facts condensed. Arguments and parts of the opinion omitted.

should be enough water to move the raft; while he was away a storm occurred, which occasioned the loss of a quantity of wood, a part of the raft, and the value of which the jury was directed to include in the damages.]

PARSONS, C. J. [After a brief recital of the declaration.] The cause was tried on the general issue, and a verdict was found for the plaintiff agreeably to the judge's direction.

The defendants have moved for a new trial for the misdirection of the judge in a matter of law, and they have also moved in arrest of judgment for the insufficiency of the declaration.

[After holding that none of the objections to the verdict could prevail, the judge proceeded]:

We now come to the motion in arrest of judgment, which has been made on two grounds.

The first is, that it is not the duty of the defendants to keep the canal in repair, sufficient for the passage of rafts and boats of the description mentioned in the declaration. This ground is endeavored to be maintained on the supposition that the powers granted to the corporation were a privilege, which might be waived or exercised at its discretion. But we think this supposition is not correct. When the act of incorporation first passed, it was optional with the proprietors whether they would or would not take the benefit of it, but after they had made their election by executing the powers granted, and claiming the toll, then the duties imposed by the tenth section, to make the canals, etc., attached, from which they can not be discharged, but by a seizure of the franchise into the hands of the government, or by a repeal of the act with their assent.

But further to maintain this ground, the defendants have argued that, from the plaintiff's own showing, it is not the duty of the corporation to keep this canal in repair. By the statutes relating to this subject, if the corporation did not open this canal in seven years, for the passage of rafts and boats, then their powers as to this canal ceased. Now the plaintiff alleges, say the defendants, that when the injury complained of happened, which was more than seven years from the passing of the statutes, the proprietors had then, and for a long time before, neglected to open and dig this canal.

If we were obliged to adopt the construction of the plaintiff's allegation, on which the defendants insist, the objection ought to prevail. But attending to other parts of the declaration, we find it averred that this canal belonged to the proprietors, and that they, unmindful of their duty, neglected to open and dig the same of a sufficient depth, and permitted it to remain in a decayed state, and out of repair, and the passage to become and remain choked and filled up. We are now considering the declaration after a verdict, and the fair construction of this allegation is not that they never opened and dug the canal sufficiently, but that they neglected to open it by digging and removing the collection of matters which choked it and ob-

structed the passage. We are, therefore, satisfied that the motion in arrest can not prevail on the ground we have been considering.

The other ground is that no action lies against a corporation for a breach of its duty by any person specially injured by the breach, and that the only remedy is by information or indictment. This point has been argued by the defendant's counsel with much ability, and has had all the attention we could give it in the short time the constitution of this court has allowed us.

The argument, when compressed, is that corporations, having only a legal and not a natural body, no *capiatur* lies against them; that in all actions of trespass and trespass on the case, where the general issue is not guilty, if judgment be against the defendant, a part of the judgment at common law is an entry of a *capiatur*; that, therefore, no such actions lie against a corporation at common law; and the statute, taking away the necessity of the entry of a *capiatur*, does not authorize an action which did not lie before.

That a process to take the body of a corporation does not lie is certainly true, but the defendants must show that in all actions of trespass a *capiatur* against the defendant may, from the nature of the action, be entered. In 21 Edw. 4, 7, 12, 27, 67, it is holden that a corporation can not be beaten, nor beat, nor commit treason or felony, nor be imprisoned for a disseizin with force, nor be outlawed, nor a *capias* in debt be awarded against them. These principles result from the nature of an aggregate corporation.

But the defendants have relied on an opinion of Thorp, J., in 22 Ass. pl. 67. He there says that trespass does not lie against a corporation aggregate by its corporate name, for a *capias* and *exigent* do not lie against it. That a *capias* and *exigent* do not lie against a corporation is evident; but that no action of trespass lies is questionable. For it is agreed that a corporation may be fined on indictment, and the fine levied by distress; and why may not a corporation be amerced, and the amercement collected in the same manner? This has led us to look into the ancient law on this subject and we find Thorp's opinion overruled as to certain trespassess. In 31 Ass. pl. 19 a corporation is holden answerable in assize as a disseizor with force. In 8 H. 6, 1, 14, 6, an aggregate corporation was holden answerable in trespass for distraining the plaintiff's cattle until he paid a toll, which he was not bound to pay. Several other cases are mentioned in Theloal's Dig. lib. 4, c. 13, as trespass against a corporation for disturbing the plaintiff in the profits of his liberties; or for disturbing him in holding a leet. It is therefore very clear, from the examination of the old books, that some actions of trespass might, at common law, be maintained against aggregate corporations. And, as in these actions no *capiatur* could be entered, the omission of this entry can be no objection to actions of trespass on the case. The foundation of the defendants' argument seems to fail them.

Let us now leave the ancient cases and resort to the maxims of the common law, which are founded in good sense and substantial justice.

It is one of these maxims that a man specially injured by the breach of duty in another shall have his remedy by action. If the breach of duty be by an individual, there is no question; and why should a corporation, receiving its corporate powers and obliged by its corporate duties with its own consent, be an exception, when it has, or must be supposed to have, an equivalent for its consent?

We distinguish between proper aggregate corporations, and the inhabitants of any district, who are by statute invested with particular powers without their consent. These are in the books sometimes called *quasi*-corporations. Of this description are counties and hundreds in England, and counties, towns, etc., in this state. Although *quasi*-corporations are liable to information or indictment for a neglect of a public duty imposed on them by law, yet it is settled in the case of Russel et al. v. Inhabitants of the County of Devon,[1] that no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute, and the sound reason is, that having no corporate fund, and no legal means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation. This burden the common law will not impose, but in cases where the statute is an authority, to which every man must be considered as assenting. But in regular corporations, which have, or are supposed to have, a corporate fund, this reason does not apply.

Among the modern cases there is one which seems in its principles to apply directly to the case before us. It is the case of The Mayor of Lynn, in error, v. Turner.[2] Turner sued the corporation of Lynn Regis for not repairing and cleansing a certain creek, in which the tide ebbed and flowed, as from time immemorial they had been used, by which he lost the use of his navigation. The declaration contained a number of counts, in one of which the special damage alleged was that the plaintiff was obliged to carry his corn round about. At the common pleas judgment on *nil dicit* was rendered on all the counts. For the plaintiff in error it was argued that the creek as described was an highway, and as in one of the counts no special damage was alleged, the action did not lie. But Lord Mansfield and the court said that a creek, in which the tide ebbed and flowed, was not necessarily a highway; that the corporation were bound by prescription, and it might be the very condition or terms of their charter. And the judgment was affirmed. By this decision it is settled that case will lay against a corporation for neglect of a corporate duty by which the plaintiff suffers. How far a special damage must be alleged we need not now decide.

For the proprietors, in support of their motion, a reference was made to the several statutes creating our turnpike corporations, in which an action is given to any person specially injured by a neglect in repairing the road. This provision was cumulative, and introduced *ex majori cautela* by the framers of the bills; and is no objection to our present construction of the law.

[1] 2 D & E. 667. [2] Cowp. 86.

There appears to us, upon the whole, no sufficient ground to stay judgment, and, as the exceptions to the verdict can not prevail, the plaintiff must have judgment.

Judgment on the verdict.

Note. The duties and liabilities of corporations will be the subject of later chapters. See *infra*, chs. 13-17, pp. 914–1766.

Sec. 10. Same. *This artificial personality is recognized particularly,* (1) *In statutes.* The word "*person*" includes *private corporations*, unless the legislative intention or the reason of the law is clearly otherwise.

CRAFFORD v. SUPERVISORS OF WARWICK COUNTY.[1]

1890. IN THE SUPREME COURT OF APPEALS OF VIRGINIA. 87 Virginia 110–118, 10 L. R. A. 129.

[In 1888 the general assembly of Virginia enacted: "That it shall be the duty of the judge of the county court *upon the application of persons paying one-third of the taxes upon real estate in said county*," to order the election officers to hold an election "for the purpose of *ascertaining the sense* of the *qualified voters of said county*" concerning the removal of the court-house, etc. Application was accordingly made by various parties (including many corporations), who paid more than one-third of the taxes on real estate in the county, whereupon the court ordered the holding of an election; this was done, and a majority of the qualified electors voted for removal; and in pursuance of such vote the supervisors, as provided by the statute, commenced to remove the court-house. The appellants, Crafford and others, obtained an injunction from the corporation court, restraining the supervisors from proceeding with the removal; this injunction was dissolved by the circuit court, and appeal from that court was taken to the supreme court of appeals.]

FAUNTLEROY, J., delivered the opinion of the court. * * *

The question raised by the pleadings in this cause is, whether or not *corporations* are included or signified in the term "*persons*," as expressed in the first section of the said act of assembly of March 2, 1888, under which the sense of the qualified voters of Warwick county was ordered to be taken, and was so taken, by the election aforesaid. The appellants contend that the word "*persons*" in the said act does not embrace or include corporations, and that the said word "*persons*" should be construed to mean "*voters* paying taxes on real estate in the county of Warwick," and that the corporations, owning real estate in the said county and paying taxes on the same amounting to very nearly two-thirds of the whole taxes on real estate in the county, were not competent signers to the written petition or application to

[1] Statement of facts condensed. Part of opinion omitted.

are 30,000 in the United States, and the aggregate value of their property is several thousand millions.[1]

It would be a most singular result if a constitutional provision, intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation. We can not accept such a conclusion. On the contrary, we think that it is well established by numerous adjudications of the supreme court of the United States and of the several states, that *whenever a provision of the constitution, or of a law, guarantees to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents.*

The case of the Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven, 8 Wheat. 464, furnishes an apt illustration of this doctrine. The sixth article of the treaty of peace with Great Britain of 1783, provided that there should be "no future confiscations made, nor any prosecutions commenced, against any person or persons for or by reason of the part which he or they may have taken in the present war, and that no person shall on that account suffer any future loss or damage, either in his person, liberty or property." An English corporation claimed the benefit of this article with reference to certain lands in Vermont granted to it before the revolution, which the legislature of that state had undertaken to give to the town where they were situated. It was contended that the treaty only applied to natural persons; that it did not embrace corporations, because they were not persons who could take part in the war, or could be considered British subjects; but the position was held to be untenable. The court, speaking through Mr. Justice Washington, said that the argument proceeded upon an incorrect view of the subject, and referred to the case of United States v. Deveaux, 5 Cranch 86, to show that the court, when necessary, will look beyond the name of a corporation to reach and protect those whom it represents.

The constitution, in defining the judicial power of the United States, declares that it shall extend to "controversies between citizens of different states;" and in the case referred to by Mr. Justice Washington, the question arose whether a corporation composed of citizens of one state could sue, in the circuit court of the United States, a citizen of another state, and it was held that it could. In deciding the question, the court, speaking through Chief-Justice Marshall, said:

"However true the fact may be that the tribunals of the state will administer justice as impartially as those of the nation to parties of every description, it is not less true that the constitution itself either entertains apprehension on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and

[1] The number of corporations here stated is much less than the number actually existing. There are over 5,000 corporations in California alone.

citizens, or between citizens of different states. Aliens or citizens of different states are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision because they were allowed to sue by a corporate name. That name, indeed, can not be an alien or a citizen, but the persons whom it represents may be the one or the other, and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate names, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution of the national tribunals. Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction."

The same point was presented in another form in the case of Marshall v. Baltimore & O. R. Co., 16 How. 326. There the question was whether a citizen of one state could sue in the circuit court of the United States a corporation of another state, and a similar conclusion was reached. After referring to the clause of the constitution extending the judicial power of the United States to controversies between citizens of different states, the court proceeded to consider the objections urged to treating a corporation as a citizen, so far as it might be necessary to protect the corporators.

"A corporation," observed Mr. Justice Grier, speaking for the court, "it is said is an artificial person, a mere legal entity, invisible and intangible. This is no doubt metaphysically true in a certain sense. The inference, also, that such an artificial entity 'can not be a citizen' is a logical conclusion from the premises, which can not be denied. But a citizen who has made a contract and has a controversy with a corporation may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons; that his writ has not been served on an imaginary entity, but on men and citizens, and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant partners.

"The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing and being sued in a fictitious or collective name. But these important faculties, conferred on them by state legislation, for their own convenience, can not be wielded to deprive others of acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism, which deals subtly with words and names, without regard to the things or persons they are used to represent."

The fifth amendment to the constitution declares that—

"No person shall be held to answer for a capital or otherwise infa-

mous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

From the nature of the prohibitions in this amendment it would seem, with the exception of the last one, as though they could apply only to natural persons. No others can be witnesses; no others can be twice put in jeopardy of life or limb, or be compelled to be witnesses against themselves; and, therefore, it might be said with much force, that the word "person" there used in connection with the prohibition against the deprivation of life, liberty and property without due process or law, is in like manner limited to a natural person. But such has not been the construction of the courts. A similar provision is found in nearly all of the state constitutions; and everywhere, at all times and in all courts, it has been held, either by tacit assent or express adjudication, to extend, so far as their property is concerned, to corporations. And this has been because the property of a corporation is in fact the property of the corporators. To deprive the corporation of its property, or to burden it, is in fact to deprive the corporators of their property or to lessen its value. Their interest, undivided though it be, and constituting only a right during the continuance of the corporation to participate in its dividends, and on its dissolution to receive a proportionate share of its assets, has an appreciable value, and is property in a commercial sense, and whatever affects the property of the corporation necessarily affects the commercial value of their interests. If, for example, to take the illustration given by counsel, a corporation created for banking purposes acquires land, notes, stocks, bonds and money, no stockholder can claim that he owns any particular item of this property, but he owns an interest in the whole of it, which the courts will protect against unlawful seizure or appropriation by others, and on the dissolution of the company he will receive a proportionate share of its assets. Now, if a statute of the state takes the entire property, who suffers loss by the legislation? Whose property is taken? Certainly, the corporation is deprived of its property; but at the same time, in every just sense of the constitutional guaranty, corporators are also deprived of their property.

The prohibition against the deprivation of life and liberty in the same clause of the fifth amendment does not apply to corporations, because, as stated by counsel, the lives and liberties of the individual corporators are not the life and liberty of the corporation.

Nor do all the privileges and immunities of citizenship attach to corporations. These bodies have never been considered citizens for any other purpose than the protection of the property rights of the corporators. The *status* of citizenship, entitling the citizen to certain

privileges and immunities in the several states, does not belong to corporations. The special privileges which citizens acquire by becoming incorporated in one state can not, therefore, be exercised in another state without the latter's consent, as was held in Paul v. Virginia, 8 Wall. 168, although such consent will generally be presumed in the absence of positive prohibition.

Decisions of state courts, in harmony with the views we have expressed, exist in great numbers. But it is unnecessary to cite them. It is sufficient to add that in all text writers, in all codes, and in all revised statutes, it is laid down that the term "person" includes, or may include, corporations; which amounts to what we have already said, that whenever it is necessary for the protection of contract or property rights, the courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in its name. *All the guaranties and safeguards of the constitution for the protection of the property possessed by individuals may, therefore, be invoked for the protection of the property of corporations. And as no discriminating and partial legislation, imposing unequal burdens upon the property of individuals, would be valid under the fourteenth amendment, so no legislation imposing such unequal burdens upon the property of corporations can be maintained.* The taxation, therefore, of the property of the defendant upon an assessment of its value, without a deduction of the mortage thereon, is to that extent invalid.

[The remainder of the opinion of Justice Field, holding that notice was absolutely essential, and that the constitutional provisions relating to taxation were not conditions as to the continued existence of the corporations, is omitted.]

We are satisfied that the assessment upon which they were levied is invalid and void, and judgment must be accordingly entered on the demurrer for the defendant, and, by stipulation of parties, the judgment must be made final.

SAWYER, C. J., *concurring*. The facts of this case are fully stated by Mr. Justice Field, and need not be repeated here. The questions presented are of the gravest character, and of the utmost importance to the people of California. While I concur, generally, in the conclusions and in the line of argument adopted by my associate, I shall also state as briefly as I reasonably can, considering the gravity of the questions discussed, my conclusions upon the points involved.

1. In my judgment, the word "person" in the clause of the fourteenth amendment to the national constitution, "No state shall * * * deprive any person of life, liberty or property without due process of law, nor deny to any *person* the equal protection of the law," includes a private corporation. It must, at least, through the corporation, include the natural persons who compose the corporation, and who are the beneficial owners of all the property, the technical and legal title to which is in the corporation in trust for the corporators. The fact that the corporators are united into an ideal legal entity, called a cor-

181; Railroad v. Barnhill, 91 Tenn. 395, 30 Am. St. 889; Horn S. M. Co. v. New York, 143 U. S. 305; People v. Wemple, 131 N. Y. 64; note to State v. Goodwill in 25 Am. St. Rep. 873; Daggs v. Orient, etc., Co., 136 Mo. 382, 58 Am. St. 638; Commonwealth v. New York, etc., R. Co., 129 Pa. St. 463, 15 Am. St. R. 724. Compare St. Louis Iron M. T. R. Co. v. Paul, 64 Ark. 83, 62 Am. St. R. 154, and note p. 167; 1902, Cook v. Howland, — Vt. —, 59 L. R. A. 338.

(*b*) But corporations are citizens of the state creating them within the meaning of section 2, article 3, of the constitution, that "the judicial power shall extend to all cases between citizens of different states." See 1809, Hope Ins. Co. v. Boardman, 5 Cranch (9 U. S.) 57; 1809, Bank of U. S. v. Deveaux, 5 Cranch (9 U. S.) 61; 1840, Commercial, etc., Bank v. Slocomb, 14 Pet. (U. S.) 60, all of which held that the court "would look beyond the mere legal being, and consider the citizenship of the individuals of whom the company is composed." In 1844, Louisville, etc., R. Co. v. Letson, 2 How. (43 U. S.) 497, 558, the court, after an elaborate review, overruled the former cases and announced the rule above given. The later cases are: 1853, Marshall v. B. & O. R. Co., 16 How. (57 U. S.) 314; 1861, Ohio & Miss. R. Co. v. Wheeler, 1 Black. (66 U. S.) 286; 1865, County of Allegheny v. Cleveland & P. R. Co., 51 Pa. St. 228, 88 Am. D. 579; 1870, Railroad Co. v. Harris, 12 Wall. 65; 1871, Chicago & M. V. R. Co. v. Whitton, 13 Wall. (80 U. S.) 270; 1876, Muller v. Dows, 94 U. S. 444; 1881, C. & W. I. R. Co. v. L., S. & M. S. R. Co., 5 Fed. R. 19; 1882, Memphis, etc., R. Co. v. Alabama, 107 U. S. 581; 1885, Pennsylvania Co. v. St. L., A. & T. R. Co., 118 U. S. 290; 1890, Nashua & L. R. Co. v. Boston & L. R. Co., 136 U. S. 356; 1890, Paul v. B. & O. R. Co., 44 Fed. Rep. 513; 1892, Shaw v. Quincy Mining Co., 145 U. S. 444; 1892, Southern Pac. R. Co. v. Denton, 146 U. S. 202; 1893, In re Hohorst, 150 U. S. 653; 1895, Missouri Pac. R. Co. v. Meek, 69 Fed. Rep. 753, 30 L. R. A. 250; 1896, St. Louis & San Francisco R. Co. v. James, 161 U. S. 545, *infra*, p. 1099; 1896, Louisville Trust Co. v. L., N. A. & C. R. Co., 75 Fed. Rep. 433.

(*c*) As to fourteenth amendment, see *infra*, No. 10.

6. **Contracts.**—Statutes relating to contracts of persons apply to corporations also: Mott v. Hicks, 1 Cow. (N. Y.) 513; State v. Nashville Univ., 4 Humph. (Tenn.) 157; Commercial Bank v. Nolan, 8 Miss. (7 How.) 508; Cincinnati Gas Co. v. Avondale, 43 Ohio St. 257.

7. **Death by wrongful act.**—Statutes making persons liable for such, include corporations: Chase v. Steamboat Co., 10 R. I. 79.

8. **Eminent domain** statutes apply to corporations, though *persons* only are named: Lehigh Bridge Co. v. Lehigh Coal Co., 4 Rawle (Pa.) 9, 26 Am. Dec. 111.

9. **Evidence.**—A corporation is a "living person" within the meaning of a statute giving a party the right to testify when the adverse party is a *living person:* La Farge v. Exchange F. Ins. Co., 22 N. Y. 352. But not within provisions protecting one from giving incriminating evidence; 1900, State v. Standard Oil Co., 61 Neb. 28, 87 Am. St. R. 449.

10. **Fourteenth amendment.**—The provisions of section 1, saying "No state shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," protects the rights of the corporations, when in the state, the same as persons: Pembina Mining Co. v. Pennsylvania, 125 U. S. 181; Santa Clara Co. v. South Pacific R. Co., 118 U. S. 394, 24 Am. & Eng. Corp. Cas. 523; Minneapolis, etc., R. Co. v. Beckwith, 129 U. S. 26; Charlotte, etc., R. Co. v. Gill, 142 U. S. 386; County of San Mateo v. South Pacific R. Co., 13 Fed. Rep. 722, *supra*, p. 36; Covington, etc., R. Co. v. Sanford, 164 U. S. 578; Smythe v. Ames, 169 U. S. 522, 171 U. S. 361. But contrary to the holding in University v. Foy, *supra*, p. 34, the 14th chapter of Magna Charta, that "no freeman shall be amerced," etc., was held not to apply to corporations aggregate, but only to corporations sole. 2 Inst. 169, 170, 8 Rep. 39. See 62 L. R. A. 407.

11. **Foreign corporations** are not *persons* within a constitutional provision "that no person shall be deprived of the natural rights to life, liberty and the enjoyment of the gains of his own industry." Daggs v. Orient Ins. Co., 136

Mo. 382, 58 Am. St. 638. See, also, Blake v. McClung, 172 U. S. 239, *infra*, p. 2036; Hammond, etc., Co. v. Best, 91 Maine 431, 42 L. R. A. 528.

12. **Incorporation.**—Statutes providing that a certain number of *persons* may incorporate do not include corporations as such persons. Factors, etc., Ins. Co. v. New Harbor P. Co., 37 La. Ann. 233; Humphrey v. Mooney, 5 Colo. 282; Central R. Co. v. Pa. R. Co., 31 N. J. Eq. 475. See *infra*, pp. 553, 889.

13. **Jurisdiction of courts.**—For this purpose a corporation is a person, inhabitant or citizen of the state creating it. See cases cited in this note No. 5, (*b*) above. See, also, Brown v. Mayor, etc., 66 N. Y. 385; Chicago, etc., R. v. Bank of North America, 82 Ill. 493; Eslava v. Ames, etc., 47 Ala. 384.

14. **Limitation of actions.**—Statutes of limitation apply to corporations in the same way as to persons. People v. Trinity Church, 22 N. Y. 44; North Missouri R. Co. v. Akers, 4 Kan. 453.

15. **Misdemeanors.**—Statutes making *persons* liable for, include corporations. White v. State, 69 Ind. 273.

16. **Penalties.**—Statutes providing penalties for certain acts of *persons*, perhaps do not include corporations unless the context very clearly shows they are meant to be so included. This is on account of the strict construction of such statutes. See Coats v. People, 22 N. Y. 245; United States v. Kan. P. R., 4 C. L. J. 174; Androscoggin Water Power Co. v. Bethel S. M. Co., 64 Maine 441; Benson v. Monson, etc., 9 Metc. (Mass.) 562; Ohio v. Cincinnati Fertilizer Co., 24 Ohio St. 611; Guardians of St. Leonard v. Franklin, 3 C. P. Div. 377.

17. **Promissory notes.**—The Statute of Anne providing for the negotiability of notes made payable to the order of any *person* applies to notes by or to corporations or to the order of corporations. Indiana v. Woram, 6 Hill. (N. Y.) 33; Mott v. Hicks, 1 Cow. (N. Y.) 513.

18. **Property, protection of.**—See below, Trespass, No. 23, and No. 10, above. United States v. Amedy, 11 Wheat. (U. S.) 392.

19. **Practice and procedure.**—People v. May, 27 Barb. (N. Y.) 238. See also *Appeals*, No. 3, above, and *Jurisdiction*, No. 13, above.

20. **Registry laws.**—Statutes providing for the registration of vessels or other things by *persons* include corporations. Regina v. Arnaud, 9 Q. B. 806, *infra*, p. 58; Durant v. Kennett L. R., 5 C. P. 262.

21. **Real estate.**—Statutes relating to real estate of *persons* apply to that of corporations. Lehigh Bridge Co. v. Lehigh Coal Co., 4 Rawle (Pa.) 9; Blair v. Worley, 1 Scam. (Ill.) 178; Cortes v. Kent Water Works Co., 7 B. & C. (K. B. Eng.) 314.

22. **Taxation.**—Statutes relating to the taxation of the property of *persons*, *inhabitants*, residents, etc, include that of *corporations* also. See Rex v. Gardner, Cowp. 79, but see 3 Q. B. 233; Royal Exchange Assurance Co. v. Vaughan, 1 Burr. 155; Reg. v. Birmingham, etc., Ry. Co., 3 Q. B. 238; People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 382, 8 Am. Dec. 243; Mayor of Mobile v. Rowland, 26 Ala. 498; Trenton Bank v. Haverstick, 6 Halst. (N. J.) 171; City of St. Louis v. Rogers, 7 Mo. 19; Bushel v. Can. Ins. Co., 15 S. & R. (Pa.) 173; Chicago, etc., R. Co. v. Bank of N. A., 82 Ill. 493; People v. McLean, 80 N. Y. 254; Otis Co. v. Inhabitants of Ware, 8 Gray (Mass.) 509; Baldwin Inhabitants v. Trustees, 37 Maine 369; Louisville, etc., R. Co. v. Com., 1 Bush (Ky.) 250; *Compare* Fox's Appeal, 112 Pa. St. 337, 14 A. & E. C. C. 356; Cherokee Ins. Co. v. Justices, 28 Ga. 121; Hartford Ins. Co. v. Hartford, 3 Conn. 15.

23. **Trespasses, protection from.**—Statutes protecting the property of *persons* apply to corporations also. White v. State, 69 Ind. 273; State v. Nashville Univ., 4 Humph. (Tenn.) 157; Bartee v. Houston, etc., R. Co., 36 Texas 648.

24. **Usury.**—Statutes forbidding usury by persons apply to corporations also. Thornton v. Bank of Wash., 3 Pet. (U. S.) 36; Grand Gulf Bank v. Archer, 8 S. & M. (Miss.) 151.

25. **Voting.**—The English Public Health Act (11 and 12 Vict., sec. 20) authorized corporations aggregate to vote by proxy under their common seal at the election of local boards of health. Grant on Corp., p. *4, n. *s*. Of course, where corporations may be owners of the stock of other corporations, statutes relating to voting by persons would apply to the corporations as well.

Sec. 11. Same. (2) *As to the ownership of its property.*

THE QUEEN ON THE PROSECUTION, ETC., v. ARNAUD ET AL.[1]

1846. IN THE COURT OF QUEEN'S BENCH. 25 Law Journal Reports (*New Series, Vol. 16*), for the year 1847, part II, Cases at Common Law, pp. 50–55.

The judgment of the court was delivered by—

LORD DENMAN, C. J. The object of the present mandamus is to compel the custom-house officers to register a vessel, the property of the Pacific Steam Navigation Company. The company is a corporation by charter of her present Majesty, for the purpose of providing vessels, and employing them in the Pacific ocean. It is admitted by the defendants that the company, as a British corporation, might be owners of British-built vessels, and *prima facie* would be, as such corporation, entitled to register them, under the provisions of the 8 and 9 Vict., c. 89, applicable to the registry of vessels by corporations.[2]

But it is said that some of the members of the corporation are not British subjects, but foreigners; and, consequently, that the vessel does not wholly belong to her Majesty's subjects, as required by the 5th section of the act, and is within the prohibition contained in the 12th section of the act, against foreigners being entitled to be owners, in whole or in part, directly or indirectly, of any vessel requiring to be registered. Now, it appears to us that the British corporation is, as such, the sole owner of the ship, and a British subject within the meaning of the 5th section, as far as such a term can be applicable to a corporation, notwithstanding some foreigners may individually have shares in the company, and that such individual members of the corporation are not entitled, in whole or in part, directly or indirectly, to be owners of the vessel. *The individual members of the corporation, no doubt, are interested in one sense in the property of the corporation, as they may derive individual benefit from its increase, or loss from its destruction; but in no legal sense are the individual*

[1] Statement of facts, except as given in the opinion and notes, and arguments omitted.

[2] This act provided, section 5, * * * "That no vessel shall be registered * * * except such as are wholly of the build of the United Kingdom, * * * and which shall wholly belong or continue to belong to her Majesty's subjects * * *" Sec. 12. * * * "That no person who has taken the oath of allegiance to any foreign state, * * * nor any person usually residing in any country not under the dominion of her Majesty * * * shall be entitled to be the owner in whole or in part, directly or indirectly, of any ship or vessel required to be registered, etc." Sec. 13. * * * "That if it shall become necessary to register any vessel belonging to any corporate body in the United Kingdom, the following declaration shall be taken and subscribed by the secretary, etc., 'I, A. B., Secretary,' etc., 'do hereby declare,' etc., * * * 'that the same (ship) doth wholly and truly belong to [*name of company or corporation*].'"

members the owners. If all the individuals of the corporation were duly qualified British subjects, they could not register the vessel in their individual names as owners; but must register it as belonging wholly to the corporation as owner. The terms of the 23d section, with respect to the condition of the bond to be given upon obtaining the registry, as to foreigners purchasing or becoming entitled to any part or share of or interest in any ship or vessel, would appear to be applicable to a case of purchase or transfer of property in the vessel itself, as it provides that the certificate shall be delivered up, "within seven days after such purchase or transfer of property in such ship," and does not, as it seems to us, bear materially on the present question. It was contended that the effect might be to defeat the object and policy of the navigation laws in this respect, inasmuch as the individual members of the British corporation might, either originally or by transfer, be all foreigners. Such does not appear to be contemplated or provided for by the act in question. If it be *casus omissus*, and evil consequences arise, they may be remedied by the interference of the legislature, or, possibly, (though we do not wish to be understood as giving any opinion upon this point), by repealing the letters patent, as improvidently giving powers operating to defeat the law and public policy, and, in future patents, by providing against the objection. But, as the case stands, it seems to us that the British corporation is, to all intents, the legal owner of the vessel, and entitled to the registry, and that we can not notice any disqualification of an individual member, which might disable him, if owner, from registering the vessel in his own name. There will, therefore, be judgment for the prosecutors, and a peremptory mandamus.

Judgment for the Crown.

Note. See also, Russell v. Temple, 3 Dane's Abr. (Mass.) 108; Bundy v. Iron Co., 38 Ohio St. 300; Button v. Hoffman, 61 Wis. 20, 50 Am. R. 131; Baldwin v. Canfield, 26 Minn. 43; Tomlinson v. Bricklayers' Union, 87 Ind. 308; Wheelock v. Moulton, 15 Vt. 519; Atchison, etc., R. Co. v. Cochran, 43 Kan. 225, 23 Pac. 151; Central T. Co. v. Kneeland, 138 U. S. 414; Louisville Bank Co. v. Eisenman, 94 Ky. 83, 42 Am. St. 335; Humphreys v. McKissock, 140 U.S. 304; Parker v. Hotel Co., 96 Tenn. 252, 34 S. W. 209; Pott v. Schmucker, 84 Md. 535, 57 Am. St. 415; Gallagher v. Germania Brewing Co., 53 Minn. 214; Barrick v. Gifford, 47 O. S. 180, 21 Am. St. R. 798; Engiand v. Dearborn, 141 Mass. 590; Rough v. Breitung, 117 Mich. 48, 75 N. W. Rep. 147; Warren v. Davenport Fire Ins. Co., 31 Iowa 464, holding a stockholder has an insurable interest in the corporation.

Sec. 12. Same. (3) *As to contracts between it and its members.*

FOSTER & SONS, LIMITED, v. THE COMMISSIONERS OF INLAND REVENUE.[1]

1893. IN THE COURT OF APPEALS. Law Reports (1894), 1 Q. B. Div. 516–532.

[Case stated by the commissioners of inland revenue under the stamp act of 1891, 54 and 55 Vict., ch. 39, § 13. In 1891, eight persons named Foster, then partners, extensively engaged in mercantile, manufacturing, mining and banking business, agreed among themselves to form a corporation under the English Limited Companies Act, to carry on their business; they took the proper steps to form, and did form, a corporation known as John Foster & Sons, Limited. These same eight persons, acting as parties of the first eight parts, by indenture duly executed, conveyed all the partnership property to the corporation, John Foster & Sons, Limited (composed of the same eight persons) acting as the party of the ninth part. The consideration for the conveyance was nothing except the preferred, ordinary and debenture stock in the corporation, which was apportioned to each one of the first eight parties in proportion to his former interest in the partnership property. Under the English Stamp Act (requiring all conveyances to be duly stamped) the commissioners of Inland Revenue levied a duty of £700 10s. This act provided, Sec. 70. "The term 'conveyance on sale' includes every instrument * * * whereby any property upon the sale thereof is legally or equitably transfered to or vested in the purchaser or any other person on his behalf." * * * Sec. 71. "Where the consideration * * * consists of stock * * * such conveyance is to be charged with ad valorem duty in respect of the value of such stock * * *." Sec. 78 imposed a duty on conveyances "not otherwise charged."

The question in this case was, was there any real conveyance upon which a stamp duty was chargeable? Wright, J., of the divisional court, held there was, but Cave, J., of the same court, held the partners had not sold their property, but there had been a mere rearrangement of ownership among the same persons, the parties, property, shares and consideration had remained the same. Wright withdrew his judgment and allowed the commissioners to appeal.]

LINDLEY, L. J.: I confess that, with great deference to Cave, J., I can not see the difficulty in this case.

The material sections of the act of 1870 must first be considered.

[The lord justice then read sections 70 and 71 of the stamp act of 1870, and continued.]

The importance of section 71, to my mind, is this: It shows that there may be a conveyance on sale, although the consideration for it is not cash or money, but may include or consist of stock or marketable securities. The definition of "stock" and "marketable

[1] Statement of facts condensed. Opinions of Cave and Wright, JJ., of the divisional court, and arguments omitted.

securities" will be found in section 2. Then section 78 imposes a stamp duty on conveyances not otherwise charged, and the schedule shows what the stamps are that are imposed upon conveyances that are charged. First, we have "conveyance or transfer, whether on sale or otherwise," of certain stocks and dividends. The present case does not come within that head. Then we have "conveyance or transfer on sale, of any property" * * * "where the amount or value of the consideration for the sale does not exceed 5*l*." That fits in with sections 70 and 71. Then we come to: "Conveyance or transfer by way of security of any property or of any security;" and then we have "conveyance or transfer of any kind not hereinbefore described." We must accordingly consider under which of these heads the particular deed in this case comes. It certainly does not come under the first, nor under "conveyance or transfer by way of security of any property," and the alternative is between "conveyance or transfer on sale" and "conveyance or transfer of any kind not hereinbefore described."

Now, the document in this case is an indenture made between eight gentlemen of the first eight parts and "John Foster & Sons, Limited (hereinafter called 'the company'), of the ninth part." Pausing there for a moment, although the persons of the first eight parts may be and were members, and the only members, of John Foster & Co., Limited, John Foster & Co., Limited, is not those eight individuals; John Foster & Co., Limited, is a corporation. *We have accordingly two parties, one party consisting of several individuals, and the other party consisting of a corporation. Whether they are or are not the members, or the only members of the corporation, is wholly immaterial. The corporation is a totally different person from them in any capacity you choose to assign to them, except a corporate one.*

[The lord justice then stated the recitals in the operative part of the conveyances, and continued]:

Then the parties of the first eight parts put their seals to the instrument, and the company puts it seal to it. Now, what is that instrument? It is certainly a conveyance of property—that is obvious. In order to amount to a conveyance of property there must be a person conveying and a person taking, and you have them both here. The persons conveying are the persons named in the first eight parts, and the persons taking are the corporation named in the ninth part.

Now, what is the consideration? The consideration for the transfer for this property is, I agree, not money, but it is stocks and securities, which for this purpose are to be regarded as equivalent to money by reason of section 71 of the act to which I have already alluded. Then what have we got? To sum it up shortly, it is a conveyance of property from one person to another for money, or what is, according to the provisions of the statute, equivalent to money. What is that except a conveyance on sale? What else can you call it? It is certainly not a gift; it is not an exchange; it is not a partition; it is not a mortgage. I do not know what it is unless it is a conveyance on

sale. I do not know what is necessary to constitute a sale, except a transfer of property from one person to another for money, or for the purposes of the stamp act, for stock or marketable securities.

But then it is argued that it is only a redistribution of property. I do not consider it a redistribution at all. It is an entire transfer of property from one set of people to another person altogether, and whether there are, as there may well be hereafter, additional persons taking shares in this company, is perfectly immaterial.

Again it is argued on behalf of the appellants that this instrument is in substance nothing more than a conveyance to a trustee to carry on the business in trust for the grantor. Just try that. Supposing there is a conveyance by half a dozen people, transferring their property to a trustee on trust to carry on the business for them, can you in any sense of the word, legal or business-like, or otherwise, call that trustee a buyer? There is no buying; there is no sale to him at all, nor is there any money, or stock, or securities, or anything else parted with by him. Then it was urged that these shares can derive no value unless the company gets this property transferred to them. That is possible enough. That is to say, in other words, that the shares in the company would be valueless unless the company had assets. Of course they would be, but that does not affect the question whether there is a sale or a conveyance or not. I think myself that Cave, J., has attached too little importance to the fact that you have here a distinct seller and a distinct buyer, and that in point of law it is immaterial that in the present case the buyer is a corporation, which consists of the eight persons who formed and who are the partners. The appeal must be allowed.

KAY, L. J. I am of the same opinion. With deference to Cave, J., it seems to me impossible to hold that this transaction was anything else than a conveyance on sale. As pointed out on the face of the statute, the consideration may be money or money's worth. Money's worth certainly is sufficiently expressed by a number of shares and debentures of an existing corporation, which, in effect, constituted the consideration for the particular transfer in this case. Now, that there was a conveyance is beyond all question. The persons who are named as vendors in the deed have divested themselves of their property in the subject of that conveyance, and all that property is vested in an entirely independent and separate body; namely, a corporation. Suppose that corporation had consisted of altogether different persons, no one for a moment would doubt that this was a conveyance on sale. Suppose there had been one person in it different, there is nothing that I have heard in the argument which induces me to suppose that even in that case it could have been doubted that this was a conveyance on sale. But the argument, as I understand it, is this: that the individual corporators who composed that corporation were, in fact, the very identical persons who were conveying this property to the corporation, and the corporation had no other property except this which it took under its conveyance; and that, as the only value of the shares and debentures was derived from this very property

which the individual corporators were conveying to the corporation, the conveying partners either got no consideration for that which they conveyed other than part of the property actually conveyed, or they got no consideration at all. Now, I do not follow that argument in the least. I think it is a fallacy from beginning to end. *In the first place, a corporation is a different thing from the individuals who compose it; and, secondly, the shares and debentures of a corporation are not the same thing as the property which that corporation owns.*

You may say, in one sense, that the property is a security for the value of those shares. The value of those shares in the market, which, observe, are immediately transferable, may depend upon the solvency of the company, the amount of property it possesses, and its chance of carrying on a profitable business. To say that the shares and debentures are part of that property seems to me to be a complete confusion of terms. Suppose the case, which I put during the argument of a sale of real estate, and the whole of the purchase-money not to be paid at once in cash, but to be secured on mortgage on that real estate; and, if you like, in order to make the analogy perfect, suppose the purchaser had no other property than that property, would the transaction be the less a sale for that reason? Still the consideration given would be a certain amount of cash which would be left on the security of the estate; but I have never yet heard that because the whole of the purchase-money upon a sale of real estate was left on mortgage of the real estate that for that reason the transaction ceased to be, or was prevented from being, a sale. Yet, really, that is what the argument in this case comes to. I confess I am not able to agree with it. Nothing else was suggested which should prevent this transaction from being a sale, and it seems to me clearly to be, under the words of this statute, "a conveyance on sale" for a consideration which, if not money, at least is money's worth. I, therefore, with all deference to Cave, J., think that his decision must be reversed and the appeal allowed.

A. L. SMITH, L. J. The question in this case is whether the instrument of November 27, 1891, is a conveyance or transfer on sale of any of the property mentioned under the second head—"conveyance or transfer"—in the schedule to the stamp act of 1870.

Now, in order to find out what is, or is not, a conveyance or transfer on sale of any property in that second head of the schedule, I must refer to sections 70 and 71 of the act. And, reading both these sections together, it seems to me that the term "conveyance on sale" includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser in consideration of any stock or marketable security. That is the definition.

First of all, then, is this an instrument whereby any property is transferred to or vested in the purchaser? I beg to say yes. It is an instrument upon the face of which the actual land of the vendors, and the trade-marks which are their property, are transferred to a limited company. I do not think that this is disputed, and it does not

appear to me to be disputed so far, in the judgment of my brother Cave: but what he says is that this is not an instrument whereby any property, upon the sale thereof, is transferred. The real pith of his judgment is that the vendors and vendees are the same persons—that the agreement as regards the sale was carried out by the members of the old firm before any company limited came into existence, and that inasmuch as they are the same persons now as then, there is no sale at all; and, therefore, there is no instrument whereby any property upon the sale thereof is transferred. I must here respectfully differ with my brother Cave. *It seems to me that the company limited are not the same persons as the eight members of the old firm—they are different altogether.* It was admitted by Mr. Finlay in argument, though he entirely took away the ground from under my brother Cave's feet when he said so, that *the company limited could maintain a suit for specific performance against the old partners.* If that is so, how can they be the same persons. This really shows that they are not the same persons. It is here that I disagree with my brother Cave.

The respondents also contend that there was no consideration. We must read the two sections together. Section 70 enacts that: "The term 'conveyance on sale' includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser." Then section 71 implies that it may be in consideration of any stock or marketable security. The land and the trade-marks are transferred by this instrument from the eight partners who were the old firm to the new company limited. The land and trade-marks are transferred by this instrument in consideration of what? In consideration of stock or marketable securities, which undoubtedly are not the same things as the land and trade-marks themselves, though they may be charges upon the land and trade-marks which are conveyed. It seems to me that it is untrue to say that in this transaction there has been no consideration passing from the vendee to the vendor. Although charges upon the land and the trade-marks, the consideration comes within the very terms of section 71 itself—"any stock or marketable security."

For these reasons I prefer the judgment of my brother Wright to that of my brother Cave.

Appeal allowed.

Note. See also Gordon v. Preston, 1 Watts (Pa.) 385; Polleys v. Insurance Co., 14 Maine 141; Pope v. Brandon, 2 Stew. (Ala.) 401; Lexington Life, F. & M. Ins. Co. v. Page, 17 B. Mon. (Ky.) 412; Moore & Handley Hardware Co. v. Towers, 87 Ala. 206, 13 Am. St. 23; Davis v. Creamery Co., 48 Neb. 471, 67 N. W. 436; 1900, Andres v. Morgan, 62 O. S. 236, 78 Am. St. R. 712.

Sec. 13. Same. (4) *Or to contracts between the members themselves.*

MORRIS SELLERS v. HOWARD GREER.[1]

1898. IN THE SUPREME COURT OF ILLINOIS. 172 Illinois 549–558.

Appeal from the appellate court for the first district, heard in that court on appeal from the superior court of Cook county, the Hon. Theodore Brentano, Judge, presiding.

This was a bill for specific performance, brought by Howard Greer against Morris Sellers, in the superior court of Cook county. The cause proceeded to a hearing on the pleadings and evidence, and the court entered a decree dismissing the bill. To reverse the decree, Greer appealed to the appellate court, where the decree was reversed and the cause remanded for the purpose of allowing Greer to recover such damages as he may have sustained on account of the failure of Sellers to perform the contract. To reverse the judgment of the appellate court, Sellers appealed to this court.

Upon looking into the record it appears that Morris Sellers and Howard Greer had been associated together in the business of manufacturing railroad supplies for several years prior to 1891. In June, 1891, they formed a corporation under the laws of this state, and adopted the name of Morris Sellers & Co., incorporated. The capital stock of the corporation was fixed at $100,000, each share being of the par value of $100, and 499 shares were subscribed for and owned by Morris Sellers and Howard Greer, respectively, each owning that number of shares from the formation of the corporation to the time of filing the bill. The remaining two shares were owned by John M. Sellers and Paul E. Greer, who were sons of said principal stockholders, each owning one share. No money was paid by any of the stockholders for their stock. The 500 shares belonging to Sellers and his son were paid for by turning over the plant and their interest in certain patents to the corporation; and the 500 shares issued to the Greers were paid for by turning over their interest in certain patents controlled by them. All four of the above named parties were stockholders and directors. Morris Sellers acted as president and treasurer and had charge of the office and financial department of the concern. Howard Greer was secretary and manager or superintendent, and had charge of the factory and manufacturing department of the business.

After the organization of the corporation it did a fair business, and its management and success seemed to have been satisfactory to the

[1] Part of the opinion relating to specific performance of the contract is omitted.

parties interested until the latter part of 1894, when trouble arose between the two principal stockholders in regard to the management of the business. Greer made an offer to purchase the Sellers interest, but the offer was not accepted. Negotiations continued, however, between the parties until September 4, 1894, when Morris Sellers made a written proposition to buy out Greer. The proposition was written and executed by Morris Sellers and by him delivered to Greer. It was as follows:

"Outline of proposition between Howard Greer and Morris Sellers: Greer to take all of the Greer patents and all of the special machinery attached to punching machines; all other appliances belonging to the making of spikes, he surrendering all of his stock in M. S. & Co., and to furnish M. S. & Co. a complete set of templates for splices; M. S. & Co. to loan machine No. 4 for six mo. and pay Howard Greer $1,800 toward a new machine for cutting spikes; Howard Greer to fill all of the present orders so far as the material now on hand will complete. This agreement to be put in proper form at as early a date as possible, pending the return of the company's attorney to draw up the necessary releases. MORRIS SELLERS.

"*Tuesday, September 4, 1894.*"

The bill alleged and the evidence tended to prove that the Greer mentioned in the proposition was appellee, and the letters "M. S. & Co." meant and referred to the corporation known as Morris Sellers & Co.

Mr. JUSTICE CRAIG delivered the opinion of the court.

The two following grounds are relied upon by counsel for appellant in the argument to reverse the judgment of the appellate court: "We claim, firstly, that the proposition is not a contract binding upon appellee or upon appellant; that it lacks mutuality; that the subject-matter was the property of a corporation, and not of either of the parties named in the proposition; that appellee is in nowise bound, and so acted as not to legally bind himself in terms to said proposition; that it was made under such circumstances that it was not, and was not intended to be, a complete or binding contract or agreement upon either appellant or appellee; hence, its specific enforcement was not only impossible, but if attempted by way of assessment of damages upon appellant, as the appellate court seeks to do, would contravene equitable principles. Secondly, that if all these points are negatived, appellee has yet barred himself of all relief in equity by his own inequitable conduct."

It will be observed that appellee did not sign the contract, and hence it is contended that the contract is not mutual. It appears, however, that the contract was delivered by Morris Sellers, appellant, to appellee, on the day it was executed, and appellee accepted the contract and agreed to its terms and conditions. The acceptance of the contract by appellee assenting to its terms, holding it and acting upon it as a valid instrument, may be regarded as equivalent to its formal execution on his part, as held by this court in Johnson v. Dodge, 17 Ill. 433, and Vogel v. Pekoc, 157 Ill. 339.

But it is said the subject-matter of the contract was the property of a corporation, and not of either of the parties named therein, and as the corporation never executed or ratified the contract it can not be enforced in a court of equity. Of the 1,000 shares of capital stock of the corporation Greer and Sellers owned equally the entire amount except two shares, which were held in the names of the respective sons of the two parties. These sons never paid anything for the stock placed in their names, and were mere nominal shareholders, and the only inference to be drawn from all the evidence is, that the two shares were placed in their names in order that the concern might have a sufficient number of stockholders to make up a board of directors. In the management of the affairs of the concern, whatever was done by Greer was assented to by his son, and whatever action was taken by Sellers was approved by his son. As between appellant and appellee they may be regarded as owners of the property named in the contract, and any contract which they may have made in regard to the property may, as between them, be enforced in a court of equity.

But it is said the proposition was not intended to be a complete and binding contract. There is nothing appearing on the face of the contract, nor is there anything in the evidence introduced on the hearing, which will sustain that position. The contract is definite and specific in regard to what was to be done by each of the parties. By the contract Greer was to do three things: First, he was to surrender all of his stock in the Morris Sellers & Co. establishment; second, he was to furnish a complete set of templates for splices; third, he was to fill all of the present orders, so far as the material then on hand would permit. From the terms of the contract there could be no uncertainty or doubt in regard to what Greer was required to do in order to comply with the contract. As to Sellers, he was required by the contract to deliver over to Greer all of the Greer patents, and what was meant by Greer patents was well understand by both parties.

It is true that Morris Sellers and Howard Greer owned all of the stock of the corporation, except two shares, which belonged to their sons. But did this fact confer upon them, or either of them, the power to sell the corporate property? It is conceded that the patents and all the other property named in the contract in question belonged to the corporation Morris Sellers & Co., and the question presented is whether Morris Sellers and Howard Greer, two of the stockholders, without the consent or authority of the corporation Morris Sellers & Co., had the right to divide the corporate property between themselves, or to sell it, as was attempted to be done by the contract in question. *A corporation is an artificial being created by law, clothed with certain powers. It acts through its board of directors and officers. Its property is not subject to the control or disposition of its members or stockholders. They have no power to sell or encumber the corporate property.* A reference to a few authorities will fully sustain what has been said.

In Cook on Stockholders (3d ed., § 709), it is said: "The

stockholders can not enter into contracts with third persons. Contracts between the corporation and third persons must be entered into by the directors and not by the stockholders. The corporation, in such matters, is represented by the former and not by the latter. Such is one of the main objects of corporate existence. To the directors is given the management and formation of corporate contracts. The stockholders can not, in meeting assembled, bind the corporation by their contracts in its behalf. Although one person owns a majority of the stock, or all of it, or all but two shares, he does not, in consequence thereof, acquire the right to act for the corporation, or as the corporation, independently of the directors. One person may own all the stock, and yet the existence, relations and business methods of the corporation continue. A single stockholder can not make a contract for and in the name of the corporation which shall have any binding force or validity, except by subsequent ratification or adoption in the regular manner."

In Allemong v. Simmons, 124 Ind. 199, it was attempted to hold a corporation liable on a contract made by one Crawford, who was a director and owner of five-sixths of the stock of the corporation. In disposing of the question the court said: "It is true, Crawford was one of the directors of the company and held a majority of the stock; but the existence of these facts confers upon him no power to make contract for the corporation. It could only be bound by the action of its board of directors. The board could have conferred upon Crawford this power, but there is no evidence that it had done so. Crawford, as one of the directors, had no more authority or power than any other director. The board consisted of five members, and three constituted a quorum. Less than three could make no binding contract for the corporation. * * * The contract which Simmons and Aleshire executed with Crawford was the mere personal engagement of Crawford with the said parties."

In Humphrey v. McKissock, 140 U. S. 304, the validity of the action of all the stockholders of a corporation in transferring its property without corporate action arose, and in disposing of the case the court said: "Both the commissioner and the court in confirming his report and entering the decree mentioned, seem to have confounded the ownership of stock in a corporation with ownership of its property. But nothing is more distinct than the two rights. The ownership of one confers no ownership of the other. *The property of a corporation is not subject to the control of individual members, whether acting separately or jointly They can neither encumber or transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers subject to the conditions prescribed by law.*

In Smith v. Hurd, 12 Metc. 385, the relations of stockholders to the rights and property of a banking corporation are stated with his usual clearness and precision by Chief Justice Shaw, speaking for the supreme court of Massachusetts, and the same doctrine applies to

the relations of slockholders in all business corporations. Said the chief justice; 'The individual members of a corporation, whether they shall all join or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account or discharge them from any liability. *Should all of the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security or chose of action, could not collect any debt, or discharge a claim, or release damage arising from any default, simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined.*'"

In this court, in Hopkins v. Roseclare Lead Co., 72 Ill. 373, the right of a stockholder of a corporation to transfer certain leases belonging to the corporation arose, and in disposing of the question the court said (p. 379): "It is insisted that La Grave had no power to make the sale of the leases, to transfer the control of the suit or to sell the twenty acres of land, as they were all owned by the company. He was but a stockholder, and as such had no power to make the sale. He, although owning the majority of the stock, could not act for the company unless specially authorized. He could, no doubt, control the action of the company by the election of its officers, but still the company could only act through its officers or by expressly delegating power to others, whether a stockholder or other persons." See, also, England v. Dearborn, 141 Mass. 590; Newton Manf. Co. v. White, 42 Ga. 148; Russell v. McLellan, 14 Pick. 63.

From what has been said it is apparent that Morris Sellers, although he owned one-half of the capital stock of the corporation, had no right to sell the corporate property, and any contract he may have made would not be obligatory on the corporation. The corporation, Morris Sellers & Co., the owner of the letters-patent and other property described in the contract, was not made a party to the bill, and no decree could have been obtained against it if it had been made a party, for the reason it never executed the contract, nor did it ratify the contract after it was made, but, on the other hand, expressly refused to do so on application of Greer to its board of directors. The bill prayed that Sellers might be compelled to convey the letters-patent named in the contract to Greer. He had no title, and hence could not make a conveyance, and any decree that might have been rendered would have been nugatory. In a bill for specific performance the contract must be of such a character that the court is able to make an efficient decree and enforce it when made. 3 Pomeroy's Eq. Jur., § 1405. * * *

Appellee not being entitled to a decree for a specific performance, the next question presented is, did the court err in refusing to retain the bill for the purpose of allowing appellee to recover damages for the failure of Sellers to perform the contract? * * *

In Kennedy v. Hazleton, 128 U. S. 667, it was held that specific performance can not be decreed of an agreement to convey property

which has no existence or to which the defendant has no title, and if the want of title was known to the plaintiff at the time of beginning suit, the bill would not be retained for the assessment of damages. The same doctrine is declared in Hurlbut v. Kantzler, 112 Ill. 482. Here, Greer, the appellee, knew when he accepted the contract from Sellers that the property named in the contract was owned by Morris Sellers & Co., a corporation. He also knew that Sellers had no authority to sell the property, and, knowing these facts, he could not maintain a bill for specific performance, nor would the bill be retained for an assessment of damages for a breach of the contract.

The judgment of the appellate court will be reversed and the decree of the superior court of Cook county will be affirmed.

Judgment reversed.

Sec. 14. Same. (5) *Also as to suits by or against third persons.*

WILLIAMSON ET AL., SYNDICS, v. SMOOT ET AL.[1]

1819. IN THE SUPREME COURT OF LOUISIANA. 7 Martin (La.) 31–33, or vol. 7 of Louisiana Term Reports.

Appeal from the court of the first district.

MATTHEWS, J., delivered the opinion of the court. The plaintiffs having caused an attachment to be levied on the steamboat Alabama, the St. Stephens Steamboat Company intervened in their corporate capacity, and claimed her as their property. The intervening party are a body politic, created by an act of the legislature of the territory of Alabama, the capital stock of which is divided into shares of a certain amount, and Smoot, the defendant, owns ten of them, subscribed for by him.

[The questions to be decided are * * * 2. Can the shares or stock of any individual stockholder be legally attached?] * * *

II. The existence of the claimants being recognized as a body corporate, and it being admitted that the boat attached belongs to them as a part of their common stock, it is clear that Smoot does not possess such certain and distinct individual property in it as to make his interest attachable. *The estate and rights of a corporation belong so completely to the body that none of the individuals who compose it has any right of ownership in them, nor can dispose of any part of them. Civ. Code, 88, art. 11.*

The court is of opinion that the district court erred in disallowing the claim of the company.

It is, therefore, ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and that the attachment of the

[1] Part of the opinion relating to the recognition of a foreign corporation by a state is omitted.

plaintiff and appellant be quashed, so far as it relates to the said steamboat, the Alabama, and that she be released therefrom.

Note. 1. **Evidence.**—Admissions of shareholders are not admissions of the corporation. Fairfield County Turnpike Co. v. Thorp, 13 Conn. 173; Polleys v. Ocean Ins. Co., 2 Shep. (Maine) 141; Osgood v. Manhattan Bank, 3 Cow. (N. Y.) 612; Hartford Bank v. Hart, 3 Day (Conn.) 493; Mayor of London v. Long, 1 Campb. 22.

2. **Judge,** by holding stock, is disqualified to try a case in which the corporation is a party. Bonham's Case, 8 Rep. 226; Day v. Savadge, Hob. 85, 87; Washington Ins. Co. v. Price, 1 Hop. Ch. (N. Y.) 1; Gregory v. Cleveland, etc., R. Co., 4 Ohio St. 675; Northampton v. Smith, 11 Met. (Mass.) 390; Newcome v. Light, 58 Texas 141; Dimes v. Grand Junction Canal, 3 H. L. Cas. 759; State v. Young, 31 Fla. 594, 34 Am. St. 41. But see Stewart v. Mech. & F. Bank, 19 Johns. (N. Y.) 501; Searsburgh Turnpike Co. v. Cutter, 6 Vt. 315.

3. **Juror,** who holds stock can not try a case in which the corporation is a party. Page v. Contoocook V. R. Co., 1 Fost. (21 N. H.) 438; Peninsular R. Co. v. Howard, 20 Mich. 18; Michigan Air Line R. Co. v. Barnes, 40 Mich. 383; Georgia A. Co. v. Hart, 60 Ga. 550; Butler v. Glens, etc., R. Co., 121 N. Y. 112; McLaughlin v. Louisville Elec. L. Co., 100 Ky. 173.

4. **Witness.**—At common law a shareholder was disqualified, because of interest, to be a witness for the corporation. Porter v. Bank, etc., 19 Vt. 410; McAuley v. The York, etc., 6 Cal. 80; Mokelumne, etc., Co. v. Woodbury, 14 Cal. 265; 1903, Read v. Toledo Loan Company, 68 O. S. 280, 96 Am. St. R. 663.

5. **Sheriff,** though a stockholder, is not disqualified to serve process on the corporation. Merchants' Bank v. Cook, 4 Pick. (Mass.) 405; Adams v. Wiscasset Bank, 1 Greenleaf (Maine) 361, 10 Am. Dec. 88; Barker v. Remick, 43 N. H. 235.

6. **Acknowledgment.** Shareholder incompetent to take. 1902, Ogden Building & L. Ass'n v. Mensch, 196 Ill. 554, 89 Am. St. R. 330. See Brewster, Conveyancing §§ 285–7; 1903, Read v. Toledo Loan Co., 68 O. S. 280, 96 Am. St. R. 663, 67 N. E. 729.

Sec. 15. Same. (6) *Or as to suits between it and its members.*

1430. "If mayor and commonalty disseise one of the commonalty he shall have *assise* against them, for they are as several persons, viz., body politic and body natural. Per Paston, Br. Corporations, pl. 24, cites 8 H. VI, 1, 14," as given in 6 Viner's Abr., Corporations, § 2, p. 304.

WARING v. CATAWBA COMPANY.[1]

1797. IN THE SUPERIOR COURTS OF SOUTH CAROLINA. 2 Bay (South Carolina) 109–111.

Assumpsit for goods sold, and for work and labor, etc.

Plea in abatement.

This case came before the court upon a plea in abatement, which pleaded that plaintiff was himself a member of the company, and, therefore, could not maintain any action against it in his individual capacity.

Mr. Trezevant, for the plaintiff, argued that there was a wide difference between a copartnership in trade and a corporation. Copartners, he admitted, must sue and be sued jointly; that they were jointly and severally liable, etc. But a corporation (as in the present case)

[1] Part of arguments omitted.

must be sued in its corporate name; that the private property of its members were not liable, only the corporate property, so that there was a wide difference between a corporation and a copartnership, both as to the mode of bringing an action and as to the effect of any judgment or decree against them. * * *

The attorney-general, *contra*, said this company ought to be considered as an association for gain, or the emolument of its members, and therefore in law should only be considered as a kind of copartnership, and not as a public corporation. * * *

The court, after hearing the arguments, overruled the plea in abatement, as containing principles subversive of justice; but they observed that the two cases of Bourdeaux and Drayton against The Santee Canal Company had settled this point, as they had both been allowed by this court to maintain their actions for their salaries, etc., against the company, as well as the cases respecting the other public societies, mentioned in the argument.

The plaintiff was then allowed to go on and prove his debt to a jury.

Present, Burke, Grimke and Bay; but as Judge Grimke was a member of the company, he declined giving an opinion.

Note. See Culbertson v. Navigation Co., Fed. Cas. 3464; Rogers v. Society, 19 Vt. 187.

NOTES TO ARTICLE II.

1. **Ancient ideas.**—The idea of an *artificial person* seems as old as our race. In fact the underlying idea of a *person* is not that it is an individual human being, but rather that *part* or character which one sustains in the world. The word comes from the Latin, meaning "a mask for actors," or "the character represented by such mask." See Century Dictionary, Austin's Jurisprudence (Campbell's edition), § 438; Holland's Jurisprudence, p. 65 (edition of 1880). This being the primary meaning of the word, it was immaterial whether this *person* was composed of a single human being, or many, or not even a human being at all, but only a thing or group of things, provided they or it had the same *status*, or was entitled to the same rights or subject to the same duties as any single human being was. So, too, the whole hierarchy of gods and goddesses that peopled the "heavens and earth" of the ancient world was nothing but *personifications* of the forces of nature. Morawetz (Private Corporations, § 1, p. 2), says: "The conception of a number of individuals as a corporate or collective entity occurs in the earliest stages of human development, and *is essential to many of the most ordinary processes of thought*. Thus the existence of tribes, village communities, families, clans and nations implies a conception of these several bodies of individuals as entities having corporate rights and attributes." The oldest corporate body or artificial person seems to have been the *family*. Hearn, in "The Aryan Household," pp. 64, 5, 6, thus characterizes the ancient family: "It formed an organized permanent body, distinct from its individual members, owning property, and having other rights and duties of its own. * * * It was a permanent association. It was not intended to pass away and be reformed like the generations of men. It was constructed and meant to endure forever. It was, in our technical language, a corporation. It had perpetual succession. It included in its members both the living and the dead. These members had various degrees of rank; but the whole number, taken collectively, formed one well defined and distinct *individuality*. Of this corporate entity, the house father for the time being was the head, or, as we might say, the managing di-

rector." Mr. Hearn cites the following authorities: Maine's Early History of Institutions, p. 78 (the Hindu family); K. O. Müller's Dorians, vol. 2, p. 240 (the Greek family); M. Ortolan, History of Roman Law, p. 577 (the Roman family); M. de Laveleye, De la Proprieté, p. 23 (the Slav family); the Editor of Ancient Laws of Ireland, Int., p. 79 (the Irish family); Maine's Ancient Law, p. 143 (the German family).

2. **In the Roman civil law.**—Although corporations do not seem to be mentioned in the Institutes of Gaius (c. 180 A. D.) they are in the Institutes of Justinian and there are many provisions in the digests (A. D. 533) relating to them; the ideas above expressed were embodied in the Roman law. "Every being capable of having and being subject to rights was called in Roman law a *persona*. Thus, not only was the individual citizen when looked at as having this capacity, a *persona*, but also corporations and public bodies. * * * The word *personæ* has also another sense. It was used not only for the being who had the capacity of enjoying rights and fulfilling duties, but also for the different characters or parts in which this capacity showed itself; or to borrow the metaphor suggested by the etymology of the word, for the different masks or faces which the actor wore in playing his part in the drama of civic and social life. Thus, for instance, the same man might have the *persona patris*, or *tutoris*, or *mariti*; that is, might be regarded in his character of *father*, *tutor*, or *husband*. * * * *Status* (legal standing) is the correlative of *persona*. *Status* is the legal capacity of a *persona; persona* is that which has *status*." Note of T. C. Sandars in Hammond's Edition of Sandars' Justinian's Institutes. De Jure Personarum, p. 76. See, also, Mackeldey, Handbook of Roman Law (Dropsie's Translation, 1883, sections 128, 129, 155.)

"A *universitas*, or corporate body, exists when a number of persons are so united that the law takes no notice of their separate existence, but recognizes them only under a common name, which is not the name of any one of them. (Digest 3, 4, 2; 3, 4, 7, 1). All the members are considered in law as a single unit or being. (Digest 46, 1, 22.) Such units are sometimes called fictitious persons, because the corporate body, as such, may sue and be sued, receive or part with property, bind itself or bind others, through some agent or syndic (Digest 3, 4, 1, 1), who acts in the name of the whole, just as any individual may act for himself. (Digest 3, 4, 7, 1.) The chief characteristic of such a body is that it does not necessarily die. (Digest 5, 1, 76.) * * * There were many such corporations in Rome, chiefly connected with trades, such as the guild of bakers, and shipowners, companies of tax-gatherers, companies for working mines of gold, silver, salt, etc. The internal government of the corporate bodies was in the hands of the members (*sodales*).—Hunter's Roman Law, 2d ed., pp. 314–5.

Sheldon Amos, in his "History and Principles of the Civil Law of Rome," p. 118, says: "Such a conception (as that of legal persons) had thoroughly penetrated the fabric of Roman law and society long before the time of Justinian, and the appropriate legal consequences had worked themselves out with considerable exactness. The conception, indeed, was extended for purposes of legal convenience, even beyond the original sense of an assemblage of persons, determinate or indeterminate, treated as integral unity. The same hypothesis of a legal personality was made in certain cases where no human beings were directly concerned at all, but where it was desired to assume, provisionally, a fixed center, to which a group of rights and duties might for some purposes be referred. Thus, in the case of an inheritance on which the heir had not yet entered, it was convenient for the moment to call it a person, and to estimate the rights and duties that would attach to a person so situated than to be making constant references to all the innumerable human beings who might be actually interested in the succession." Taylor, in his work on Corporations, ch. 1, takes a slightly different view, and holds that at least in the early period of the Roman law the idea of the artificial personality of a corporation, if it existed at all, was in a very rudimentary shape, though he admits it was present in the later periods, as evidenced by such provisions as, "If anything is owed to a corporation, it is not owed to

any single [member]; nor what a corporation owes do the single [members] owe." ["*Si quid universitati debetur, singulis non debetur; nec quod debet universitas singuli debent.*" Digest iii, 4, lex 7, § 1.] And in the notes (p. 3) he cites Ihring, to the effect that the members of a corporation were the true subjects of corporate rights and liabilities, at least among themselves, and the corporation was only the form assumed toward outsiders. Gheist, etc., iii, Theil., pp. 219, 220, 343–4. So, too, Pollock and Maitland say: "It would be a great mistake to suppose that what we are wont to consider the true theory of *universitates* lay so plainly written on the face of the Roman law books that no one could read them attentively without grasping it. The glossators did not grasp it. Bracton's master, Azo, had not grasped it." History of English Law, vol. 1, p. 477.

3. **In the Canon law.**—The personification of an institution, such as *The Church*, was one of the earliest and most persistent ideas of the early Christian world; so, too, the blending of many members into one body was an early Christian conception. "The Church of God." Acts xx, 28; 1 Cor. i, 1 and 2; Rev. ii, 7. "He is the head of the *body*, the church." Colos. i, 18; Eph. i, 22, 23. "For as the body is one and hath many members, and all the members of that one body, being many are one body; so, also, is Christ * * * Now ye are the body of Christ, and members in particular." 1 Cor. xii, 12, 27. Pollock and Maitland, History of English Law, vol. 1, p. 489, thus summarises the history on this point: "Within the ecclesiastical sphere there have been 'juristic persons' from an extremely remote time. Confining our view to England, we may say that they have existed ever since Æthelberht sanctioned God's property with a twelve-fold bot, and gave lands to St. Andrew. God and the saints, it is needless to say, were not regarded as imaginary persons; still their property had to be administered for them by 'the church,' and the personality of the church is more purely juristic. A personified building gives way to a personified institution or a personified purpose. Then the worldly business of the church is often conducted for it, not by a single man, but by a group of men acting in common; still these men are not the *ecclesia*; no, not though they be all taken together. Thus, canonists have obtained a foundation of fact and practical law for their theories. They see and proclaim that the *universitas* is *persona ficta*, not found in the world of sense, but created by law, that it is invisible, immortal, a body that has no body and no soul. It can not sin, it can not be excommunicated, it can not commit a crime, it can not be punished; very probably it can not commit a delict. These theories are very generally worked out in the thirteenth and the following centuries; they bear abundant fruit in our latest Year Books. To 'the church,' modern law owes its conception of a juristic person, and the clear line that it draws between 'the corporation aggregate,' and the sum of its members." In fact it has been said that Pope Innocent IV (A. D. 1243–1255) was the father of the modern learning of corporations. Ib., p. 477.

4. **In the early common law.**—The personification of *the church*, as having rights, was a common idea in the Saxon laws. "The property of God and *the church* twelve-fold." Laws of Æthelberht, 1 (c. 600 A. D.). "If any carry off a nun from a minster * * * let him pay 120 shillings, half to the king and half to the bishop and to the *church-hlaford*," which Stearns (Germs and Developments of Laws of England, n. 1, p. 78), translates "*church corporation*," though the word is more frequently rendered *tribute*. See Laws of Alfred, 8 (c. 890 A. D.). Under the Laws of Edward the Confessor (c. 1043–1066), there was a *peace* of the *church* as there was of the king (1, 6); lands were held of the *church*; *it* had fiefs, and *it* was entitled to tithes (3, 4, 7).

These provisions of the laws of Edward were also in the confirmation of them by William the Conqueror. London traced some of its liberties to a charter granted by the Conqueror, sealed with his seal, "bitten with his tooth in token of sooth." Coke says he had seen a "charter made by Henry I (1100–1135), by which he granted them *gildam mercatorum*, and a confirmation by Henry II (1154–1189), by which charters they were incorporated." 10 Rep. 30. Though corporations seem to have been in existence from the

time of the Conqueror, Bracton's ideas (c. 1263) were not clear, and were taken almost wholly from the Roman law. He says: "Things belong to corporate bodies, and not to individuals, which are in cities, such as *theaters, stadia*, etc., * * * such as lands and serfs, which are said to belong to cities because they so belong to all the citizens as not to belong to any one person by himself." F. 8, 1 Twiss's Translation 59. This is substantially taken from Justinian's Institutes, Bk. 2, T. 1, § 6. In f. 171*b*, he speaks of the "body corporate of the realm." [*Universitas regni.*] 3 Twiss 93. In f. 180*b*. (3 Twiss 151), he adds race grounds, walls and gates of cities, to corporate property. From what he says, f. 102 (2 Twiss 133), f. 228*b*, (3 Twiss 535), it seems "all may complain or one (only) under the name of the corporation (*Universitatis*). On f. 374 (5 Twiss, pp. 447–449), he says: "If an abbot, or prior, or other collegiate men claim land, etc., in the name of their church upon the seysine of their predecessors, * * * the declaration should not be from abbot to abbot, or from prior to prior, nor should there be mention of the intermediate abbots or priors, *because* in colleges and in chapters the same corporation always remains, although they all die successively and others are substituted in their place, as may be said of flocks of sheep, where there is always the same flock, although all the sheep or heads successively depart, nor does any individual of them succeed to another by right of succession, in such manner that the right descends by inheritance from one to another, because the right always pertains to the church, and remains with the church, according to what may be seen in the charters of feoffment of religious orders, * * * and accordingly if the abbot or the prior, the monks or the canons successively die, the house remains to eternity." This comes very near to the modern idea of the existence of the corporation separate and distinct from its members.

By 1311 a borough is called a "*corps.*" Y. B., 4 Ed. II 103, Gross's Gild Merchant I, 94, note. But "It was really about the reign of Edward III (1327–1377) that the idea of the lay corporation, the lay *persona ficta* as now understood, was painfully elaborated. The doctrine that there could not be a writ of *capias* against a "commonalty" was definitely expressed at least as early as 22 Edward III (1349), 22 Ass. 67, and the practice had been in accordance with this doctrine considerably earlier. There is a very curious case at the end of this reign, which shows not only that the lawyers had come to the notion of a "*body*," afterwards called a "body politic," but also by what road they traveled. They had often been troubled by the question whether something in dispute was appendant or appurtenant to something else, or was a thing by itself and independent, which they called a gross (*un gross*). It was, for instance, a common subject of argument whether an advowson was a gross (according to modern phraseology "in gross"), or appendant. By a curious psychological process they realized that what we now call a corporation was "a gross," or something which had an existence *per se;* and this something they called alternatively "*un corps.*" Thus they came to the idea of an individuality composed of the members of a corporation, or, as we might now say, to the idea of a *persona ficta*. At the same time it was held that the commonalty of a guild which had not been affirmed by a royal charter could not be adjudged to be a body (*un corps*), capable of purchasing an estate of freehold." See 49 Li. Ass. 8. Introduction by L. O. Pike to Y. B., 16 Ed. III, part 1, p. xlvi. Many points turning on or recognizing the artificial personality of a corporation were determined during this reign. In 1335 it was held the head of the corporation could be sued by the corporation, as the dean by the chapter of the same church. Y. B., 9 Ed. III 45*b*. In 1341 it was held that if a corporation disposes of all its property the corporation yet remains. 15 Ass. 10. In 1349, as indicated above, it was said: "The corporation is invisible, incorporeal; it can not be assaulted, or be beaten or imprisoned; trespass does not lie against it, for *capias* nor *exigent* lies not against a commonalty." 22 Ass. 100, pl. 67. In 1356, "Nor can they commit treason, or be outlawed, or excommunicated, for they have no souls, nor can they appear in person, but by attorney." In 1372, however, it was held "a corporation can commit a trespass." 45 Ed. III 2.

In 1375, the taking by the servant of a corporation is a taking by the corporation. 48 Ed. III 17. In 1376, none but the king can make a corporation. 49 Ed. III 4. In 1377, one corporation can be united to another (consolidation?), so as to succeed to the rights of the latter. 50 Ed. III 27. Pollock and Maitland (History of English Law, vol. 1, p. 473) place the birth of the corporate idea a little later than indicated above. They say: "If for a moment we take our stand in Edward IV's reign (1461–1483) * * * we can say that the idea of a corporation is already in the minds of our common lawyers; it may trouble them, this is shown by their frequent discussions about its nature, but still it is there. First we notice that they already have a term for it, namely, '*corporacion*' for which '*corps corporat*,' and '*corps politik*,' are equivalents." Kent says (2 Comm., § 270, note *e*), "the terms corporation and body corporate first appeared in the reign of Henry IV (1399–1413), in any public document." In 1429, it was unsuccessfully contended that when a member and the corporation were sued together, the member was twice sued. Y. B., 8 Hen. VI, f. 1. In 1437, "if a man recovers a debt or damages against a commonalty he shall have execution only against the goods they have in common." Y. B., 16 Hen. VI, Fitz. Abr., Execution pl. 128. In 1441, "a release by all the members of a corporation is not the release of the corporation." Y. B., 19 Hen. VI 64. So too "if all the members of a corporation appear in person to answer a suit against the corporation it is not sufficient." Y. B. 19 Hen. VI 80. In 1442, "if all the members, as abbots and monks, die, the corporation is dissolved." Y. B., 20 Hen. VI 7, 8. In 1454, "when a city or village is incorporated as bailiff and commonalty of ——, they are by this name a *person corporate*, an entire body." Y. B., 32 Hen. VI 9. In 1461, "a corporation aggregate of several is invisible, immortal and rests only in intendment and consideration of law, and therefore dean and chapter can not have predecessor nor successor." Y. B., 39 Hen. VI 13*b*, 14. In 1470, generally they must act by deed only. Y. B., 9 Ed. IV 59, but in 1479, they can appoint ordinary servants and agents without a seal. Y. B., 18 Ed. IV 8.

In 1481 *corporate* bodies are *contrasted* with unincorporated bodies. Y. B., 20 Ed. IV 2. So, too, in this year or the next, a juror was challenged because he was a brother to one of the members of the corporation; it was answered that the juror was "a stranger to the chapter, for it is a body of such nature that it can have neither brother nor cousin," but conceded that it would have been otherwise if the juror had been brother to the Dean, Y. B., 21 Ed. IV, f. 28, 1 Pollock and Maitland 474. In this year, too, a corporation is called a *mere* name. Y. B., 21 Ed. IV 13. Perhaps the most interesting case of the time is the one of this year summarized by Pollock and Maitland thus: "Abbot, of Hulme, sued mayor, sheriff and commonalty of Norwich, on a bond, and they pleaded that when the bond was made the then abbot had got the then mayor in prison and extorted the bond by duress. The lawyers admitted that the corporation itself can not be in prison or suffer duress, and that it would be no defense to urge that when the bond was made some few of the citizens of Norwich were in prison. Counsel said: 'Every body politic is made up of natural men. And as regards what has been said touching its inseverability, I do not admit that, for they allowed that mayor, sheriffs and commonalty make up a single body; here, then, are members, namely the mayor is one member * * * the sheriff another member * * * the third is the commonalty. In this case there is an alleged imprisonment of one of the distinct members named in the title of the corporation, to wit, the mayor, who is the head and (as in the body natural) the principal member * * * and if one member of the body natural be restrained or beaten, that is a restraint or battery of the whole body.'" Vol. 1, p. 475. Y. B., 21 Ed. IV, f. 7, 12, 27, 67. In 1483, it was held that "if the king makes a general corporation by a certain name, all the incidental powers, as to sue, be sued, purchase and hold land and other property, contract, have a seal, make by-laws, etc., are included." Y. B., 22 Ed. IV, cited in 10 Coke's Rep. 30.

Littleton, in his Tenures, written about 1481, does not have much to say of corporations, but enough to make it certain that their nature and presence

were pretty well known, and the distinctions between sole and aggregate pretty well recognized. He speaks particularly of "prelates, abbots, priors, deans, or of the parson of a church, or of other bodies politike." Section 413. See, also, §§ 133 and 134. And his statements accord with the holdings such as: "Where a bond is made to the *Dean* of P. *and his successors*, and it is *not* said dean and chapter, and his successors, this is good to the executors, and void to the successors. *Contra*, if it had been to the *dean and chapter and his successors;* for he has two capacities, viz., "To him and his heirs, and another with the corporation." 20 Ed. IV 2 (1481). So, "If *land* be granted to a *mayor* and *commonalty, saying to their successors*, they have a fee-simple. 11 Hen. VII 12 (1496). In 1501, where a corporation has a head (as a mayor) he may command a thing *in person;* but a corporation aggregate, which has no head, must give their authority, under the *seal of the corporation.*" Y. B., 16 Hen. VIII 2. In 1523, all acts of a corporation must be by their name of corporation, and by writing, otherwise it is not the corporate act. As *do a tort* make a feoffment, enter into an agreement; yet they may elect a dean, master or attorney, *which are of record.* Y. B., 14 Hen. VIII 2, 29. In 1542, corporations aggregate can not do *fealty;* for a body invisible can not be in person, nor can swear. 33 Hen. VIII, Br., Fealty pl. 15. "A body politick is *not contained in the word person.*" Plowden, f. 177 (1550–1580). In 1585, a corporation consisting of *confreres* and *sisters* is dissolved by the death of all the sisters. In 1587, "A corporation is a body politick, consisting of material bodies, which, joined together, must have a name to do things that concern their corporation, or otherwise it is no corporation. Ch. B., in Mariot v. Mascall, And. 206 pl. 238, 29 Eliz. In the argument in this case it was said: "All the natural persons are not the corporation, but are persons of which the corporation consist, but not wholly; for the name is part also, without which the corporation can not be." And. 210. In 1596, it was contended that an annuity charged against a corporation was gone when the corporation was dissolved, for it is the *person* charged. 38 Eliz. Viner, Corp. (4, 3) 8. Rochester (Bishop's) Case.

Coke's idea of a corporation was that of an artificial personality. "The *corporation* itself is only *in abstracto*, and rests only in intendment and consideration of law." Sutton's Hospital, 10 Rep. 1, on p. 32. (1613). "*Persons* capable of purchase are of two sorts, persons natural, created of God, and *persons* incorporate, or politique, created by the policy of man (and, therefore, they are called bodies politique)." 1 Institutes 2 *a.* (1628). "It is also called a corporation, or body incorporate, because the persons are made into a *body*, and are of a capacity to take and grant." Ib. 250 *a.* Lord Chief Justice Hale classed corporations among persons. The 22d section of Analysis of the Law (c. 1676) is entitled "*Concerning persons or bodies politic*, i. e., corporations. I have done with the *jura personarum naturalium* * * * and I now come to persons politic, or corporations, that is, bodies created by operation of law."

5. **In the modern law.**—There can be no doubt as to the influence of the definitions of Blackstone upon our legal ideas, and there can be scarcely less doubt as to the influence of Hale's classification upon that of Blackstone. The latter says: "Persons are divided by the law into either natural or artificial. * * * Artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic." 1 Comm. *123 (A. D. 1765). On p. *467 he says: "It has been found necessary, when it is for the advantage of the public to have any particular rights on foot and continued, to constitute *artificial persons*, who may maintain a perpetual succession and enjoy a kind of legal immortality. These artificial persons are called bodies politic, bodies corporate (*corpora corporata*), or corporations, of which there is a great variety subsisting, for the advancement of religion, of learning and of commerce." Hammond shows that parts of this 18th chapter, Book I (containing eighteen small pages), have been quoted, cited or criticised nearly 150 times in reports of cases in the United States.

Marshall's definition in the Dartmouth College Case, 4 Wheat. (U. S.), p.

518 (A. D. 1819), seems to have come from Coke and the Year Books. He says: "A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best to effect the object for which it was created. Among the most important are immortality, and if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same and may act as a single individual." Although in this case Judge Story seemed to favor the view that a corporation was essentially a collection of individuals (see *infra*, p. 727), yet he summed up his definition thus: "It is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises, which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation as distinctly as if it were a *real personage*." 4 Wheat. (U. S.) 667. Justice Washington quotes Blackstone, and looks upon a corporation as a *franchise*, 4 Wheat. (U. S.) 657; (see *infra*, p. 723).

The Louisiana civil code of 1824 defined a corporation as "an intellectual body, created by law, composed of individuals united under a common name * * * and for certain purposes, considered a natural person." Tit. 10, ch. 1, art. 418, 427. This is approved and substantially adopted by Angell and Ames Corporations, p. 1 (1831). Walker, American Law, § 90 (1837), says: "Persons are either natural or *artificial*," the latter consisting "of natural persons clothed by law with an artificial character and capacity." So, too, in 1839 (22 Wend. 70, Thomas v. Dakin, *supra*, p. 19), and 1841 (1 Hill (N. Y.) 620), corporations are defined to be *persons*. Grant on Corporations, p. *4 (1850), says: "The ideal being called a corporation we may thus define to be a continuous identity, endowed at its creation with capacity for endless duration; residing in the grantees of it and their successors, its acts being determined by the will of a majority of the existing body of its grantees or their successors at any given time * * * having a name, and under such name a capacity for taking, holding and enjoying all kinds of property, a qualified right of disposing of its possessions, and also a capacity for taking, holding and enjoying but *inalienably*, liberties, franchises, exemptions and privileges, * * * of suing and being sued." In 19 N. Y. 39 (1859), a corporation is treated as a *person*. Sir Nathaniel Lindley, in his Treatise on the Law of Partnerships, p. 66 (1860), says: "A corporation is a fictitious person, created by special authority, and endowed by that authority with a capacity to acquire rights and incur obligations, as a means to the end for the attainment of which the corporation is created. A corporation, it is true, consists of a number of individuals, but the rights and obligations of these individuals are not the rights and obligations of the body corporate exercisable by or enforcible against the individual members thereof, either jointly or separately, but only collectively as one fictitious whole."

The California code of 1872 calls it "a creature of the law having certain powers and duties of a natural person." Section 283. This is repeated in the codes of South Dakota (1883), § 373; and Oklahoma, § 944. The Georgia code of 1882 says: "A corporation is an artificial person created by law for specific purposes." Section 1670. Lowell, Transfer of Stock, §§ 1, 2 (1884), says: "A corporation is an imaginary person, who, by a fiction of law, possesses certain rights, and is made subject to certain duties. * * * The corporation is something distinct from its members. Its life is independent of theirs. Its will may, at times, be different from that of any member, or of any given proportion of its members, and it may be bound by conduct which binds no one of its members as an individual. Of course, there are, in reality, no rights or duties but those of natural persons; but the rights and duties of natural persons who deal with a corporation arise from a fiction, and their nature and extent are determined by that fiction. A person, therefore, who confounds a corporation with its stockholders, who says that they are the corporation, or that it consists of its members, not only misstates the legal view of the matter, but is in danger of falling into endless confusion and error. A

corporation is distinct from its members in the same sense that a state is distinct from its citizens."

Austin Abbott, in the Century Dictionary (1889) defines a corporation as "An *artificial person*, created by law, or under authority of law, from a group or succession of natural persons, and having a continuous existence irrespective of that of its members, and powers and liabilities different from those of its members." Cook, Stock and Stockholders (3d ed., 1894), § 1, says: "A corporation is an artificial person like the state. It is a distinct existence—an existence separate from that of its stockholders and directors." This is repeated in the 4th ed., 1898. Reese, The True Doctrine of *Ultra Vires*, 1897, says, § 2: "It will be assumed in the examination of the doctrine to be hereafter discussed, that a corporation both under the common law and as now organized and created under our state laws, is a *legal entity, separate and distinct from the members who compose it;* that in the corporation, the creature of the law, is vested all the property and powers of the company; that it can only be affected by such acts and agreements as are done or executed in its behalf by the corporate agencies, *acting within the legitimate scope of its chartered powers;* and that no acts or contracts by the officers or agents of the company beyond the scope of the powers as prescribed and designated in the charter or articles of association, can be ascribed to the corporation, though done and concurred in by each and all of the stockholders." Elliott Corporations, 1899. § 2, gives and approves the definitions of Abbott, *supra*, and Kyd, *infra*, p. 109.

The nature of the corporate personality has been the subject of much speculation. At present, in the United States, the theory is generally held that the *personality* is *artificial*, or *fictitious*, has no existence in fact. On the other hand, in Germany, the theory is the reverse of this—that the *personality* of a corporation is *organic*—a *real* person, with a will and capacity to act, and that this is different from, but just as real, as the individual personality of each of its members. Recently Dr. Freund, of Chicago University, has put forth a view that seems to be between these—that the *personality* is a representative one, limited to a special purpose, but within that purpose exhibiting a real capacity of acting and willing that has substantially all the legal elements of responsibility that pertain to an individual. Like the *state*, it is a real legal existence, that expresses the will of its members through representatives selected in a definite way, and is as near a reality as the state is.

ARTICLE III. THE CORPORATION AS A COLLECTION OF INDIVIDUALS.[1]

Sec. 16. The corporation is considered as a collection of individuals,

(1) *In the management of corporate affairs:*[2]

"Where an act is to be done by a corporation, all of the members ought to be assembled together to consent, but this can not be separately and apart by them at several times, for then it is a *factum singulorum*. Case of the Dean and Chapter of Fernes, 5 Jac. B. R. (1608)." 6 Viner's Abr. Corporations (G. 3), 6. "In a trial * * * where there are twelve canons besides the dean, which in all make thirteen of the corporation, it was held: 1st. That *prima facie, in all acts done by the corporation, the major number must bind the lesser, or else differences could never be determined.* 2d. That acts done by the corporation *ought to be done by the consent of the major* number,

[1] See note at the end of this article.

[2] The management of corporations is treated in ch. 10, *infra*, p. 833, *et seq.*

or else they are not valid, and therefore, *where the* corporation consists of thirteen, there ought to be seven to make a chapter; but the act of the major number of these seven is binding to the corporation. But if the ancient usage hath been that acts have been done from time to time by the major part of those that are present, although they are but three or four, it shall be then intended that that was part of their constitution at the beginning, and so what is done by them is binding to the rest." 6 Viner's Abr. Corporations (G. 3), 7, citing Haschard v. Somany, Freem. Rep. 504 (1693). "If an act to be done be referred to the constituent members of a corporation, nothing can be done but by those who are the constituent part of the corporation; but where a thing is referred to be done by the commonalty, there the majority of those who are present (all being summoned) will determine and bind the rest, but in the other case the majority of those who are present will not do." 6 Viner's Abr. Corporations (G. 3), 8, citing The Queen v. Lock, 6 Ann. B. R. (1708).

Sec. 17. (2) *When, by agreement or otherwise, reason, policy, or justice requires, the artificial personality of the corporation will be ignored, and the rights and duties of those composing it alone considered.*

CHATER v. THE SAN FRANCISCO SUGAR REFINING CO., ET AL.[1]

1861. IN THE SUPREME COURT OF CALIFORNIA. 19 Cal. 219–248.

[This was a bill filed by the plaintiff for the specific performance of an agreement between plaintiff and Gordon and Bond, for the formation of a company to be called the "San Francisco Sugar Refining Company," to consist of 1,000 shares, of $100 per share, providing that one-third of the stock was to be issued to J. B. Bond or his assigns, upon him or them paying $12,500, Bond to convey back to the company 83⅓ shares, into the common stock of the company. A like provision is made in reference to Gordon. And also "one-third [of the shares] are to be issued to Nathaniel Chater or his assigns, upon him or them executing two notes—one of $6,250 to J. B. Bond, collaterally secured by 125 shares of stock, having two years to run, bearing 2 per cent. per month interest; and another note of $6,250 to George Gordon, collaterally secured by 125 shares of stock, having same time to run, and bearing the same interest, and said Chater is also to transfer back to the company 83⅓ shares of stock into the common stock of the company."

"It is agreed that the two hundred and fifty shares of stock thus given back to the company shall be sold only by a majority vote of the company, and J. B. Bond guarantees to the extent of the note of

[1] Statement of facts condensed, arguments and part of opinion omitted.

said Chater held by him ($6,250), that from one hundred and twenty-five of the shares he will raise the sum of $12,500, as needed, and George Gordon guarantees to the extent of the note of said Chater held by him, that he will, on one hundred and twenty-five shares, also raise the sum of $12,500.

"And it is further agreed, that the shares not sold belonging to the common stock of the company, as above recited, shall, if it be not found necessary to sell them, be divided equally among the three parties hereto, but not until the company's works have been in operation for at least twelve months.

"It is agreed that George Gordon shall organize the company in San Francisco by taking out articles of incorporation according to law, and that the first trustees shall be Charles W. Bond, Nathaniel Chater and George Gordon.

"That upon the organization of the company and on the enactment of its by-laws, the trustees shall issue stock as herein set forth, to the parties, upon their furnishing the respective amounts they herein agree to furnish, or in proportion as they furnish said amount.

"Each certificate of stock to be signed by two trustees and countersigned by the secretary.

"The stock of N. Chater to be issued to him, as herein provided, on the execution of the agreement to manage the works, a memorandum of which agreement is made simultaneous with this.

"The said Gordon and Chater agree that, to the extent of the interest which they may control, they will vote for the said Bond to act as agent of the company in San Francisco, attending to the commercial affairs of said company there, for which service he shall receive a salary of $1,800 per annum."

Afterwards, another agreement was made, of the same date, as follow:

"Whereas, N. Chater has induced the said Bond and Gordon to enter into the organization of a company in San Francisco for the purpose of sugar refining and its collateral branches; and the said Bond and Gordon do so on the representation of said Chater and on his promise to manage the same for five years, and to retain his interest therein during that time, and upon his further representation that he can skillfully manage a sugar refinery; with a view of engaging the services of said Chater, the said Bond and Gordon, by an agreement of even date herewith, have agreed to set apart to said Chater two hundred and fifty shares of the capital stock of the company, at the rate of fifty cents on the dollar of the par value of the shares, and to take therefor the notes of said Chater (two, and $6,250 each), having two years to run, collaterally secured by the two hundred and fifty shares, and also to give the said Chater one-third of the reserved or paid back shares which may not be sold, as provided for in agreement of this date made between the present contracting parties.

"Now, the said Chater agrees with and to the said Gordon and Bond (which agreement they make for the company they propose to

form, and with the understanding that they shall be at liberty to transfer the said agreement to the company when it shall be formed) that he, the said Chater, will proceed to San Francisco and there superintend the erection of the sugar refinery and construct the same as he may be directed by the company, with regard to location, cost and extent, and get the same into working order, and that after the same is in order, he shall superintend the business of sugar refining for the said company for the period of five years from the date of first of May, 1856 (eighteen hundred and fifty-six).

"That he shall engage in no other business during the period of his engagement with this company, but devote his entire time to the business of the company during the time he is manager.

"And the more effectually to secure the performance by him, the said Chater, of this agreement, he hereby agrees that during the period of his engagement above named, of five years, he will not dispose of such of his shares of stock in the company (or sell or transfer them) as he may have been enabled to pay for out of the dividends made upon the stock issued to him, and the said Chater agrees that the stock shall be issued to him with such restrictions as shall prevent him selling it during the above named period.

"He, the said Chater, also agrees with the said Bond and Gordon that the dividends declared from time to time upon the stock issued to him shall go to the payment of the notes hereinbefore referred to.

"The said Bond and Gordon undertake that the proposed company shall, in consideration of the premises, agree to pay the said Chater the yearly salary of $3,000, in monthly sums of $250 per month, to commence at the time the works go into operation, and shall also pay him the monthly sum of $150 during the time his services may be required in erecting the works prior to commencing operations, and up to the time of commencing operations.

"That said Chater also agrees, that if at any time the company become dissatisfied with his management, they may remove him without prejudice to this agreement, in which event his yearly salary of $3,000 shall cease and determine, but he, the said Chater, shall not be at liberty to engage in California in the business of sugar refining either for himself or for others.

"Interest on the notes given by said Chater to commence on the first day of September of this present year.

"It is agreed that said Bond and the said George Gordon shall procure for the said Chater, within sixty days of being notified by him of his readiness to pay the notes herein specified, the said notes and collaterals, though the notes shall not have matured, and that in the event of the said Gordon and Bond respectively failing to procure the said notes, the interest upon same shall, from such date, be reduced to one per cent. per month.

"It is further agreed, until dividends shall have been declared by the company of sufficient amount so that those due on the stock of said Chater, hypothecated to secure said notes, shall be sufficient to pay the interest due and accruing monthly on those notes, that the company

shall advance to said Chater the interest so upon due until the maturity of the notes as a loan to him." * * *

Chater, afterwards, on the 17th of October, 1856, was seized with paralysis, and was rendered incapable of attending to the business.

The notes mentioned in the agreement as those to be made by the plaintiff were never given, nor, so far as appears, demanded.

The defense seems to rest principally upon the point that these notes were not made as contemplated by the agreement, that the plaintiff, therefore, did not comply with the contract on his part, and consequently has no right to insist on performance by defendants, that one of the principal, if not the leading, inducements to the contract was the rendition of the services of the plaintiff, and that the failure to render these, though caused by his sickness, was a failure of the consideration of the agreement; and that the agreement was that of the individual members or stockholders, Gordon and Bond, and not of the corporation.] * * *

BALDWIN, J., delivered the opinion of the court, FIELD, C. J., and COPE, J., concurring.

The whole case in this view of it may be thus summed up: Three men enter into an agreement to form a corporation for commercial purposes. By this agreement, and the corporate act, each corporator is entitled to an equal proportion of the stock; two contribute to the capital in money—the third has no money; he proposes and is allowed to give his note in lieu of money, pledging his stock as security; the other two agree that on this stock they will raise him the money. It is agreed that the stock due him shall be issued on a given event; the event happens. The note is not made nor the stock issued to him, but the company, controlled by the other two corporators, goes on recognizing the third as a corporator; no demand is made for his note or the stock issued to him. The corporation makes profit enough to pay the debts, and the share coming to the third partner pays his contribution. No stock is issued to him, and he now claims it. If the two who were to raise the amount to be contributed by the third, having by the agreement the right to demand his note and stock, do not demand them or issue the stock to him, but without *this form* of security advance the money which was to be raised, they are to be considered as waiving this formal right, and are not at liberty to plead the want of a mere literal compliance as a forfeiture—for such it would be—of the interest of the third partner in the common enterprise. In equity the substance of the whole transaction is fulfilled; the object of the security answered, and the original right of the plaintiff here to his stock is not lost by a mere failure on his part to give a particular form of security, upon which those beneficially interested in demanding it did not insist. What, in such a state of things, was not insisted upon was waived; and equity, not regarding mere modes or forms, but looking at the very substance of the transaction, is satisfied when the substantial purpose is effected, though not effected in the precise way contemplated by the parties; and this is the more especially true if this failure to follow the prescribed mode

be owing to the laches, or be by the waiver or acquiesence of the party entitled in strict right to insist upon it.

The notes of Chater were merely to represent his debt, and the money to pay this debt Bond and Gordon were to raise on the security of his stock, they being interested in using it; and whether the stock was issued in the form of a certificate or not, it was bound by the agreement; and if they chose, they could as safely advance the money without the note, and the substance of the whole arrangement be attained. It is not necessary for us, therefore, to consider the other points urged, to say the least, with plausibility, in avoidance of the ground taken by the appellants to sustain the proposition just discussed.

This view distinguishes this case from mere executory agreement, through a performance of the terms of which a party becomes entitled to property, of which class Green v. Covillaud (10 Cal. 317), and the other cases cited by appellants, are examples. Here Chater was entitled, as of original right, to his stock, and the conditions annexed to the issuance of the certificates to him, even if not waived, at most were mere qualifications in favor of his associates of that right, and in the nature of security to them, the substance of which security they enjoyed, and a failure of the precise process prescribed, neither by the general principles of law applicable to such contracts, nor by the express terms of the agreement, worked a forfeiture of his interest in the stock, nor in the business of the corporation.

We think there is nothing in the point that the rendering of plaintiff's services for the five years was a condition precedent to the vesting of the plaintiff's title to the stock. Nothing in the agreement so declares. The provision for the employment of plaintiff as superintendent seems to be an independent term of the agreement. * * *

BALDWIN, J., delivered the opinion of the court upon the petition for rehearing, FIELD, C. J., and COPE, J., concurring. * * *

It is next insisted that we erred in holding that this agreement bound the corporation. That point was barely suggested on the oral argument, and in the learned and able briefs of the counsel no great stress seemed to be laid on it. We gave it no very elaborate consideration, for we really supposed—erroneously, perhaps—that the counsel placed but little reliance upon it. The argument now on this point is very full and very ingenious, but as applied to the facts of this record is not sound.

Every opinion, as Chief Justice Marshall well observes, must be considered with reference to the particular facts upon which it is made; for it is impossible so to use language as that general expressions apply in every instance with the same meaning to every condition of facts. We asserted no such doctrine as that, by force of a secret agreement between the original corporators in a commercial corporation, whether made before or after the act of incorporation, the stock issued by the corporation to innocent parties without notice of the agreement could be charged or affected by it. There was no case before us for the application of such a principle. But the right

to incorporate for such a purpose as that here is a statutory right, which is free to everybody. The rights in the corporation can be adjusted by contract, and the terms fixed by contract. The corporation is little more, under our laws, than a joint stock company under the English laws, indeed, in its true nature more nearly resembling a limited partnership under special articles than a corporation at common law. This corporation was organized under an agreement, which was in itself legal and binding. The original corporators were really the men (except one—if, indeed, he were not the assignee of one) who made the agreement, and were bound to execute it. They had the power to execute it; for they had on the organization the power, subject to restrictions which we do not apply here, to control their own business in their own way. A man may as well make an agreement with another for certain stock in a corporation to be organized hereafter, as an agreement for stock in a presently existing corporation. If A, B and C agree to form a corporation for a railroad with a capital of so much, to be represented by so many shares of stock, why may not they contract that each is to have so many shares on such and such terms? What rule of law forbids? Is there anything immoral in the contract, or opposed to public policy? Can not a man as well *subscribe* one time as another for stock, if all interested consent? Indeed, as under this particular agreement they organized, *so far as the then members are concerned*, the agreement becomes as effectual as if a part of the corporate act.

As there is in this respect no restriction upon the terms on which they associate or do business, or to the time of making them, why not find those terms in an antecedent agreement as well as a present adoption, if the preceding agreement is connected by clear proof with the act of incorporation and its affairs? Suppose A, B and C agree to form a corporation for running stages, and put in, each, $10,000, but there are to be no certificates of stock issued and no debts incurred. This agreement precedes, of course, the incorporation; and suppose the money is paid before the corporate act is consummated. The corporation is formed and proceeds to do business. Will it be contended that these men are not entitled to their respective shares of the profits, etc., from the mere fact that all this occurred before the technical ideal thing—the corporation—was called into existence? The truth is, the corporation, under our system, following such an agreement, would be the mere agency of the associates created for the sake of convenience in carrying out the agreement, *as between those who made the bargain*—the different characters or forms in which or by which the bargain was made, and the order in which the several parts of it were executed, makes no substantial difference in the obligation. But if it did, and this ideal thing, the corporation, be something essential, distinct and exclusive, making the men inside of it and controlling it wholly different from the same men just before they went into it; yet these shares are interests and property *in esse* or *posse*. This interest, or those shares, entitle the holder to certain privileges of value, and may entitle him to profits. Whether, therefore, the corporation is

bound of itself, and as a separate entity, to recognize a right in a claimant to this interest, a private person holding these shares or interests would be bound to such claimant for them.

But apart from all this, when the corporation became such, it organized with Chater, Bond and Gordon as trustees, and these were really the sole corporators also; and they organized with full knowledge of this agreement, which not only contemplated the formation of the company or corporation, but prescribed the terms and rights of the members in the corporation and corporate business. Chater was not only superintendent under this agreement, but trustee, too; and the corporate business was commenced and for a long time prosecuted with reference to this agreement, which recited these terms and affirmed these rights. If anything could be, this was an adoption by the corporation of these terms. It is not necessary to inquire whether an innocent purchaser of the stock, buying subsequently without notice, would be affected by any such acts—for no such question is before us now. If the corporation be bound by this agreement, and the court, proceeding to enforce it by ordering the issuance of stock, should affect injuriously any innocent holder of stock, it will be time enough to consider his rights, legal or equitable, when the facts and proper parties are before the court.

If, on taking the account, it should appear that Chater is not entitled to anything, but that the corporation is so indebted as to make it inequitable for him to receive his shares, the court below, on the final hearing, can make the proper decree, unaffected by anything in the decree under review.

With these modifications, the decree is affirmed and the cause remanded.

See 1903, Home Ins. Co. v. Barber, — Neb. —, 60 L. R. A. 927.

Note. (1) **Specific performance** of stock agreements may be had when damages would be inadequate. See: 1746, Buxton v. Lister, 3 Atkyns, Ch. 383; 1804, Lady Arundell v. Phipps, 10 Vesey 148; The Mechanics', etc., Bank v. Seton, 1 Peters (U. S. Sup. C.) 299; 1828, Cowles v. Whitman, 10 Conn. 121; 1839, Clark v. Flint, 22 Pick. (Mass.) 231; 1863, Treasurer v. Commercial Mining Co., 23 Cal. 390; 1879, Cushman v. Thayer Mfg. I. Co., 76 N. Y. 365, 32 Am. Rep. 315; 1886, Eckstein v. Downing, 64 N. H. 248, 10 Am. St. Rep. 404; 1888, Goodwin Gas S. & M. Co.'s Appeal, 117 Pa. St. 514; 1891, Bumgardner v. Leavitt, 35 W. Va. 194, 12 Law. Rep. Ann. 776; 1894, New England Trust Co. v. Abbott, 162 Mass. 148, 27 Law. Rep. Ann. 271.

(2) **Waiver of statutory liability,** by creditors, may be made by express agreement: 1839, Kerridge v. Hesse, 9 Carr. & Payne 200; 1863, Robinson v. Bidwell, 22 Cal. 379; 1872, Basshor v. Forbes, 36 Md. 154; 1883, Brown v. Eastern Slate Co., 134 Mass. 590.

(3) Generally an informal agreement among members of a corporation, without *corporate action in the prescribed mode,* does not bind the corporation: 1891, Independent Order of Foresters v. Zak, 136 Ill. 185, 29 Am. St. Rep. 318; 1896, Dennis v. Joslin Mfg. Co., 19 R. I. 666, 61 Am. St. Rep. 805.

(4) Provisions in articles of association contrary to law or public policy are void: 1889, People v. Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319; yet they may be considered as surplusage, and not vitiate the organization: 1896, Shick v. Citizens' Enterprise Co., 15 Ind. App. 329, 57 Am. St. Rep. 230; unless there is no sanction in law at all for the purposes proposed: 1894, State v. Inter-National Investment Co., 88 Wis. 512, 43 Am. St. 920.

Sec. 18. Same. Particularly, (*a*) In matters relating to the constitution of the corporation itself, or changes therein.

ASHTON v. BURBANK ET AL.[1]

1873. IN THE UNITED STATES CIRCUIT COURT, Eighth Circuit, District of Minnesota. 2 Dillon (U. S. Cir. Ct.) 435-441, Fed. Cas. No. 582.

[This is an action on a promissory note, dated August 19, 1867, for $3,000, made by the defendants to the Provident Life Insurance and Investment Company. The defendants were subscribers of that company, and the note in suit was given for an assessment upon their stock. The original charter of said company authorized it to transact a "life and accident insurance" business. After the defendants' subscription to the stock, the charter was amended, and the name of the company changed to the Eagle Insurance Company, and it was also authorized, by the amended charter, to transact the business of "fire, marine and inland insurance." The amended charter was accepted, but, in point of fact, the company took no risks during the short period it afterwards did business, except such as were authorized by its original charter. Subsequently, the company, being then in possession of the note in suit, forfeited, under authority given in its charter, the stock of the defendants therein. The note in suit, when long past due, was transferred by the company to the plaintiff. * * *

The defendants neither procured nor assented to said last mentioned act [amending the charter], nor did they know of it until after its passage, and thereupon they protesed against it, and refused to pay the note in suit on this ground. Subsequently the said Eagle Insurance Company ceased to do business, and this note, among other assets, was sold to the plaintiff in the year 1871, in payment of a debt due from the Eagle Insurance Company to him. After the said amendment of the charter of March 3, 1869, the Eagle Insurance Company did not, in fact, transact any fire, marine or inland insurance business, or do any other business than such as was authorized by the original charter.]

DILLON, C. J. We hold the following propositions: * * *

The change in the charter, by which a life and accident company was authorized to transact fire, marine and inland insurance, is an organic change of such a radical character as to discharge previous subscribers to the stock of the company from any obligation to pay their subscription, unless the change is expressly or impliedly assented to by them. Here there was no such assent, and no acquiescence in the structural change made in the charter of the company. The company could not, against such a subscriber, maintain a suit to collect his subscription, and take the money and use it as capital for the transaction of business under the charter as altered. We think, in

[1] Statement of facts condensed. Part of opinion omitted.

such a case, the subscriber is not bound to enjoin action under the amended charter, but may, if he elects, defend against an action to recover on his subscription to the stock.

If the company accepted the amended charter, as it did, by adopting the new name, it is not essential to such a defense to show that at the time of the trial the corporation had actually exercised the enlarged powers conferred upon it. The defendants are not bound, on their subscription, to pay to the company money which, if paid, may be used as capital to carry on the business authorized by the amended charter.

Judgment for the defendants.

NELSON, J., concurs.

Note. The power of the majority to modify the constitution of a corporation is discussed in ch. 16, see p. 1447, *infra*. See, particularly: 1820, Livingston v. Lynch, 4 Johns. Ch. 573; 1824, Natusch v. Irving, 2 Cooper's Ch. 358, appendix to Gow on Partnership, p. 398; 1862, Durfee v. Old Colony & F. R. R. Co., 5 Allen (Mass.) 230; 1867, Zabriskie v. H. & N. Y. R. Co., 18 N. J. Eq. (3 C. E. Green), 178, 90 Am. Dec. 617; 1887, Dow v. Northern R. Co., 67 N. H. 1, 36 Atl. 510.

Sec. 19. Same. (*b*) In determining the rights of members among themselves in equity.

DODGE, APPELLANT, v. WOOLSEY.[1]

1855. IN THE SUPREME COURT OF THE UNITED STATES. 18 Howard (59 U. S) 331–380.

[Appeal from the circuit court of the United States for the district of Ohio.

Suit in chancery by Woolsey, a citizen of Connecticut, and holder of thirty shares in the Commercial Bank of Cleveland (an Ohio corporation, and branch of the State Bank of Ohio) against the tax collector (Dodge), the bank directors and the bank itself (all citizens of Ohio) to enjoin the collection of the tax assessed by the state of Ohio against the bank. The bank's charter of 1845 provided that semi-annually it should pay six per cent. of its net profits for the preceding six months to the state of Ohio "in lieu of all taxes to which said company or the stockholders, on account of stock owned therein, would otherwise be subject." In 1851 the new state constitution was adopted, and this provided that laws should be passed taxing "the notes and bills discounted or purchased, money loaned and all other property, effects or dues whatever, without deduction, of all banks now existing or hereafter created, and of all bankers, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals." In 1852 the legislature of Ohio, in accordance with this constitutional provision, made it the duty

[1] Statement of facts condensed. Arguments and parts of opinions omitted.

of the president and cashier of every bank (under a severe penalty) to make report of the various items indicated to the county auditors, who were to place the same upon the tax duplicate, to be taxed as other property. In 1852, the president and cashier of the Commercial Bank of Cleveland, did this, under protest, the tax assessed and collected by distress being over $10,000, and more than $7,500 more than it would have been under the charter plan. Like proceedings were had in 1853, when the tax assessed was nearly $12,000 more than the charter plan would have made. Woolsey alleged that "if the taxes are permitted to be assessed and collected * * * it will virtually destroy and annul the contract between the state and the bank, in respect to the tax which the state imposed upon it by the charter * * * in lieu of all other taxes, the stock will be thereby lessened in value, dividends diminished, and the bank be compelled to suspend business; that, as a stockholder, he had requested the directors of the bank to take measures to prevent the collection of the tax."

The material allegations, except the unconstitutionality of the law, and the application to the directors to prevent the collection of the tax, were admitted. Upon the latter point it was agreed that Woolsey had by his attorney addressed a letter to the bank requesting it to take proper proceeding to prevent the collection of the tax, the answer to which was: "Resolved, that we fully concur in the views named, and believe it to be in no way binding upon the bank; but in consideration of the many obstacles in the way of testing the law in the courts of the state, we can not consent to take the action which we are called upon to take, but must leave the said (Woolsey) to pursue such measures as he may deem best in the premises." Upon the foregoing, the circuit court granted the injunction with costs against Dodge, who appealed, his counsel relying upon the following points:

"1. The complainant does not show himself to be entitled to relief in a court of chancery, because the charter of the bank provides that its affairs shall be managed by a board of directors, and that they are not amenable to the stockholders for an error of judgment merely. And that in order to make them so, it should have been averred that they were in collusion with the tax collector in their refusal to take legal steps to test the validity of the tax."]

[2 and 3, relating to the jurisdiction of the court, and the constitutionality of the tax, omitted.]

Mr. Justice WAYNE (after stating the facts) delivered the opinion of the court. * * *

We will consider the points in their order. The first comprehends two propositions, namely; that courts of equity have no jurisdiction over corporations, as such, at the suit of a stockholder for violations of charters, and none for the errors of judgment of those who manage their business ordinarily.

There has been a conflict of judicial authority in both. Still, it has been found necessary, for prevention of injuries for which common-law courts were inadequate, to entertain in equity such a jurisdiction

in the progressive development of the powers and effects of private corporations upon all the business and interests of society.

It is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits which might result in lessening the dividends of stockholders or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. 2 Russ. & Mylne Ch. Rep., Cunliffe v. Manchester and Bolton Canal Company, 480, *n.*; Ware v. Grand Junction Water Company, 2 Russ. & Mylne 470; Bagshaw v. Eastern Counties Railway Company, 7 Hare Ch. Rep. 114; Angell & Ames, 4th ed., 424, and the other cases there cited.

It was ruled in the case of Cunliffe v. The Manchester and Bolton Canal Company, 2 Russ. & Mylne Ch. R. 481, that where the legal remedy against a corporation is inadequate, a court of equity will interfere, and there were cases in which a bill in equity will lie against a corporation by one of its members. "*It is a breach of trust toward a shareholder in a joint-stock incorporated company, established for certain definite purposes prescribed by its charter, if the funds or credit of the company are, without his consent, diverted from such purpose, though the misapplication be sanctioned by the votes of a majority;* and, therefore, he may file a bill in equity against the company in his own behalf, to restrain the company by injunction from any such diversion or misapplication." In the case of Ware v. Grand Junction Water Company, 2 Russ. & Mylne, a bill filed by a member of the company against it, Lord Brougham said: "It is said this is an attempt on the part of the company to do acts which they are not impowered to do by the acts of parliament, meaning the charter of the company; 'so far I restrain them by injunction.' Indeed, an investment in the stock of a corporation must, by every one, be considered a wild speculation, if it exposed the owners of the stock to all sorts of risk in support of plausible projects not set forth and authorized by the act of incorporation, and which may possibly lead to extraordinary losses. The same jurisdiction was invoked and implied in the case of Bagshaw v. The Eastern Counties R. Co.; so, also, in Coleman v. The Eastern Counties R. Co., 10 Beavan's Ch. Rep. 1. It appeared in that case that the directors of the company, for the purpose of increasing their traffic, proposed to guarantee certain profits, and to secure the capital of an intended steam-packet company, which was to act in connection with the railway. It was held, such a trans-

action was not within the scope of their powers, and they were restrained by injunction. And in the second place, that in such a case one of the shareholders in the railway company was entitled to sue in behalf of himself and all the other shareholders, except the directors, who were defendants, although some of the shareholders had taken shares in the steam-packet company. It was contended in this case that the corporation might pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability was to increase the traffic upon the railway and thereby increase the traffic to the shareholders. But the master of the rolls, Lord Langdale, said, "there was no authority for anything of that kind."

But further, it is not only illegal for a corporation to apply its capital to objects not contemplated by its charter, but also to apply its profits. And therefore a shareholder may maintain a bill in equity against the directors and compel the company to refund any of the profits thus improperly applied. It is an improper application for a railway company to invest the profits of the company in the purchase of shares in another company. The dividend (says Lord Langdale, in Solamons v. Laing, 14 Jurist for December, 1850), which belongs to the shareholders, and is divisible among them, may be applied severally as their own property; but the company itself or the directors, or any number of shareholders, at a meeting or otherwise, have no right to dispose of his shares of the general dividends, which belong to the particular shareholder, in any manner contrary to the will, or without the consent or authority of, that particular shareholder.

We do not mean to say that the jurisdiction in equity over corporations at the suit of a shareholder has not been contested. The cases cited in this argument show it to have been otherwise, but when the case of Hodges v. The New England Screw Company et al. was cited against it (we may say the best argued and judicially considered case which we know upon the point, both upon the original hearing and rehearing of that cause), the counsel could not have been aware of the fact that, upon the rehearing of it, the learned court, which had decided that courts of equity have no jurisdiction over corporations as such at the suit of a stockholder for violations of charter, reviewed and recalled that conclusion. The language of the court is: "We have thought it our duty to review in this general form this new and unsettled jurisdiction, and to say, in view of the novelty and importance of the subject and the additional light which has been thrown upon it since the trial, we consider the jurisdiction of this court over corporations for breaches of charter at the suit of shareholders, and how far it shall be extended, and subject to what limits, is still an open question in this court." 1 Rhode Island Reports 312—rehearing of the case September term, 1853."

The result of the cases is well stated in Angell & Ames, paragraphs 391, 393. "*In cases where the legal remedy against a corporation is inadequate, a court of equity will interfere, is well settled, and there are cases in which a bill in equity will lie agaist a corporation*

by one of its members." "*Though the result of the authorities clearly is, that in a corporation, when acting within the scope of and in obedience to the provisions of its constitution, the will of the majority, duly impressed at a legally constituted meeting, must govern; yet beyond the limits of the act of incorporation, the will of the majority can not make an act valid;* and the powers of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be observed that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension, or simple negligence on the part of the directors."[1]

We have then the rule and its limitation. It is contended that this case is within the limitation; or that the directors of the Commercial Bank of Cleveland, in their action in respect to the tax assessed upon it, under the act of April 18, 1852, and in their refusal to take proper measures for testing its validity, have committed an "error of judgment merely."

It is obvious, from the rule, that the circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought. That the pleadings must be relied upon to collect what they are, to ascertain in what character, and to what end a shareholder invokes the interposition of a court of equity, on account of the mismanagement of a board of directors. Whether such acts are out of or beyond the limits of the act of incorporation, either of commission contrary thereto, or of negligence in not doing what it may be their chartered duty to do.

[1] So it has been repeatedly decided that a private corporation may be sued at law by one of its own members. The text upon this subject is so well expressed, with authorities to support it, that we will extract the paragraph 390 from Angell and Ames entire. "A private corporation may be sued by one of its own members. This point came directly before the court, in the state of South Carolina in an action of assumpsit against the Catawba Company. The plea in abatement was, that the plaintiff himself was a member of that company, and therefore could maintain no action against it in his individual capacity. The court, after hearing argument, overruled the plea as containing principles subversive of justice; and they moreover said, that the point had been settled by two former cases, wherein certain officers were allowed to maintain actions for their salaries due by the company. In this respect, the cases of incorporated companies are entirely dissimilar from those of ordinary co-partnerships, or unincorporated joint-stock companies. In the former, the individual members of the company are entirely distinct from the artificial body endowed with corporate powers. A member of a corporation who is a creditor has the same right as any other creditor to secure the payment of his demands, by attachment or by levy upon the property of the corporation, although he may be personally liable by statute to satisfy other judgments against the corporation. An action was maintained against a corporation on a bond securing a certain sum to the plaintiff, a member of the corporation, the member being deemed by the court a stranger. Pierce v. Partridge, 3 Met. (Mass.) 44; so of notes and bonds, accounts and rights to dividends. Hill v. Manchester and Salford Water-Works, 5 Adol. & Ellis 866; Dunston v. Imperial Glass Company, 3 B. & Adol. 125; Geer v. School District, 6 Vt. 76; Methodist Episcopal Society, 18 Vt. 405; Rogers v. Danby Universalist Society, 19 Vt. 187."

This brings us to the inquiry, as to what the directors have done in this case, and what they refused to do upon the application of their co-corporator, John M. Woolsey. After a full statement of his case, comprehending all of his rights and theirs also, alleging in his bill that his object was to test the validity of a tax upon the ground that it was unconstitutional, because it impaired the obligation of a contract made by the state of Ohio with the Commercial Bank of Cleveland, and the stockholders thereof; he represents in his own behalf, as a stockholder, that he had applied to the directors, requesting them to take measures, by suit or otherwise, to prevent the collection of the tax by the treasurer, and that they refused to do so, accompanying, however, their refusal with the declaration that they fully concurred with Woolsey in his views as to the illegality of the tax; that they believed it no way binding upon the bank, but that, in consideration of the many obstacles in the way of resisting the collection of the tax in the courts of the state, they could not consent to take legal measures for testing it. Besides this refusal, the papers in the case disclose the fact that the directors had previously made two protests against the constitutionality of the tax, because it was repugnant to the constitution of the United States, and to that of Ohio also, both concluding with a resolution that they would not, as then advised, pay the tax, unless compelled by law to do so, and that they were determined to rely upon the constitutional and legal rights of the bank under its charter.

Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty than of an error of judgment. It was a non-performance of a confessed official obligation, amounting to what the law considers a breach of trust, though it may not involve intentional moral delinquency. It was a mistake, it is true, of what their duty required from them, according to their own sense of it, but, being a duty by their own confession, their refusal was an act outside of the obligation which the charter imposed upon them to protect what they conscientiously believed to be the franchises of the bank. A sense of duty and conduct contrary to it is not "an error of judgment merely," and can not be so called in any case. It amounted to an illegal application of the profits due to the stockholders of the bank, into which a court of equity will inquire to prevent its being made.

Thinking, as we do, that the action of the board of directors was not "an error of judgment merely" but a breach of duty, it is our opinion that they were properly made parties to the bill, and that the jurisdiction of a court of equity reaches such a case to give such a remedy as its circumstances may require. This conclusion makes it unnecessary for us to notice further the point made by the counsel that the suit should have been brought in the name of the corporation, in support of which they cited the case of the Bank of the United States v. Osborn. The obvious difference between this case and that is, that the Bank of the United States brought a bill in the circuit court of the United States for the district of Ohio, to resist a tax assessed

under an act of that state, and executed by its auditor, and here the directors of the Commercial Bank of Cleveland, by refusing to do what they had declared it to be their duty to do, have forced one of its corporators, in self-defense, to sue. If the directors had done so in a state court of Ohio, and put their case upon the unconstitutionality of the tax act, because it impaired the obligation of a contract, and had the decision been against such claim, the judgment of the state court could have been re-examined, in that particular, in the supreme court of the United States, under, the same authority or jurisdiction by which it reversed the judgment of the supreme court of Ohio, in the case of the Piqua Branch of the State Bank of Ohio v. Jacob Knoop, treasurer of Miami County, 16 How. 369. * * *

MR. Justice CAMPBELL (with whom concurred Justices DANIEL and CATRON), dissenting. * * *

The court has assumed this jurisdiction, and I am therefore called to inquire whether a court of chancery can take cognizance of the bill? The act of incorporation of the bank charges the board of directors with the care of the corporate affairs, subject to an annual responsibility to the stockholders. The principle of a court of chancery is, to decline any interference with the discretion of such directors, or to regulate their conduct or management in respect to the duties committed to them.

The business of that court is to redress grievances illegally inflicted or threatened, not to supply the prudence, knowledge or forecast requisite to successful corporate management. The facts of this case involve, in my opinion, merely a question of discretion in the performance of an official duty. In 1852, the taxes were withdrawn from the treasurer of Cuyahoga county, by an assignee of the bank, and were never passed into the state treasury. The supreme court of Ohio, subsequently to this, pronounced the taxes to be legally assessed upon these banks, and that there was no contract between the state and the banks, and there was no exemption from the tax by anything apparent in the act of 1845. Some of these judgments were pending in this court upon writs of error then undecided, no judgment having been given contrary to that of the authorities, legislative, executive and judicial, as well as by the people of Ohio. It was under these conditions that this stockholder, who purchased stock after the controversy had arisen in Ohio, some five days before the taxes were payable, addressed the directors of the Commercial Bank to take preventive measures—that is, I suppose, to file a bill for an injunction instantly —and, upon their suggestion of difficulties, proceeds to take charge of the corporate rights of the bank by this suit, in the circuit court of the United States. The directors were elected annually; they were, collectively, owners of one-tenth of the stock of the bank, and no evidence is shown that any other stockholder supposed that "preventive measures," under the circumstances, could be sustained. There is no charge of fraud, collusion, neglect of duty or of indifference by the directors, save this omission to take some undefined "preventive measures," which the plaintiff affected to suppose might be proper.

I understand the rule of chancery in reference to such a case to be that no suit can be maintained by an individual stockholder for a wrong done, or threatened, to such a corporation, unless it appears that the plaintiff has no means of procuring a suit to be instituted in the name of the corporation; and that the rule is universal, applicable as well to the cases where the acts which afford the ground for complaint were either such as a majority might sanction, or whether it belonged to the category of those acts by which no stockholder could be bound, except by his own consent. This principle has the highest sanction in the decisions of that court. (Foss v. Harbottle, 2 Hare 461—affirmed 1 Phil. 790; 2 Phil. 740; 7 Hare 130.) The principle is an obvious consequence from the relations between the officers and members of a chartered corporation and the corporation itself. These are explained in Smith v. Hurd, 12 Met. 371. The court says: "There is no legal privity, relation or immediate connection between the holders of shares in a bank in their individual capacity on the one side and the directors of the bank on the other. The directors are not the bailees, the factors, agents or trustees of such individual stockholders. The bank is a corporation and body politic, having a separate existence as a distinct person in law, in whom the whole stock and property of the bank are vested, and to whom all agents, debtors, officers and servants are responsible for all contracts, express or implied, made in reference to such capital, and for all torts and injuries diminishing or impairing it." The corporation, therefore, must vindicate its own wrongs and assert its own rights, in the modes pointed out by law.

I do not say that a court of chancery will never permit an individual stockholder to come before it to assert a right of the corporation in which he is a shareholder, where there is an obstacle of such a nature that the name of the corporation can not be employed before legitimate tribunals in their regular modes of proceeding, but the burden is thrown upon the plaintiff to establish the existence of an urgent necessity for such a suit.

The consideration of analogous cases will strengthen this conclusion; cases where courts of chancery are more free to intervene, from the fiduciary relations between the parties and the extent of its general jurisdiction over them. Such are cases of danger to the interests of a creditor of an estate from the collusion of an executor with the debtor of the estate, or the insolvency of the executor; or where an executor wrongfully fails to make a settlement with a surviving partner, and a residuary legatee seeks one entire settlement of the estate against the executor and partner; or where a decedent in his life has fraudulently conveyed assets, and his executor is estopped to impute fraud, and there are creditors; or where the managers of a joint stock company have been guilty of fraud, illegality, waste, and their stockholders desire relief. In all these cases the court of chancery will suffer a party remotely interested to institute the suit which his trustee, or other representative, should have brought, and will grant the relief on that suit which would have been appropriate to the case of him who

should have commenced it. Sir John Romilly, in a late case belonging to one of these categories, says:

"To support such a bill as this it is not sufficient to prove that it may be an unpleasant duty to the executors and trustees to take the necessary steps for protecting the property intrusted to them. It is not sufficient to show that it will be for their interests not to take such steps. It is necessary to show that they prefer their own interests to their duty, and that they intend to neglect the performance of the obligation incidental to the office imposed upon them, and which they assumed to perform; or, as said in Travis v. Mylne, that a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partner exists." Stainton v. Carron Co., 23 L. & Eq. 315; Travis v. Mylne, 9 Hare 141; Hersey v. Veazie, 11 Shep. 1; Colquitt v. Howard, 11 Geo. 556.

These cases afford no support to this suit. The Cleveland Bank has betrayed no purpose to abandon its corporate duty. The interests and obligations of the directors coincide to support its pretensions. There is no supineness in their past conduct, nor indifference to the existing peril. The evidence, at the most, convicts them only of a present disinclination to commence suits, which were likely to be unproductive, at the request of a single shareholder. The answer shows that the taxes for 1852 had not been recovered by the state, but had been retaken by an assignee of the bank. Nor does the correspondence show that the directors had decided to abandon the contest. The case here does not at all fulfill the conditions on which the interposition of a shareholder is allowable. Elmslie v. McAulay, 3 Bro. C. C. 224, 1 Phil. 790; Law v. Law, 2 Coll. 41; Walker v. Trott, 4 Ed. Ch. Rep. 38.

But the evidence does not allow me to conclude that any impediment whatever existed to a suit in the name of the corporation, from any disposition of the directors to resist the claims of the state. Their protest appears at every successive stage of the action of the fiscal officers. This suit is evidently maintained with their consent; there has been no appearance either by the directors or the corporation, but they abide the case of the stockholder. The decree is for the benefit of the corporation. The question then is, can a corporation belonging to a state, and whose officers are citizens, upon some hope or assurance that the opinions of the courts of the United States are more favorable to their pretensions, by any combination, contrivance or agreement with a non-resident shareholder, devolve upon him the right to seek for the redress of corporate grievances, which are the subjects of equitable cognizance in the courts of the United States, by a suit in his own name? In my opinion, there should be but one answer to the question. * * *

Decree of circuit court affirmed.

Note. The rights of members of a corporation is the subject of chapter 17, *infra*. See page 1706, *et seq.*, where this topic is further discussed. A few references are here given: 1843, Foss v. Harbottle, 2 Hare (English Vice Chancel-

lor's Court) 461; 1844, Hersey v. Veazie, 24 Maine 9, 41 Am. Dec. 364; 1847, Smith v. Hurd, 12 Met. (Mass.) 371; 1867, Seaton v. Grant, L. R. 2 Chan. App. 459; 1881, Hawes v. Oakland, 104 U. S. 450, *infra*, p. 1716; 1890, Eschweiler v. Stowell, 78 Wis. 316, 23 Am. St. Rep. 411; 1896, Decatur M. L. Co. v. Palm, 113 Ala. 531, 59 Am. St. 140; 1903, Corbus v. Gold Mining Co., 187 U. S. 455.

Pleading, see Quincy v. Steel Co., 120 U. S. 241.

Sec. 20. Same. (*c*) When the corporate organization is used as a cloak to aid in the commission of frauds.

METCALF v. ARNOLD.[1]

1895. IN THE SUPREME COURT OF ALABAMA. 110 Ala. 180–185; 55 Am. St. Rep. 24.

Appeal from the chancery court of Montgomery.

Heard before the Hon. Jere N. Williams.

The bill in this case was filed by the appellees, who were judgment-creditors, for the benefit of themselves and all other creditors of the Metcalf Drug Company who might desire to come in and make themselves parties.

The bill avers that complainants recovered a judgment against H. B. Metcalf and F. G. Weatherly, who were doing business under the firm name of H. B. Metcalf, and that executions on each of said judgments were issued and returned no property found. It was further averred in the bill that after the debts which were the basis of the judgment in favor of each of the complainants were contracted, and while said H. B. Metcalf and F. G. Weatherly were indebted to complainants and other creditors, the said H. B. Metcalf and F. G. Weatherly were conducting a drug business in the city of Montgomery, Alabama, and had a large stock of goods and assets in said business, none of which were exempt to them, or either of them; that after the creation of the indebtedness to the complainants, but prior to the rendition of the judgment in their favor, "the said H. B. Metcalf and F. G. Weatherly, with the intention to hinder, delay and defraud complainants and others of their creditors, attempted to form a corporation, with a capital stock of $8,000," and put into the said corporation as its only capital stock, the stock of goods, wares and merchandise and notes and accounts, which were the assets of the firm of H. B. Metcalf; that "said H. B. Metcalf and F. G. Weatherly, carrying out their hitherto formed intention of hindering, delaying and defrauding complainants and their other creditors, had the stock of said corporation, consisting of eighty shares, of the par value of $100 each, issued as follows: thirty-six shares of par value of $3,600, to A. P. Metcalf, the wife of H. B. Metcalf; eighteen shares of par value of $1,800, to H. B. Metcalf; seventeen shares of the par value of $1,700, to M. M. Weatherly, the wife of F. G. Weatherly; and nine shares of the par value $900, to F. G. Weatherly."

[1] Arguments omitted.

It was further averred that the corporation so attempted to be formed was known and called the "Metcalf Drug Company," but that the said A. P. Metcalf and M. M. Weatherly had no interest whatever in the effects put into the formation of the capital stock of said corporation; that all of said property put into the said corporation belonged to H. B. Metcalf and F. G. Weatherly, doing business in the firm name of H. B. Metcalf; and that the property so put into the corporation constituted all, or substantially all, of the property belonging to said firm and to each member thereof, upon which property the complainants had an equitable lien for the payment of their debts.

It was further averred "that on, to wit, April 18, 1894, by a collusion between H. B. Metcalf and F. G. Weatherly and a small creditor of theirs, a judgment was allowed to be taken against the said defendants, H. B. Metcalf and F. G. Weatherly, in a justice court, for an amount less than one hundred dollars, upon which judgment execution was issued and levied upon seventeen shares of stock in the name of H. B. Metcalf and eight shares in the name of F. G. Weatherly, and the said H. B. Metcalf and F. G. Weatherly, with the still further fraudulent intent of placing all their property beyond the reach of their creditors, allowed all of said shares to be sold at public outcry, and they pretended that said shares were bought in by their respective wives, but your orators allege that in truth and in fact the amount so bid at such sale for said stock was paid by the said H. B. Metcalf and F. G. Weatherly.

The bill further averred "that according to the stock-books of the Metcalf Drug Company, the said H. B. Metcalf now owns one share of stock and the said F. G. Weatherly owns one share of stock, but upon said stock-books, notice is given that the one share of H. B. Metcalf is transferred as collateral security to his wife for a pretended debt, and the one share of F. G. Weatherly is transferred to his wife as collateral security for a pretended debt."

The prayer of the bill was for the issuance of an injunction restraining the defendants and each of them from disposing of, transferring or incumbering any of the property referred to in the bill, and for the appointment of a receiver of the goods, wares, merchandise and the notes, accounts and books of the Metcalf Drug Co., and "that on a final hearing of this cause, your honor will decree that the formation of said corporation was fraudulent and void as to your orators, and that the issue of stock and pretended interest therein of A. P. Metcalf and M. M. Weatherly is illegal and void as to your orators, and that your orators have a lien upon said property to the extent of debts due them, and that your honor will order a reference to ascertain the amount of debts due your orators and any other creditors who may come in and make themselves parties hereto; and will order the receiver to sell and dispose of said stock of goods, and to collect the notes and accounts, and pay your orators out of the proceed thereof."

The respondents demurred to the bill, and assigned many grounds, the substance of which were the following: (1) The said bill seeks to forfeit the charter of the Metcalf Drug Company, and fails to show

that it was not duly organized according to law. (2) The bill seeks to forfeit the charter of the Metcalf Drug Company, and fails to set forth any grounds for the forfeiture of said charter. (3) The bill seeks to condemn the assets of the Metcalf Drug Company to the payment of debts for which it is not liable. (4) The bill shows on its face that the debts which are sought to be collected in this suit are due from H. B. Metcalf and F. G. Weatherly, as partners, under the firm name of H. B. Metcalf, and are not due from the Metcalf Drug Company, and yet the bill seeks to condemn the property of the Metcalf Drug Company, and not the property of said debtors. (5) The bill seeks to fasten a specific lien on the goods, wares, merchandise, notes and accounts delivered in payment of the corporate stock in the Metcalf Drug Company, but fails to state that all, or any part, or what part of said assets were in the possession of the defendants, or any one of them, at the time of the filing of the bill in this cause.

On the submission of the cause on the demurrer, the chancellor overruled the said demurrer. The defendants appeal from this decree, and assign the same as error.

BRICKELL, C. J. The demurrer was properly overruled. The bill is not, as is supposed by several of the causes of demurrer, a bill assailing collaterally the incorporation of the Metcalf Drug Company and seeking a forfeiture of its charter. It is a bill by judgment creditors, seeking the aid of a court of equity to remove obstacles and hindrances to the enforcement of their judgments, which the judgment debtors have fraudulently interposed. Whatever may be the character of the obstacle or hindrance; whatever may be the scheme or device to which the debtor resorts, it lies within the province of a court of equity to remove it. The formation of a corporation, investing it with the legal title to all the property and rights of property of the judgment-debtors, and parcelling out the stock of the corporation to the debtors and their wives, may be a new device for hindering, delaying and defrauding creditors. The novelty of the device is not of consequence; the fraud of its conception and consummation vitiates it, as fraud vitiates all transactions tainted with it. The bill does pray that the formation of the corporation be deemed fraudulent and void as to the complainants. Such a decree would be proper in granting to the complainants the full measure of relief to which they are entitled if the allegations of the bill be true. But it would not work a forfeiture of the charter, or a dissolution of the corporation; it would simply be ancillary to the divestiture of the title to the property, liable to the debts of the complainants, with which it had been invested by the judgment-debtors.

Let the decree of the chancellor be affirmed.

Note. See also: 1865, Booth v. Bunce, 33 N. Y. 139, 88 Am. Dec. 372; 1878, Des Moines Gas Co. v. West, 50 Iowa 16; 1882, Hibernia Insurance Co. v. St. Louis, etc., Trans. Co., 13 Fed. Rep. 516; 1886, Slatterly v. St. Louis, etc., T. Co., 91 Mo. 217, 60 Am. Rep. 245; 1890, Montgomery Web Co. v. Dienelt, 133 Pa. St. 585; 1891, Breman, etc., Bank v. Branch, etc., Co., 104 Mo. 425, 16 S. W. 209; 1892, Vance v. McNabb, 92 Tenn. 47; 1892, Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218; 1896, Austin v. Tecumseh Natl. Bank, 49

Neb. 412, 68 N. W. 628, 5 A. & E. Corp. Cas. N. S. 382, 35 L. R. A. 444; 1897, Ewing v. Composite, etc., Co., 169 Mass. 72; 1897, Gates v. Tippecanoe Stone Co., 57 O. S. 60, 48 N. E. Rep. 285, 7 A. & E. Corp. Cas. N. S. 431.

Sec. 21. Same. (*d*) When corporate sins result from the concerted, but apparently individual, actions of the corporation members.

THE PEOPLE, ETC., RESPONDENT, v. THE NORTH RIVER SUGAR REFINING COMPANY, APPELLANT.[1]

1890. IN THE COURT OF APPEALS OF NEW YORK. 121 N. Y. 582–626, 18 Am. St. Rep. 843, 32 Am. & E. Corp. Cas. 149, 24 North Eastern Rep. 834; also in the lower court, 54 Hun 354, 7 N. Y. Supp. 406, 22 A. & E. Corp. Cases 511, 5 Ry. & Corp. L. J. 56, 6 Ry. & Corp. L. J. 442.

Appeal from judgment of the general term of the supreme court in the first judicial department, entered upon an order made November 7, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the trial court, and affirmed an order denying a motion for a new trial.

This action was brought by the attorney-general to have the defendant "dissolved, its charter vacated and its corporate existence annulled." This complaint alleged, and it was found that defendant is a corporation organized under the general manufacturing act; that it, together with other corporations and firms, in violation of law and in abuse of its powers, became a party to and carried out an agreement which among other things provided in substance as follows:

Deed: The undersigned, namely, Havemeyers & Elder [and fourteen other sugar refining partnerships and corporations named, including the North River Sugar Refining Co.], for the purpose of forming the *board*, hereinafter provided for, and the other purposes hereinafter set forth, enter into the following agreement: Name, the *board* shall be designated the Sugar Refineries Company. Objects: (1) To promote economy of administration, reduce the cost of refining, and keep the price of sugar as low as is consistent with reasonable profit. (2) To give each refining company benefit of all appliances and processes known or used by the others, useful to improve quality, and diminish cost of sugar. (3) To protect against unlawful combinations of labor. (4) To prevent the lowering of the standard of refined sugars, and (5) Generally to promote the interests of the parties hereto in all lawful and suitable ways. Board: All parties hereto not corporations, to become such before deed goes into effect; all shares of stock of each corporation to be transferred to a *board*, consisting of eleven persons, any member to be removable by two-thirds of the entire board for incapacity or refusal to serve, vacancies in term to be filled by vote of board, at end of terms by election of certificate holders, at an annual meeting in New York City. Board to make by-laws for themselves, act by proxy if they choose, majority to be a quorum, and majority of quorum to control, except in appropriating money, a majority of all, required; members of board to be members of boards of directors of the

[1] Statement of facts condensed. Arguments and parts of the opinion omitted.

several companies; shares in such companies to be transferred to them in order to qualify them, if necessary; members of board to be divided into three classes, first to serve seven years (each being named), second, five years (each named), and third, three years (naming them). **Officers**: Board to appoint a president, vice-president and treasurer from the members of the board, and a secretary (not necessarily a member of the board), and such other officers as necessary, fixing their duties. **Plans**: The several parties hereto to maintain their separate organizations, and carry on and conduct their own business. Capital stock of each corporation to be transferred to the board, and certificates not exceeding $50,000,000 (500,000 shares of $100 each) to be issued by the board to each refinery in proportion to the value of its plant as fixed by appraisers to be selected, and each stockholder in each refinery to have such proportion of the certificates issued to each refinery as his stock bore to the stock of that refinery, except 15 per cent. of the shares allotted to each refinery to be left with the board to be disposed of for the purchase of other refineries or increasing the refining capacity of the parties hereto.

The **certificate** provided that the holder was entitled to —— shares in the sugar refineries company, subject to the provisions of the deed, transferable on the books of the board upon surrender, subject to right to increase the total stock, or change this deed, and the assignee, by accepting the certificate to be held to agree to the terms of the deed, or changes made therein. The **title to the stock** of the corporations to be in the members of the board as trustees, strictly as joint tenants and having all the rights and powers incident to stockholders in the several corporations, subject to the provisions of this deed. **Profits** of each corporation to be paid to the board, and dividends distributed by the board to certificate holders. **Changes** in the deed to be made by a majority of certificate holders. **Other refineries** to be added upon terms provided by the board. **Custody of the deed** to be in the president of the board, with sole and independent control, and not to be shown to any corporation, firm or person whatsoever except by express direction of the board.

The stockholders of the North River Sugar Refining Company in April, 1887, at a meeting when all the trustees were present, appointed a committee to make arrangements to consolidate the sugar refineries of New York, and directed the president and secretary to sign such contract as the committee should make for that purpose. The secretary, on behalf of the company, in September signed the foregoing deed to go into effect in October. In November, at a stockholders' meeting, the powers of the committee and the president and secretary were revoked, but it was recited that one John Searles, Jr., had offered to purchase all of the stock for $325,000, and it was unanimously resolved that a committee be appointed to deliver it to him, the proceeds to be divided in proportion to the ownership of shares by the stockholders. Accordingly, the members individually, transferred their shares, indorsed in blank, to Searles, who was a member and the secretary and treasurer of the board created by the deed above set forth; the stock was by Searles transferred to the board, and it issued certificates to the shareholders to the amount of $700,000, less 15 *per cent.*, as provided by the deed; new directors were chosen by the *board*, Searles became president, and shortly afterward the works of the North River Sugar Refineries Company were closed, and never run thereafter, though it was allotted its share of dividends for its certificate holders.

FINCH, J. The judgment sought against the defendant is one of corporate death. The state, which created, asks us to destroy; and the penalty invoked represents the extreme rigor of the law. Its infliction must rest upon grave cause, and be warranted by material misconduct. The life of a corporation is indeed less than that of the humblest citizen, and yet it envelopes great accumulations of property, moves and carries in large volume the business and enterprise of the

people, and may not be destroyed without clear and abundant reason. That would be true, even if the legislature should debate the destruction of the corporate life by a repeal of the corporate charter; but is beyond dispute where the state summons the offender before its judicial tribunals, and submits its complaint to their judgment and review. By that process it assumes the burden of establishing the charges which it has made, and must show us warrant in the facts for the relief which it seeks. * * *

Two questions, therefore, open before us, first, has the defendant corporation exceeded or abused its powers; and second, does that excess or abuse threaten or harm the public welfare.

The first question requires us to ascertain what the defendant corporation has done in violation of its duty, or omitted to do in performance of its duty. We find disclosed by the proof that it has become an integral part and constituent element of a combination which possesses over it an absolute control, which has absorbed most of its corporate functions, and dictates the extent and manner and terms of its entire business activity. Into that combination, which drew into its control sixteen other corporations engaged in the refining of sugar, the defendant has gone, in some manner and by some process, for, as an unquestionable truth, we find it there. All its stock has been transferred to the central association of eleven individuals denominated a "Board;" in exchange it has taken and distributed to its own stockholders certificates of the board carrying a proportionate interest in what it describes as its capital stock; the new directors of the defendant corporation have been chosen by the board, made eligible by its gift of single shares, and liable to removal under the terms of their appointment at any moment of independent action. It has lost the power to make a dividend, and is compelled to pay over its net earnings to the master whose servant it has become. Under the orders of that master it has ceased to refine sugar, and, by so much, has lessened the supply upon the market. It can not stir unless the master approves, and yet is entitled to receive from the earnings of the other refineries, massed as profits in the treasury of the board, its proportionate share for division among its own stockholders holding the substituted certificates. In return for this advantage it has become liable to be mortgaged, not for its own corporate benefit alone, but to supply with funds the controlling board when reaching out for other and coveted refineries. No one can look these facts fairly in the face without being compelled to say that the defendant is in the combination and in to stay. Indeed, so much is with great frankness admitted on the part of the appellant. Its counsel concedes that the stock was transferred "to the board mentioned in the agreement and on the terms and for the purposes mentioned in the agreement; and that this action effectually lodged the control of the defendant company, so far as such contol can be secured by the voting power in that board."

But that truth does not alone solve the problem presented. We are yet to ascertain whether the corporation became the subordinate and servant of the board by its own voluntary action, or the will and

power of others than itself; by force of a contract to which it was in reality a party, or as the simple consequence of a change of owners; by its fault or its misfortune; by a sale or by a trust. For, if it has done nothing, if what has happened, and all that has happened, is ascertained to be that the stockholders of the defendant, one or many, sold absolutely to the eleven men who constituted the board their entire stock, and the latter, by force of their proprietorship and as owners, have merely chosen directors, in their own interest, and are only managing their property in their own way as any absolute owners may; if that is the truth, and the entire and exact truth, it is difficult to see wherein the corporation has sinned, or what it has done beyond merely omitting for a time to carry on its business. That is the theory upon which the appellant stands, and which it submits to our examination.

On the other hand it is contended that there never was a sale, but a trust constituted by mutual agreement; that they who agreed were the whole body of stockholders in each corporation necessarily representing and binding the corporation itself; that they transferred their shares to the board upon the trusts declared in the deed; that the certificates issued by the board were the formal declaration of the trust; that the corporate stockholders parted with the legal title of their stock to the chosen trustees with the power to vote upon it, but retained, nevertheless, its beneficial ownership through the operation of the certificates; and so the corporations entered into a partnership with each other, vesting the partnership power in a board of control.

I have brought these two theories face to face, where they may confront each other, because, when a choice is made between them, we have gone a long distance towards the end of the controversy.

[After reviewing the provisions of the deed and indicating that a sale implies existing vendors and vendees, a negotiation between them, signing of the formal contract by both, a vesting of the entire dominion in the vendee, with the accompanying rights of ownership, in all of which points the deed was peculiarly deficient; and on the other hand that the board was expressly made trustees, with managing powers of stockholders only by the express terms of the deed, and not as an incident of real ownership; that the right to mortgage was derived from the deed alone, and not as owner; that payment was to be made not by money but by certificates of the board created by the deed, who were not to create any liability either as a whole, or by its members, all of which indicated a trust and nothing more, the opinion proceeds:]

The combination, therefore, framed by the deed was a trust; and, if created by the corporations, or in any respect the consequence or product of their action, some inevitable results would be certain to follow. But here we encounter the stronghold of the appellant's argument which is, that if the corporations are in some manner in the combination, they are there solely as the result of a contract other than their own; are there without corporate action on their part; and so are sufferers and not sinners. The reasoning leading to that result is so severely technical as to have suggested a justification almost reminding one of an apology. We are called upon to sever the corporation, the abstract legal entity, from the living and acting corporators; as it

were, to separate in our thought the soul from the body, and admitting the sins of the latter to adjudge that the former remains pure. Let us first recall the facts in the order of their occurrence.

[After stating the facts in relation to the surrender to the board, substantially as above set forth, p. 101, the opinion proceeds:]

And yet it is argued that the corporation, the legal entity, has done nothing; that Searles was guilty, but the corporate robe that enveloped him was innocent, and so he must be left to wear it undisturbed; that while all that was human and could act had sinned, yet the impalpable entity had not acted at all and must go free. I believe that the history of what occurred, as I have already described it, furnishes a sufficient answer, assuming that stockholders and trustees acting together can do a corporate act at all. There *was* corporate action in making the combination agreement which bound the defendant. The revocation of an executed authority left the contract standing. The corporation thus helped to make the trust and became an element of it. If there was anything imperfect in its action, the new stockholder and his associates waived the imperfection by acting upon the agreement of the corporation, and so confirming it in all particulars.

But the assumption underlying the view I have expressed is itself contested, and a proposition asserted which denies the possibility of any corporate action, except by the trustees or directors acting formally as such; a proposition which, if sound, dominates the whole field of controversy, and, establishing that there has been no corporate action at all, effectually shuts out every question of illegality or public injury. I can not admit that proposition. *I think there may be actual corporate conduct which is not formal corporate action; and where that conduct is directed or produced by the whole body, both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and if illegal and injurious may deserve and receive the penalty of dissolution.*

There always is, and there always must be, corporate conduct without formal corporate action where the thing challenged is an omission to act at all. A corporation organized in the public interest, with a view to the public welfare, and in the expectation of benefit to the community, which is the motive of the state's grant, may accept the franchise and hold it in sullen silence, doing nothing, resolving nothing, furnishing no formal corporate action upon which the state can put its finger and say, this the corporation has done by the agency through which it is authorized to act. That is corporate conduct which the state may question and punish without searching for a formal corporate act. The directors of a corporation, its authorized and active agency, may see the stockholders perverting its normal purposes by handing it over, bound and helpless, to an irresponsible and foreign authority, and omit all action which they ought to take, offer no resistance, make no protest, but silently acquiesce as directors in the wrong which, as stockholders, they have themselves helped to com-

mit. That again is corporate conduct, though there be an utter absence of directors' resolutions.

Is it asked what they could have done to prevent the organization of the trust, how they were negligent and unfaithful as corporate officers by their omission to act; what good a mere protest or objection would have accomplished; what effective form their resistance could have assumed? The answer is that they could have refused to recognize the illegal trust transfer of the stock; they could have declined to register the new ownership upon their stock books; they could have said, and acted upon their words, that the original stockholders remained not only the beneficial, but the legal owners of the stock; and, if the board of trustees appealed to the law, the resisting directors could challenge the legality of the transfer as molded by the combination agreement, and might have defeated the trust and shattered it at the outset of its career. So much they could have done as corporate officers; so much it was their duty to have done as representatives of the corporation, and when beyond that corporate neglect they recognized the validity of the stock transfers in trust, put the new and unlawful ownership upon their books, and accepted its votes in the choice of new directors, who were to throttle the independence of the corporation and chain it to the will of the trust, I think we must shut our eyes in willful blindness if we fail to see both corporate neglect and corporate action.

It is true, as we are reminded, that the statute confers upon trustees and directors general authority to manage the stock, property and concerns of manufacturing corporations; and equally true that, as a general rule and as between the companies and those with whom they deal, the corporate action must be manifested through and by the directors; but other statutes indicate with equal plainness that there are corporate acts which the trustees can not perform, and which affect and bind the corporation only upon the condition that they proceed from the stockholders, or from them and the trustees acting together. In increasing or diminishing the capital stock, the corporate act is wholly that of the corporators, and in consolidating two or more companies into one, there must be the joint action of both trustees and stockholders. The trust of the refineries, in substance and effect, approached very near to these two corporate acts, so far as the resultant consequences affected the corporators acting. The trust stipulations practically doubled their corporate stock through the agency of the certificates issued, and the combination in its result is largely the equivalent of a substantial consolidation. If these things had been done lawfully, they would have been accomplished by the united action of trustees and corporators, and beyond any question would have been corporate acts. Having been done unlawfully, but by the same united agency aiming at similar results, they must still constitute corporate conduct, unless the bare fact of their illegality takes away their corporate character. To say that would disarm the state in every case of misuse or abuse of chartered powers.

The abstract idea of a corporation, the legal entity, the impalpable

and intangible creation of human thought is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what in a given case has been that collective action and agency. As between the corporation and those with whom it deals the manner of its exercise usually is material, but as between it and the state, the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise. The state gave the franchise, the charter, not to the impalpable, intangible and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men to be used by them, to redound to their benefit, to strengthen their hands and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act collectively, as an aggregate body, without the least exception, and so acting, reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility of the corporation itself, we can not hesitate to conclude that there has been corporate conduct which the state may review, and not be defeated by the assumed innocence of a convenient fiction. As was said in People, ex rel., v. K. & M. T. R. Co. (23 Wend. 193), "though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court."

It remains to determine whether the conduct of the defendant in participating in the creation of the trust, and becoming an element of it was illegal and tended to the public injury and we may consider the two questions together and without formal separation.

It is quite clear that the effect of the defendant's action was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the state the gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self-control. When it had passed into the hands of the trust, only a shell of a corporation was left standing, as a seeming obedience to the law, but with its internal structure destroyed or removed. Its stockholders, retaining their beneficial interest, have separated from it in their voting power, and so parted with the control which the charter gave them and the state required them to exercise. It has a board of directors nominally and formally in office, but qualified by shares which they do not own, and owing their official life to the board which can end their power at any moment of disobedience. It can make no dividends whatever may be its net earnings, and must encumber its property at the command of its master, and for purposes wholly foreign to its own corporate interests and duties. At the command of that master it has

ceased to refine sugar, and without any doubt for the purpose of so far lessening the market supply as to prevent what is termed "overproduction." In all these respects it has wasted and perverted the privileges conferred by the charter, abused its powers, and proved unfaithful to its duties. But graver still is the illegal action substituted for the conduct which the state had a right to expect and require. It has helped to create an anomalous trust which is, in substance and effect, a partnership of twenty separate corporations.

The state permits in many ways an aggregation of capital, but mindful of the possible dangers to the people overbalancing the benefits, keeps upon it a restraining hand, and maintains over it a prudent supervision, where such aggregation depends upon its permission and grows out of its corporate grants. It is a violation of law for corporations to enter into a partnership. N. Y. & S. C. Co. v. F. Bank, 7 Wend. 412; Clearwater v. Meredith, 1 Wall. 29; Whittenton Mills v. Upton, 10 Gray 596. The case last cited furnishes the reasons with precision and at length. It shows the utter inconsistency of a double allegiance by those who act for the corporation to two different principals, and demonstrates that the vital characteristics of the corporation are of necessity drowned in the paramount authority of the partnership. That the combination of the refineries partakes of the nature of a partnership is not denied. Indeed, in one of the papers added to the appellant's brief, it is not only admitted, but asserted and defended. That paper shows quite clearly that by force of the arrangement there was a community of interest in the fund created by the corporate earnings before division, and that each member of the trust shared in the profit and loss of all. It is said, however, that a consolidation of manufacturing corporations is permitted by the law, and that the trust, or combination, or partnership, however it may be described, amounts only to a practical consolidation, which public policy does not forbid, because the statute permits it. Laws of 1867, ch. 960; Laws of 1884, ch. 367. The refineries did not avail themselves of that statute. They chose to disregard it, and to reach its practical results without subjection to the prudential restraints with which the state accompanied its permission.

If there had been a consolidation under the statute, one single corporation would have taken the place of the others dissolved. They would have disappeared utterly, and not, as under the trust, remained in apparent existence to threaten and menace other organizations and occupy the ground which otherwise would be left free. Under the statute the resultant combination would itself be a corporation deriving its existence from the state, owing duties and obligations to the state, and subject to the control and supervision of the state, and not, as here, an unincorporated board, a colossal and gigantic partnership, having no corporate functions and owing no corporate allegiance. Under the statute the consolidated company taking the place of the separate corporations could have as capital stock only an amount equal to the fair aggregate value of the rights and franchises of the companies absorbed; and not as here a capital stock double that value at the

outset and capable of an elastic and irresponsible increase. The difference is very great and serves further to indicate the inherent illegality of the trust combination.

And here, I think, we gain a definite view of the injurious tendencies developed by its organization and operation, and of the public interests which are menaced by its action. *As corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their normal functions, and maims and cripples their separate activity, and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest; and that to a much greater extent when beyond their own several aggregations of capital they compact them all into one combination which stands outside of the ward of the state, which dominates the range of an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion.* It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group at his sovereign will; for it is one thing for the state to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations.

The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine, and mass their forces in a solid trust or partnership, with little added risk to the capital already embarked, without limit to the magnitude of the aggregation, a tempting and easy road is opened to enormous combinations, vastly exceeding in number and in strength and in their power over industry any possibilities of individual ownership; and the state by the creation of the artificial persons constituting the elements of the combination, and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause of an aggregation of capital which it simply endures in the individual as the product of his free agency. What it may bear is one thing, what it should cause and create is quite another.

And so we have reached our conclusion, and it appears to us to have been established, that the defendant corporation has violated its charter and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution. Having reached that result, it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy. Our duty is to leave them until some proper emergency compels their consideration. Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this state there can be no partnerships of separate and

independent corporations, whether directly, or indirectly through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints, but that manufacturing corporations must be and remain several as they were created, or one under the statute.

The judgment appealed from should be affirmed with costs.

All concur.

Judgment affirmed.

Note. (1) The right of the state to forfeit the charter of a corporation for a violation of it injuriously affecting the public, is treated in ch. 16, *infra*, p. 1294, *et seq.*

(2) Also the power of a corporation to become a member of a partnership is treated in ch. 13, *infra*, p. 957.

(3) As to the "fiction of the legal entity of the corporation" see particularly, 1892, State v. Standard Oil Co., 49 Ohio St. R. 137, 34 Am. St. R. 541, and the quotations from Morawetz and Taylor, in the note to this article, *infra*, p. 110. Also 1895, Ford v. Chicago Milk Shippers' Association, 155 Ill. 166; 1895, Belden v. Burke, 147 N. Y. 542; 1888, Wood v. Trust Co., 128 U. S. 416.

(4) As to validity of trusts or combinations in restraint of trade. See 1889, Richardson v. Buhl, 77 Mich. 632, 27 Am. & E. C. C. 256; 1889, People v. Chicago Gas Trust, 130 Ill. 268, 17 Am. St. R. 319, 29 Am. & E. C. C. 257; 1889, Gibbs v. Consolidated Gas Co., 130 U. S. 396, 25 Am. & E. C. C. 369; 1890, Emery v. Ohio Candle Co., 47 Ohio St. 320, 32 Am. & E. C. C. 165; 1890, State v. Nebraska Distilling Co., 29 Neb. 700, 29 Am. & E. C. C. 656; 1891, Huston v. Rentlinger, 91 Ky. 333, 34 Am. St. R. 225; 1893, People v. Sheldon, 139 N. Y. 251, 36 Am. St. R. 690; 1894, Nester v. Continental Brewing Co., 161 Pa. St. 473, 41 Am. St. R. 894; 1895, Distilling & Cattle F. Co. v. People, 156 Ill. 448, 47 Am. St. R. 200; 1895, People v. Milk Exchange, 145 N. Y. 267, 45 Am. St. R. 609; 1897, People v. Chicago Live Stock Exchange, 170 Ill. 556, 62 Am. St. R. 404; 1897, United States v. Joint Traffic Association, 76 Fed. R. 895, s. c. in 171 U. S. 505.

NOTES TO ARTICLE III.

The corporation as a collection of individuals, history and definitions:

Mr. Kyd (Corporations, vol. 1, p. 13, 1793) says: A corporation, or body politic, or body incorporate is a *collection* of many individuals united in one body, under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence."

In Hope Insurance Co. v. Boardman, 5 Cranch (9 U. S.) 57, 1809, and in Bank of United States v. Deveaux, 5 Cranch (9 U. S.) 61, same year, it was held, in regard to the citizenship of corporations for the purpose of jurisdiction, that the court "would look beyond the mere legal being which the charter created, and consider the character as to citizenship, of the individuals of whom the company is composed." This, of course, ignored the corporate personality, and continued to be the law till 1844, when the case of Louisville, etc., R. R. Co. v. Letson, 2 Howard (43 U. S.) 497, 558, announced that a corporation "is to be deemed to all intents and purposes *as a person*, although an artificial person," and a citizen of the state creating it. In the later case of Ohio and Mississippi R. Co. v. Wheeler, 1 Black (66 U. S.) 286, 1861, the Deveaux and Letson cases were attempted to be reconciled, by inventing another strange fiction that the members of any corporation were to be con-

clusively presumed to be citizens of the state creating the corporation, and "no averment or evidence to the contrary is admissible," though the truth is otherwise, and though the suit of a corporation "is to be considered as a suit by the individuals who compose it." This seems to be the theory yet.

In Muller v. Dows, 94 U. S. 444, 1876, it is said: "A suit may be brought in the federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation," all of whom are conclusively presumed to be citizens of the state creating the corporation.

(See further on this point, Shaw v. Quincy Mining Co., 145 U. S. 444, *infra*, p. 1066, and St. Louis & S. F. R. v. James, 161 U. S. 545, *infra*, p. 1099.)

Judge Story, in the Dartmouth College case, 1819 (4 Wheat. 667, *infra*, p. 727), while recognizing the artificial personality of the corporation, yet seemed to emphasize the *collective* or *associate* character more particularly. He says: "A corporation aggregate is a *collection* of individuals united into one *collective* body, under a special name, and possessing certain immunities, privileges and capacities in its *collective* character, which do not belong to the natural persons composing it."

Chief Justice Shaw, of Massachusetts, in Overseers of the Poor v. Sears, 22 Pick. (Mass.) 122 on 128, *infra*, p. 193, 1839, says; "A corporation aggregate consists of many persons united together into one *society*, and kept up by a perpetual succession of members so as to continue forever."

Lumpkin, J., in Hightower v. Thornton, 8 Ga. 492, 1850, says: "Corporations *are but associations of individuals*." So Baldwin, J., in Chater v. San Francisco, etc., Co., 19 Cal. 219, 1861 (*supra*, p. 80), says: "A corporation organized under general laws is scarcely more than a partnership, or an association of individuals." Similarly Law, J., in Gelpcke v. Blake, 19 Iowa 263, on 268, 1865, asks: "Who in law constitutes the company, if it be not the stockholders?"

Mr. Morawetz, in the preface to the second edition of his Treatise on the Law of Private Corporations, 1886, says the first edition (which appeared in 1882) was prepared according to a plan differing from that followed in any previous treatise on the same subject, and specifies particularly: "The author was of the opinion that the law relating to private business corporations could not be clearly understood, unless the fact were recognized that such a corporation is *really an association formed by the agreement of its stockholders*, and that the existence of a corporation as an entity, independently of its members, is a fiction; and that while the fiction of a corporate entity has important uses and can not be dispensed with, it is nevertheless essential to bear in mind distinctly that the rights and duties of an incorporated association are, in reality, the rights and duties of the persons who compose it, and not of an imaginary being." He retains the same view throughout the second edition. In section 227 he says: "A corporation is really an association of persons, and no judicial dictum or legislative enactment can alter this fact." And "In equity the conception of a corporate entity is used merely as a formula for working out the rights and equities of the real parties in interest, while at law this figurative conception takes the shape of a dogma, and is often applied rigorously without regard to its true purpose and meaning. In equity the relationship between the shareholders is recognized whenever this becomes necessary to the attainment of justice; at law this relationship is not recognized at all." He particularly enumerates that the unanimous actions of the members, within corporate powers, are the actions of the corporation; notice to all members is notice to the corporation; property of associations subject to debts can be followed, when vested in a corporation organized by their members; also in the questions relating to constitutionality of laws affecting corporations, and laws of consolidations and dissolutions of corporations, the rights of creditors and the rights of members as against the corporation, and in similar cases the fiction is necessarily overlooked or ignored. See sections 228, 229, 230 and 231.

Mr. Taylor, Treaties on the Law of Private Corporations, in the preface to his first edition in 1884, says: "It is the opinion of the writer that the fic-

tion of the 'legal person' has outlived its usefulness, and is no longer adequate for the purposes of an accurate treatment of the legal relations arising through the prosecution of a corporate enterprise. By dismissing this fiction a clearer view may be had of the actual human beings interested, whose rights may then be determined without unnecessary mystification." In the preface to his third edition, 1894, he says: "When special rules cease to accord with the general rule once back of them,—if no further convenient rules can be drawn from the general rule,—it drops from the body of the law. * * * Thus it is at present with the rule or fiction that a corporation is a legal person; it still represents a convenient phrase, nay, a convenient point of view; but it is dead as a principle because legal propositions are no longer deduced from it, nor is it in logical connection with the great mass of legal rules which have been called forth by controversies relating to railroad and other business corporations," citing People v. North Riv. S. R. Co. (*supra*, p. 100), and State v. Standard Oil Co., 49 O. S. 137. In the text, section 36, he says: "A corporation, considered as a legal institution, is the sum of the legal relations resulting from the operation of rules of law, in its constitution upon the various persons, who, by fulfilling the prerequisite conditions, bring themselves within the operation of these rules." In section 48 he adds: "It is now necessary to determine who are the individuals composing the corporation regarded not as a mass of legal relations, but as a body of men. Can it be said that the corporation, or body corporate, is composed of all the persons between whom these legal relations subsist? This conception would embrace all persons in any way interested in the corporate enterprise, * * * the state * * * the shareholders and directors, * * * and creditors." But, he says, section 49, "It is more in accordance with the ordinary use of terms, and a clearer and more serviceable conception, to regard the corporation as consisting of the shareholders, who may, with propriety, be said to constitute the body corporate, as it is through their acts, or the acts of their predecessors, that incorporation is caused." Section 50: "The shareholders, then, vested with the corporate powers, are the body corporate, corporation or company." Section 51: "Such, then, are the two meanings of the term corporation; the one, the sum of legal relations subsisting in respect to the corporate enterprise; the other, the organic body of shareholders, whose acts cause the operation of the rules of law in the constitution. These two conceptions include all that is really connoted by the term in whatever sense used. And, if so, what has become of the venerable 'legal person?' Is he still somewhere, as he has always been imagined? Or is he nowhere as he has always actually been? * * *. Shall we say he is the combination, the mystic unification of our two conceptions? Better not; better forget him. For he is a conception, which, if it amounts to anything, is but a stumbling-block in the advance of corporation law towards the discrimination of the real rights of actual men and women. And then, after all, what has he ever been but an abstraction materialized in a name?" He says, also, note 1, § 51: "It is in respect of the doctrine of *ultra vires*, that the fiction of a legal person is most pernicious, as this fiction involves regarding a corporation as a unit, and retards the proper discrimination of the rights of different persons in regard to *ultra vires* acts." Compare the definition of Reese, *supra*, p. 79.

Prof. Pomeroy, in reviewing Mr. Taylor's work, under the title, "Legal Idea of a Corporation," 19 Am. Law Rev., pp. 114–116 (1885), says: "The common law conception of the 'legal personality' of the metaphysical entity constituting the corporation entirely distinct from its individual members arose at a time when corporations were all created by special charters, generally granted by the crown; when very few * * * were 'stock' corporations, * * * and were necessarily monopolies. * * * In the United States * * * almost all private corporations * * * are formed under general laws * * * for almost any business purpose. * * * The associations thus formed * * * differ very little in their essential attributes from partnerships. * * * Of late years parliament has enacted statutes similar in their scope and effect to our general laws for the formation of private corporations. The English courts have never treated the joint-stock

companies with limited liability, formed under these statutes, as being identical with common law corporations, but have always carefully distinguished between them. In our opinion, the American courts must, in time, recognize and enforce the same distinction."

In Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, on 189 (1888), Field, J., says: "A private corporation is *merely* an *association* of individuals united for a special purpose and permitted to do business under a particular name, and have a succession of members without dissolution." He said the same in Baltimore, etc., R. Co. v. Fifth Baptist Church, 108 U. S. 317, 330 (1883).

The Am. & Eng. Ency. (4 vol. 185) (1888), says: "A corporation is a *body consisting* of one or more persons, established by law for certain specific purposes, with the capacity of succession (either perpetual or for a limited period) and other special privileges not possessed by individuals, yet acting in many respects as an individual."

Mr. Beach, Commentaries on the Law of Private Corporations, vol. 1, § 1, 1891, after noting the conflicts in definitions given, says: "Although a corporation is, in a certain sense, something distinct from its members, having a life independent of theirs, the truth would seem to lie between these conflicting views of its nature. * * * The effort of practical jurisdiction should be to regard it as a unit or as a collection of persons according to the relation in which it acts in a given instance. As has been aptly said to this point (quoting Professor Pomeroy, 19 Am. Law Rev. 114) 'the shield will be either white or red accordingly as it is viewed from the one side or the other.'"

Mr. Thompson, Commentaries on Corporations, 1895, § 1, says: "The most usual conception of a corporation is that it is a collection of natural persons, joined together by their voluntary action or by legal compulsion, by or under the authority of an act of the legislature, to accomplish some purpose, pecuniary, ideal, or governmental, authorized by the legislature, under a scheme of organization and by methods thereby prescribed or permitted: with the faculty of having a continuous succession during the period prescribed by the legislature for its existence, of having an individual name by which it may make and take contracts and sue and be sued, and of acting as a unit in respect of all matters within the scope of the purposes for which it was created."

Mr. Clark, Handbook of the Law of Private Corporations, 1897, §§ 1, 2, 3, says: "A corporation aggregate is a collection of individuals united, by authority of law, into one body, under a special denomination, with the capacity of perpetual succession. Every corporation aggregate consists of, (*a*) A collection of individuals. (*b*) A legal entity, which is, for many purposes, in contemplation of law, separate and distinct from the members who compose it. For the purpose of acquiring, holding, and conveying property, contracting obligations, incurring liabilities, suing and being sued, a corporation is regarded in law as a legal entity separate and distinct from the members who compose it. * * * That a corporation is thus a legal entity, separate and distinct from the members who compose it, is a mere legal fiction introduced for the convenience of the corporation in transacting business, and of those who do business with it; and when urged to an intent and purpose not within its reason and policy, it will be disregarded, and the fact that the corporation is really a collection of individuals will be recognized, even at law. Courts of equity, in numerous instances, look behind the corporate entity, and recognize the individual members and will do so whenever justice requires."

It seems from the foregoing, and still more from the further treatment of the subject by Mr. Beach, Mr. Thompson and Mr. Clark, that "the collection of individuals" is emphasized only by being placed first in their definitions as Mr. Kyd did, and is not made especially prominent as a principle from which to deduce theories of corporate rights and liabilities, as is the case with Mr. Morawetz and Mr. Taylor.

Mr. Trapnell in "The Logical Conception of a Corporation,"—a paper read before the West Virginia Bar Association in 1896, defines a corporation as "an association of individuals formed under the sanction of the state, for a distinct and definite purpose." He specifies particularly that the associa-

tion originates in an agreement between individuals, which becomes effective only through a special charter or general enabling act, the provisions of which are accepted by the execution of the agreement; the peculiar mode of existence is perpetual, actual or potential; the distinct feature of its termination is the state's power to dissolve for violation of the law; the distinctive features as to membership are the effect of assignment of stock, and the confining of rights and liabilities strictly to the proper purposes of the corporation; as to the state's sanction, it must be an express *legislative* one, which operates both as a *grant* of *powers* forming a contract with the state, and as a *law*, prescribing certain forms and modes of action, and, as to the purpose, it must be a definite one, and no *corporate* power is to be exercised outside of this express or necessarily implied purpose, under penalty of forfeiture, and no corporate liability will arise therefrom except by way of estoppel; the corporate actions must be through the forms and by the parties or officers prescribed, and the funds must be applied only to the purposes indicated, without diversion or dissipation to the prejudice of members or creditors. The foregoing is the substance of what he submits "as a logical statement of all the elements essential to a modern business corporation, with such analysis of each as is necessary to differentiate a corporation from all other associations known to law, as regards that particular," in other words *"to exhibit the anatomy of a healthy corporation."* He says further: "It seems worth while to attempt to embody a clear conception of a corporation—immortality, 'corporate identity,' 'perpetual succession,' and all—without any aid from the 'artificial' person whom Coke and Blackstone regarded so lovingly, and who is such a bugbear to, at least, one modern text writer."

ARTICLE IV. THE CORPORATION AS A FRANCHISE.[1]

Sec. 22. In its relation to the state a corporation is considered as a primary franchise held by the members in their individual capacity, enabling them in their collective or corporate capacity to have and exercise other or secondary franchises, rights or privileges.

(1) General nature of a franchise.

THE PEOPLE, ETC., EX REL. THE ATTORNEY-GENERAL, v. THE UTICA INSURANCE COMPANY.[2]

1818. IN THE SUPREME COURT OF NEW YORK. 15 Johnson (N. Y.) *358–*395.

[Information in the nature of *quo warranto* against the Utica Insurance Company,—a company authorized to do all kinds of insurance business, and "in general of doing and performing, in these operations, all the business generally performed by insurance companies, excepting therefrom that this corporation shall not engage in loaning any money upon bottomry and respondentia nor in making any insurance upon any life or lives,"—for using without any warrant,

[1] See note at end of this article, p 157.

[2] Statement of facts condensed, parts of arguments, and parts of opinion omitted.

charter or grant the following liberties, privileges and franchises to wit, that of becoming proprietors of a bank or fund for the purpose of issuing notes, receiving deposits, making discounts, and transacting other business which incorporated banks may and do transact by virtue of their respective acts of recorporation, all of which liberties, privileges and franchises the said company have usurped and still do usurp upon the people of the state. The bank pleaded authority under their act of incorporation and the people demurred.]

Attorneys [*Harrison and T. A. Emmet*] for the insurance company maintained: 1. The acts charged against the defendants are not the exercise of franchises; and therefore an information in the nature of a writ of *quo warranto* will not lie against them. Franchise or not is a question of law and is not admitted by the demurrer. A franchise is a royal privilege, or branch of the royal prerogative, subsisting in the hands of the subject, by grant from the crown. A writ of *quo warranto* is the king's writ of right and and issues where a franchise is usurped, or forfeited by misuser. (2 Bl. Com. 37, Finch's Law 38, 164, 166; 3 Cruises' Dig. 278, tit. 27, § 1.) The word "franchises" is often used, in common parlance, in a very broad sense, for all liberties, but its legal or technical signification is more confined. A franchise was, always, in England, a gem in the royal diadem. It was inherent in the crown from the first institution of monarchy. But the right of banking was never a franchise or branch of the royal prerogative. The bank of *England* was established in 1694, pursuant to an act of parliament (5 W. & M., cap. 20), which authorized their majesties, William and Mary, to grant a commission to take subscriptions from individuals, and to incorporate them. Had the power of banking been a royal franchise, this special authority from parliament would not have been necessary.

In 1697 (8 & 9 W. & M., ch. 20, § 28) it was enacted that during the continuance of the bank of England, no other bank, or any other corporation, society, fellowship, company or constitution, in the nature of a bank, should be erected or established, etc., by act of parliament.

This still left individuals and ancient corporations free to bank. But in 1708 (7 Anne, ch. 7, § 61), it was enacted, that during the continuance of the bank of England, it should not be lawful for any corporation erected, or to be erected (other than said bank), or for any other persons in partnership, exceeding the number of six persons, to take up money on their bills or notes, etc. It is clear, then, that if parliament had not interfered, all corporations might lawfully have carried on banking business; the act of 7 Anne, restraining them, does not declare it unlawful, but merely prohibits the exercise of the power while the bank of England continued. It is manifest, therefore, that in England, banking was not considered as a royal franchise; and private banking is now carried on in that country by associations of partnership of not more than six persons.

If we look to the acts of our legislature, we shall find that they

speak the same doctrine. Numerous acts of incorporation have been passed since the restraining act of *April* 11, 1804, each of which contains a special clause to restrain the corporation from banking.

[Here the counsel enumerated more than *fifty* acts passed since 1804, which, he said, contained a special restraining clause.]

It is remarkable, also, that in the same session in which the restraining act was passed there was an act of incorporation passed containing a special prohibition against banking. What stronger evidence can be wanted of the sense of the legislature that the right of banking is not a franchise, but exists at large in every citizen, and may be freely exercised, unless expressly restrained by the legislature?

The right was open to every individual, and the defendants, being created a corporation, have, as its inseperable incidents, a perpetual succession, a capacity to sue and be sued, a right to purchase and hold land, to have a common seal, and to make by-laws, etc. (Kyd on Corp., 69, 70.) They might therefore, as well as any individual, carry on banking business, unless expressly prohibited. If, then, this is not a royal franchise, no information in the nature of a writ of *quo warranto* lies; for these informations have been substituted in the place of that ancient prerogative writ. (2 Co. Inst. 496, 1 Bulst. 55, 56; Rex v. Marsden, 3 Burr. 1817, per Wilmot, J.)

Not a case can be found in which a writ of *quo warranto* has been brought, or an information in the nature of one filed for exercising the right of banking.

In The King v. Shepherd (4 Term Rep. 381), Lord Kenyon said, that the old writ of *quo warranto* lay only where there was a usurpation on the rights and prerogatives of the crown; and that an information in the nature of a *quo warranto* could be only granted in such cases. So, in The King v. The Corporation of Bedford Level (6 East 359), Lawrence, J., says it has been always understood that a *quo warranto* only lay for encroachments on franchises created by the crown.

Again, for the exercise of any power incidental to a corporation or association, a writ of *quo warranto* does not lie. As well might it lie to ascertain by what authority individuals assembled for political purposes. A person entitled to a manor need not show by what title he holds a court baron, for that is *incident* to a manor. (Rex v. Stanton, Cro. Jac. 259, 260.)

But it is said the restraining act has made banking a franchise, and that no person can now exercise the right, without showing a legislative grant. Suppose in *England*, after the restraining act, more than six persons had associated as bankers, would an information, in nature of a *quo warranto*, have been filed against them? No. Their acts would have been illegal and void. How have the legislature assumed this prerogative and franchise? How have they taken to themselves what was before the common right of every citizen? By prohibiting all unincorporated banking associations. Is everything which is made the subject of exclusive right or grant a franchise, and to be tried by

a *quo warranto*? Ferries, running of *stages*, and *steamboats* are made exclusive rights, yet it has never been supposed that an information in nature of *quo warranto* would lie in case of any invasion of these rights.

Again, the restraining act is not in conjunctive; it declares that "no person unauthorized by law shall subscribe to, or become a member of, any association, institution or company, or proprietor of any bank or fund for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks may or do transact, by virtue of their respective acts of incorporation." By this act the legislature *assume* the rights specified. They do not resume a franchise. If the legislature can thus assume all rights common to the citizen, there is no commercial business whatever which they may not prohibit; and so the chamber of commerce apprehended. And on their petition the sections to the act, 27th session, chapter 110, sections 8 and 9, were passed in explanation of the restraining act. It was, in effect, an act to restrain commercial partnerships or companies, but the explanatory sections do virtually repeal the restraining act.

It may be said that banking is *quasi* a franchise or branch of prerogative. But when every individual has a right to bank, how can it be, in any degree or shape, a franchise? The act merely restrains associations. Every citizen, or inhabitant, may, if he pleases, be a banker. Can it be possible that the legislature may assume to itself the rights of every citizen? Such is not the law of England. If it is the law of any country, it is that of Turkey, where, alone it can be imagined that the common rights of man should be doled out for the purposes of gain. The mind revolts at the idea of a legislature bargaining out the common rights of the citizen for money. If the exercise of the right be injurious, prohibit it. What is granted should be given freely. A contrary doctrine would be attended with the most pernicious effects. * * *

Van Buren in reply. * * * The general demurrer admits, that the power exercised by the defendants is a *franchise;* and it follows, that this is the proper remedy. But is it not a franchise? The chancellor had no doubt on the question. He says, that "the right of banking was formerly, a common law right belonging to individuals, and to be exercised at their pleasure.

But the legislature thought proper, by the restraining act of 1804, which has since been re-enacted, to take away that right from all persons not specially authorized by law. Banking has now become a franchise derived from the grant of the legislature, and subsisting in those only who can produce the grant; if exercised by other persons, it is the usurpation of a privilege for which a competent remedy can be had by the public prosecutor in the supreme court." This ought, perhaps, to be a sufficient authority on this question. But to pursue it further: A franchise is a liberty or privilege. There is a distinction between *royal* and *common* franchises—between those of the sovereign and those of the people, as the right of trial by jury. When

the colony became a sovereign and independent state the people succeeded to all the rights and privileges of *English* subjects, and more, they succeeded to all the rights and privileges of the crown or sovereign. The legislature have, accordingly, from time to time granted various exclusive liberties and privileges, or franchises, to citizens. By the restraining act of the 11th of *April*, 1804, the legislature did take to itself the right or liberty of banking. What was before common to all ceased to be so, and became a franchise or privilege in the government, not to be exercised by citizens, unless by grant. Whether this was a franchise in *England* or not, it is made a franchise here, and the legislature were competent to make it so. It is true that private individuals may bank, but the defendants are an *association* carrying on banking business in violation of the act of the 11th of *April*, 1804, passed expressly to prevent any unauthorized or unincorporated association from banking. Being a privilege, then, which the defendants could not lawfully exercise without a grant from the legislature, it comes within the very definition which has been given of a franchise. We could not proceed by indictment, for the act gives a penalty, and not to the people, but to the informer. If this remedy does not lie, there is no remedy, civil or criminal. It is, at least, a liberty *in the nature* of a franchise; and this is the only and proper remedy. * * *

THOMPSON, Ch. J., delivered the opinion of the court. * * * It may safely be admitted, that formerly the right of banking was a common law right belonging to individuals and to be exercised at their pleasure. It can not, however, admit of a doubt that the legislature had authority to regulate, modify or restrain this right. This they have done by the restraining act of 1804 (sess. 27, ch. 117), and which has since been re-enacted and continued in full force (2 N. R. L. 234).[1] The construction which has been given by this *court* to the act is, that it extends only to associations or companies formed for banking purposes, and not an individual who carries on banking operations alone, and on his own credit and account (14 Johns. Rep. 205). *The right of banking, therefore, by any company or association, has, since the restraining act, become a franchise, or privilege, derived from the grant of the legislature, and subsisting only in such companies or associations as can show such grant.* The defendants have, accordingly, set up, as their authority or charter, for the exercise of this privilege, an act passed the 29th of *April*, 1816, entitled "an act to incorporate the Utica Insurance Company." The real inquiry is whether this act contains any such grant of banking privileges. * * *

Many powers and capacities are tacitly annexed to a corporation duly created; but they are such only as are necessary to carry into effect the purposes for which it was established. The specification of certain powers operates as a restraint to such objects only, and is an implied prohibition of the exercise of other and distinct powers. A contrary doctrine would be productive of mischievous consequences, especially with us, where charter privileges have been so alarmingly multiplied. * * * I am, accordingly, of opinion that the defendants are un-

[1] 1 R. S. 712.

authorized, by law, to enter into such business, and that judgment of ouster ought to be rendered against them.

SPENCER, J. Two questions have been brought forward in the argument: (1) Whether an information in the nature of *quo warranto* will lie in this case. (2) Whether the defendants have authority, under the act incorporating the Utica Insurance Company, to carry on banking operations in the manner set forth in their plea.

The statute (1 N. R. L. 108) (2 R. S. 581) gives this writ against any person who shall usurp, intrude into or unlawfully hold and execute any office or franchise within this state; and if the right set up by the defendants is a franchise, and the act under which they claim to exercise it does not confer it, then the defendants are subject to this prosecution.

A franchise is a species of incorporeal hereditament; it is defined by Finch (164) to be a royal privilege, or a branch of the king's prerogative subsisting in the hands of a subject; and he says that franchises being derived from the crown, they must arise from the king's grant, or, in some cases, may be held by prescription, which presupposes a grant; that the kinds are various, and almost infinite, and they may be vested in natural persons or in bodies politic.

All the elementary writers agree in adopting Finch's definition of a franchise, that it is a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject.

An information, in the nature of a writ of *quo warranto*, is a substitute for that ancient writ, which has fallen into disuse; and the information which has superseded the old writ is defined to be a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, and seize it for the crown. It has, for a long time, been applied to the mere purpose of trying the civil right, seizing the franchise or ousting the wrongful possessor, the fine being nominal only. (2 Inst. 281, pl. 12; 3 Burr. 1817, 4 Term Rep. 381, 1 Bulst. 55.)

If there are certain immunities and privileges in which the public have an interest, as contra-distinguished from private rights, and which can not be exercised without authority derived from the sovereign power, it would seem to me that such immunities and privileges must be franchises; and the act for rendering the proceedings upon writs of mandamus, and informations in the nature of quo warranto, more speedy and effectual, presupposes that there are franchises, other than offices, which may be usurped and intruded into.

If in *England*, a privilege in the hands of a subject, which the king alone can grant, would be a franchise, with us a privilege, or immunity of a public nature, which can not legally be exercised without legislative grant, would be a franchise. The act commonly called the restraining law (sess. 27, ch. 114), (1 R. S. 712) enacts, that no person, *unauthorized by law*, shall subscribe to, or become a member of, any association, or proprietor of any bank or fund, for the purpose of issuing notes, receiving deposits, making discounts or transacting any other business which incorporated banks do, or may transact, by virtue of their respective acts of incorporations.

Taking it for granted, at present, for the purpose of considering whether the remedy adopted is appropriate, that the defendants have exercised the right of banking, without authority, and against the provisions of the restraining act, they have usurped a right which the legislature have enacted should only be enjoyed and exercised by authority derived from them. The right of banking, since the restraining act, is a privilege or immunity subsisting in the hands of citizens, by grant of the legislature. The exercise of the right of banking, then, with us, is the assertion of a grant from the legislature to exercise that privilege, and consequently it is the usurpation of a franchise, unless it can be shown that the privilege has been granted by the legislature. An information, in the nature of a writ of *quo warranto*, need not show a title in the people to have the particular franchise exercised, but calls on the intruder to show by what authority he claims it, and if the title set up be incomplete, the people are entitled to judgment. (2 Kyd on Corp., 399; 4 Burr. 2146–7.)

This position is illustrated by the nature and form of the information; the title of the king is never set forth; but after stating the franchise usurped, the defendant is called upon to show his warrant for exercising it.

This consideration answers the argument urged by the defendant's counsel, that banking was not a royal franchise in *England*, and that it is not a franchise here which the people, in their political capacity, can enjoy; for if their title to enjoy it need not be set out in the information, it is not necessary that it should exist in them at all. In the case of The King v. Nicholson and Others (1 Str. 303), it appeared that by a private act of parliament for enlarging and regulating the port of *Whitehaven*, several persons were appointed trustees, and a power was given to them to elect others upon vacancies by death or otherwise. The defendants took upon them to act as trustees without such an election; and upon motion for an information in the nature of a *quo warranto* against them, it was objected, by the counsel for the defendants, that the court never grants these informations but in cases where there is usurpation upon some franchise of the crown; whereas, in that case the king alone could not grant such powers as are exercised by the trustees, the consequence of which was, that this authority was no prior franchise of the crown. To this it was answered, and resolved by the court, that the rule laid down was too general, for that informations had been constantly granted when any new jurisdiction or public trust was exercised without authority; and leave to file an information was, accordingly, granted. This case is a strong authority in favor of this proceeding.

Many cases might be cited, in which informations, in the nature of *quo warranto*, have been refused, where the right exercised was one of a private nature to the injury only of some individual. In the present case, the right claimed by the defendants is in the nature of a public trust; they claim, as a corporation, the rights of issuing notes, discounting notes and receiving deposits. The notes they issue, if their claim be well founded, are not obligatory on the individuals who

compose the direction or are proprietors of the stock of the corporation. These notes pass currently, on the ground that the corporation have authority to issue them, and that they are obligatory on all their funds; the right claimed is one, therefore, of a public nature, and, as I conceive, deeply interesting to the community; and if the defendants can not exercise these rights without a grant from the legislature; if they do exercise them as though they had a grant, they are, in my judgment, usurping an authority and privilege of a public kind; and we perceive that it is not necessary that the right assumed should be a prior franchise of the crown, or of the people of the state.

Had the defendants claimed and exercised the right of banking as private individuals, I agree that an information would not lie against them; they would have been subject only to the penalties inflicted by the act; but they claim the privilege as a corporation, and under a grant from the legislature. If they have not that grant, they have exercised and usurped a franchise, and the remedy pursued is well adapted to the case. * * *

Judgment of *ouster*.

Note. See 1896, Meadowcroft v. People, 163 Ill. 56, 54 Am. St. 447; State v. Woodmansee, 1 N. Dak. 246. But see 1892, State v. Scougal, 3 S. Dak. 55, 44 Am. St. R. 756, holding that "Banking was not a franchise at common law, and except as to the privilege of issuing notes to circulate as money, can not be made such by the legislature. See also 1885, In Matter of Jacobs, 98 N. Y. 98, 50 Am. Rep. 636 (act forbidding manufacture of cigars in certain ways and places held unconstitutional); 1885, People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34 (prohibiting sale of oleomargarine). Also 1893, Braceville Coal Co. v. People, 147 Ill. 66, 37 Am. S. R. 206, as to the constitutional restrictions upon the police power of the legislature. *As to corporate franchises* particularly see cases in addition to those given in text: 1838, Regents v. Williams, 9 Gill & J. (Md.) 365, 31 Am. D. 72; 1886, Appeal of Pittsburgh, etc., R. R. Co., 122 Pa. St. 511, 9 Am. St. 128; *infra*, p. 1342; 1846, Enfield Toll Bridge Co. v. Hartford, etc., R. R. Co., 17 Conn. 454, 44 Am. Dec. 556; 1892, Mayor, etc., v. Houston, etc., Ry. Co., 83 Tex. 548, 29 Am. St. R. 679; 1890, Macon, etc., R. R. Co. v. Gibson, 85 Ga. 1, 21 Am. St. R. 135; 1846, Miners' Bank v. United States, Morris (Iowa) 482, 43 Am. D. 115.

Sec. 23. Same.

SPRING VALLEY WATER-WORKS v. SCHOTTLER ET AL.[1]

1882. IN THE SUPREME COURT OF CALIFORNIA. 62 Cal. 69–119.[2]

[Appeal by plaintiff from judgment of the superior court of the city and county of San Francisco, denying a writ of review, and confirming the action of the board of equalization of that city and county, in raising the assessment of the franchise of the water-works company from $5,000 to $5,000,000. The state constitution (art. 13, § 1) provided: "All property in the state * * * shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to in-

[1] Statement of facts condensed. Parts of arguments and opinion omitted.
[2] Affirmed by U. S. Sup. Ct., Spring Valley W. W. v. Schottler, 110 U. S. 347.

clude moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal and mixed, capable of private ownership." The water-works company was organized under general acts of 1850, 1853, 1858, etc., giving it the power of perpetual succession for fifty years, to sue and be sued, to make and use a seal, hold, purchase and convey necessary real and personal property, appoint necessary officers and agents, divide its stock into shares, make by-laws to regulate its management and regulate the transfer of stock; to exercise power of eminent domain, to use streets, alleys, ways, etc., necessary for laying its pipes, to furnish water to the inhabitants at rates fixed in a prescribed way, and the further right to "all the privileges, immunities and franchises that might be thereafter granted to any individual or corporation relating to the introduction of fresh water into any city or town of the state for the use of the inhabitants thereof." The state constitution also provided (art. xi, § 19): "In cities where there are no public works owned by the municipality * * * any individual or company duly incorporated for that purpose shall (subject to certain provisions as to damages) have the privilege of using the streets for laying down pipes, etc."]

Fox & Kellogg, for appellant, argued:

* * * In making up the assessment, the revenue officers seem to have taken it for granted that because franchises may be property, they are *ex necessitate* liable to assessment; and to have overlooked the provision of the constitution and the statute, that they can only be property and subject to taxation when "capable of private ownership." According to their theory, the elective franchise, the freedom of speech, the freedom of the press, the most valuable of all franchises, are liable to assessment and subject to taxation. But these and a hundred other franchises are not "capable of private ownership," and therefore not "property," and, not being property, are not subject to taxation.

We submit that nothing but "property" is subject to assessment and taxation, in the form now under consideration, under the constitution or laws of this state. Only those "franchises" can be classed as "property * * * capable of private ownership," which are defined by the supreme court of the United States, in Bank of Augusta v. Earle, 13 Pet. 519, as being "special privileges conferred by government on individuals, which do not belong to the citizens of the country generally, or by common right." Wherever we find a franchise held to be property, we find it to be of the class thus clearly defined by the highest tribunal in the land. Of these are street railroads, turnpike roads, bridges, ferries, wharves and the like.

But the appellant in this case possesses no such franchise. There is no right or privilege which it can name, or upon which it can place its hand and say, "This is mine;" none that is or can be held by it in "private ownership." It owns no franchise; it simply enjoys the privileges conferred by law. Its privileges are these and these only: (1) **The right of corporate existence.** This is a privilege granted by the legislature to all the people of the state, and any five of its inhabitants may enjoy that franchise at any time, when they see

fit to incorporate for any purpose for which men may contract or associate themselves together. (Civil Code, § 286.) (2) **The right to acquire property**, when it is absolutely necessary, and can not otherwise be acquired for certain of its corporate uses, by condemnation. This is a right which can never be exercised without enormous cost, proportioned to the value of the thing acquired, and which is not, and can not be held in private ownership.

It is a right held in common by all corporations organized for the purpose of supplying cities and towns with water as well as many others, and there is no limit to the number of corporations which may organize and actually engage in the business of supplying the same city or town. (See Statute, 1858, p. 218; Code of Civil Procedure, § 1237.) (3) **The right to lay and maintain pipes** in the streets and to collect water rates. Like the two preceding, so of this. It is not a right which is or can be held "in private ownership." By the statute of 1858, above cited, and under which the appellant is organized, it is a right guaranteed to every corporation organized for the purpose of supplying water in cities and towns, with no limitation upon the number that may engage in the same business in the same city or town. By the codes the same right is also guaranteed to any corporation organized for such purpose; but under them it could only be exercised when thereunto authorized by ordinance of the city. But by the same section of the code, the city authorities were prohibited from granting any exclusive privilege of the kind. (See Civil Code, §§ 548, 549.) But since the passage of both the statute and the code, the people, in the majesty of their power, have taken away even the limitations of those laws, by which the right to exercise the privilege was limited to corporations, and now it is a right common to every person in the state whether incorporated or not.

[After quoting provisions of art. xi, § 19, of the constitution above given:]

Thus it will be seen that under the constitution of the state it is impossible that there should be a franchise of this kind—that is "capable of private ownership." It is one which belongs to everybody, and whoever sees fit to use it need not even say to the municipal authorities, "by your leave." All they have to do is to be subject to general regulations for damages and indemnity for damages, and to supervision of the street superintendent, as to the mode and manner of using the street. It is true that article xiv of the constitution declares the right to collect water rates to be a franchise which can only be exercised by authority and in the manner prescribed by law. But that does not militate against the proposition that it is a privilege common to all, and not "capable of private ownership." It is declared to be a franchise solely for the purpose of making it subject to regulation by law, and without giving it the character of property or private ownership. These are all the franchises, if they can be called such, enjoyed by the appellant. They are all franchises which are enjoyed by every inhabitant of the state, which are not "capable of private ownership," and therefore not liable to assessment under the law.

F. G. Newland, for appellant, argued:

The term "franchise," in its broad sense, means "exemption from constraint or oppression, liberty, freedom." (Webster.) In this sense the right to vote is termed a "franchise;" so also the right of trial by jury, freedom of speech and freedom of the press are termed "franchises." The declaration of the constitution that the word "property" includes "franchises," certainly was not intended to apply to those general privileges and rights which society has guaranteed and secured to individuals. The "franchises" declared by the constitution to be property, must be those special privileges, exclusive in their nature, conferred by the government on individuals, and having the incidents and attributes of property; that is to say, they must be capable of private ownership, of assignment and of being inherited. In this sense they are included in that division of property called "incorporeal hereditaments;" they are things without body, capable of being inherited, such as the right of "ferry," or the right of "fishery," or the right to maintain a "toll" road, conferred upon the grantee, his heirs or assigns. It is evidently in this sense that the word is used in the constitution, for in it the word "property" is declared to include "moneys, credits, * * * franchises and all other matters and things real, personal and mixed, capable of private ownership." The last words attach to and qualify all the taxable things referred to in the above quotation.

[After quoting the provisions of the constitution and general laws relating to the formation of the corporations:]

Under these acts the petitioner has the following rights and privileges: 1. **The right to be a corporation**—that is to say, the right as an artificial being, to act under an artificial name, and to exercise certain powers and duties of a natural person, among others, to sue and be sued, and to purchase, hold, sell and convey real and personal property. Under the act of 1853, any three or more persons could associate themselves together and form a water-company, by signing and filing the proper certificate. This was a privilege made by the laws of common right and general enjoyment. All persons could exercise it. Under the civil code, section 286, "Private corporations may be formed for any purpose for which individuals may lawfully associate themselves," and any five persons may associate themselves together and form such corporation.

It appears, then, that the right to be a corporation is simply a privilege conferred by the general law upon any number of persons, not less than three in the one case or five in the other, whoever they may be, who may wish to associate themselves together, to exercise, as an associated body, under an artificial name, certain powers and perform certain duties of a natural person. In other words, a corporation is a bundle of faculties. Could the faculty of a natural person to sue and be sued, or his faculty to acquire and possess property, be assessed as property? The right to the things sued for, which constitute choses in action, or the property acquired and possessed could be assessed both to natural and artificial beings, but not mere faculties or powers. The right to be a corporation is simply the right to exist at the

will of the creator. Can the right to exist either as a natural or artificial being be valued as property?

2. Under the act of 1858 water companies are granted the privilege of exercising the power of eminent domain; but they exercise this privilege simply as the agents of the state, for the purpose of serving a public use, to which their powers and property are delegated. This agency may be revoked at any time. It is a naked power—not a power coupled with an interest. Can the agency of the agent, whether natural or artificial, be assessed as property? * * *

3. The only other right or privilege conferred by the general law of 1858, upon water companies, is the right of laying down pipes in the streets of the city, and supplying the inhabitants with water at rates fixed by law; but this right is not only common to all water companies, but is also conferred by art. xi, § 19, and art. xiv, of the new constitution, on all individuals, so that this right which, if granted absolutely and exclusively to a single individual or a single corporation, and his or its assigns, might be regarded as property, has been by the fundamental law of the state made a matter of common right and general enjoyment. It is true that everybody does not exercise this right or privilege, just as everybody does not exercise the right to vote, but everybody has the right to exercise it, and it is even more unlimited and general than the right to vote, for the latter right is conferred only upon native-born inhabitants over twenty-one years of age, and upon naturalized citizens, whilst the former right can be exercised by anybody, whether adult or minor, citizen or alien. This right or privilege has none of the incidents of ownership; no one can sell it, for every body has it, and no person can gain by the accession of the right of another.

We have thus classified all the rights and privileges of water companies under the general law, and the constitution of the state, and we find that they are all subject to alteration and entire revocation by the state; they are privileges enjoyed, not property owned. Webster defines property to be: "4. The exclusive right of possessing, enjoying and disposing of a thing, ownership. 6. An estate, whether in lands, goods or money." Blackstone, book 1, page 138, speaks of property as an absolute right "which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution save only by the laws of the land," and in another place, book 2, page 2, speaks of the right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe." Bouvier, in his Law Dictionary, in defining the word property, says: "It is the right to enjoy and to dispose of certain things in the most absolute manner, * * * so that property, considered as an exclusive right to things contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person without any consideration, or even throwing them away."

Can it be said that any of the rights or privileges conferred on the

petitioner by general laws, subject to alteration, amendment or repeal, come within the definition of the term "property"? * * * Under the new constitution it is impossible to grant a franchise, in the property sense of that term, to either natural or artificial persons, for it declares (art. 1, § 21); "No special privileges or immunities shall be granted which may not be altered, revoked or repealed by the legislature. Nor shall any class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." And, again (art. 4, § 25): "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: Granting to any corporation, association or individual any exclusive right, privilege or immunity in all cases where a general law may be made applicable."

It is evident, therefore, that the day of "franchises" as property is over. The whole tendency of the civilized government, is to do away with special or exclusive privileges, and wherever a right is extended by the government to make it common to all. Equality of right, equality of privilege, and equality of burden, are now the crowning franchises of all persons, natural and artificial, in this state. The great difficulty in construing a word like "franchise," which has figured extensively in the evolution of government, is that the attributes of a by-gone age are likely to be given to it notwithstanding the modifications that may have taken place in its character, and scope.

As already stated the power of society over the individual is absolute. It is called the power of government, or the police power. Every privilege which the individual, either specially or as a member of a class or in common with all other individuals enjoys, may be regarded in one sense as a grant from the government.

The despot who rules with the consent or by the sufferance of society has absolute power over the vocation of life. He can grant to a certain individual the right to pursue a special trade exclusively, or he can throw open such trade or occupation to all. When such a grant is made to an individual, his heirs and assigns, it may be regarded as his property, and when such a grant is made to all individuals it is no less a franchise; it is a freedom, a liberty, but not "property." If we look back to the times of Elizabeth, James I and Charles I, we will find many examples of special grants which partook of the nature of property. Hallam, in his Constitutional History of England, vol. 1, ch. v, speaking of the reign of Elizabeth, says: "The crown either possessed or assumed the prerogative of regulating almost all matters of commerce at its discretion."

"Patents to deal exclusively in particular articles, generally of foreign growth, but reaching in some instances to such important necessaries of life as salt, leather and coal, had been lavishly granted to the courtiers, with little direct advantage to the revenue. They sold them to companies of merchants, who, of course, enhanced the price to the utmost ability of the purchaser."

"In 1601 parliament made a bolder and more successful attack on the administration than this reign had witnessed. The grievance of

monopolies had goné on continually increasing; scarce any article was exempt from these oppressive patents. When the list of them was read over in the house a member exclaimed: 'Is not bread among the number?' The house seemed amazed. 'Nay,' said he, 'if no remedy is found for these, bread will be there before the next parliament.'"

It was in those times that the East India Company was organized under letters patent from the crown, and vested with the exclusive right to trade in India. Monopolies were granted by letters patent, conferring the exclusive right to deal in necessaries of life, such as coal, iron, soap, salt, leather, tobacco, beer, hops, linen, etc. (Bright's English Hist., vol. 11, p. 629.) Rights of ferry, rights of wharfage, rights of fishing, rights of chase and of toll-roads, etc., were also granted. All these grants, as a rule, were made by letters patent, running to an individual, his heirs or assigns, and exclusive in their nature. They were protected by the courts as property, and it was held by the courts that no grant could be made by the sovereign which would interfere with or impair the exercise of the previous grant. They were therefore termed incorporeal hereditaments, and, Kent, in speaking of such franchises, says (Kent's Com., vol. 3, page 458): "Another class of incorporeal hereditaments are franchises, being certain privileges conferred by grant from government, and vested in individuals. In England they are very numerous and are understood to be royal privileges in the hands of a subject. They contain an implied covenant on the part of the government not to invade the rights vested. * * * The government can not resume them at pleasure or do any act to impair the grant without a breach of contract. * * * An estate in such a franchise and an estate in law rest upon the same principle, being equally grants of a right or privilege for an adequate consideration. If the creation of a franchise be not declared to be exclusive, yet it is necessarily implied in the grant, as in the case of the grant of the ferry, bridge, or turnpike, or railroad, that the government will not, either directly or indirectly, interfere with it, so as to destroy or materially impair its value. Every such interference, whether it be by the creation of a rival franchise or otherwise, would be in violation or in fraud of the grant."

Such was the nature of franchises in England, and also in this country at the time Chancellor Kent wrote. In the celebrated case of Dartmouth College v. Woodward, 4 Wheaton 519, it was decided that the charter granted by the British Crown to Dartmouth College was a contract, and that an act of the legislature of New Hampshire altering the charter was an act impairing the obligation of a contract, and was unconstitutional and void. Justice Washington said (page 657): "To this grant or this franchise the parties are the king, and the person for whose benefit it is created or trustees for them. The assent of both is necessary. The subjects of the grant are not only privileges and immunities, but property. * * * Certain obligations are created, binding both on the grantor and grantee. On the part of the former, it amounts to an extinguishment of the king's pre-

rogative to bestow the same identical franchise on another corporate body, because it would prejudice his prior grant. It implies, therefore, a contract not to reassert the right to grant the franchise to another, or to impair it."

Justice Story says (p. 700): "In respect to corporate franchises they are, properly speaking, legal estates vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest."

Mr. Webster, in his memorable argument in that case said: "Hume gives the reason: It is that such franchises were regarded in a most emphatic sense as private property. If it could be made to appear that the trustees and the president and professors held their offices and franchises during the pleasure of the legislature and that the property holden belonged to the state, then indeed the legislature have done no more than they had a right to do. But this is not so. The charter is a charter of privileges and immunities, and these are holden by the trustees expressly against the state forever."

The decision of this case attracted great attention. Its effect was feared; it placed the creature beyond the power of the creator, and as a result of it the various states adopted constitutional amendments, providing for the formation of corporations under general laws, which should be subject to alteration, amendment or repeal. The courts themselves in a measure shrank back from the doctrine of that case, and in a subsequent case, argued in the supreme court of the United States, entitled Charles River Bridge v. Warren Bridge et al. (11 Peters 420), they modified the doctrine which had previously existed as to the exclusiveness of franchises, and declared "that a franchise conferred by the government was not exclusive unless so expressed in the grant." This remained the settled doctrine of the American courts since that decision.

It will be observed, therefore, that the tendency of the people, acting through constitutional conventions and representative legislatures and of the courts, has been to modify the doctrine of the *Dartmouth College case*, and to make powers conferred by the government upon persons, natural or artificial, mere privileges enjoyed, not property owned. This tendency has reached its highest development in our state, where the legislature is not permitted to grant any special privilege to any person, natural or artificial, and where all privileges conferred by the sovereign power are made of common right and general enjoyment. * * *

The only case which has been called to our attention in which a tax has been imposed upon the franchise of a corporation as property, separate and apart from the property in connection with which it is exercised is the case of Exchange Bank of Columbus v. Hines, 3 Ohio St. 7, in which the court declared the tax invalid, in the following language: * * *

Does a corporate franchise, in sober truth and reality, possess the essential qualities of property? It is said that the corporate franchise of a bank, conferring a peculiar legal capacity, and the high function

of making and circulating paper money, is valuable—indeed, a thing of great value. But value is not the distinguishing attribute of property. The right of suffrage is esteemed valuable; a public office, with its emoluments, is valuable; a license to keep a tavern, as formerly granted in this state, or a license to carry on any special business which is prohibited without a special grant of authority from the government, may be valuable, and a right to either of these things may be asserted and maintained in a court of justice, yet neither of them possesses the essential qualities which constitute property. Our right to the free use and enjoyment of things which are in common, such as air, light, water, etc., is valuable; and our right to the free use of the public highways, and to many of the privileges and advantages derived from the government may be valuable, and may be maintained by legal process. Yet none of these things come within the denomination of property. Those things which constitute the subject-matter of private property are such as the owner may exercise exclusive dominion over, in the use, enjoyment and disposal of them, without any control or diminution save only by the laws of the land. (1 Wend. Blackstone, 138.) It is a fundamental principle that property considered as an exclusive right to things contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person, without any valuable consideration in return, or even of throwing them away, which is usually called relinquishing them." (Rutherford's Institutes 20; Puffendorff, c. 9, b. 7.)

"It is said that capability of alienation, or disposal, either by sale, devise, or abandonment, is an essential incident to property." (2 Kent's Com. 317.) "*A corporate franchise, therefore, being a mere privilege, or grant of authority by the government, is not property of any description, and consequently not subject to taxation under the above provision of the constitution.*" * * *

The constitution not only provides that "all property shall be taxed in proportion to its value," but that such value is "to be ascertained as provided by law." The only rule laid down in the Political Code for the assessment of property is that contained in section 3637, to wit: "All taxable property must be assessed at its full cash value," which latter term is defined (§ 3617, subd. 5) as follows: "The terms value and cash value mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor." * *

The rule applied was one which it was declared had the approval of the supreme court, in the case of San Jose Gas Co. v. January, viz., by ascertaining, first, the market value of the stock of the corporation; and secondly, the assessed value of the property thereof, and deducting the latter from the former, the difference was declared to be the value of the franchise. * * *

The rule applied does not operate equally and uniformly upon all franchises, for in the case of a franchise enjoyed by an individual, there would be no stock from the aggregate market value of which could be deducted the value of the tangible property in order to

ascertain the value of the franchise, nor is it an equal or uniform rule in any sense, for it applies only to corporations, whereas the business of private individuals and firms should be subjected to the same mode of assessment. A mercantile firm may have a stock of goods on hand worth $100,000, and yet its business, the good will, so called, with the advantages which years of skillful and honorable attention to business united with fortunate circumstances may have given, may be worth five times as much as the stock, and yet the assessor assesses only the tangible property, and lets the good-will go free. The law provides that "private corporations may be formed for any purpose for which individuals may lawfully associate themselves." (C. C., § 286.) Such a mercantile firm could, if it chose, form itself into a mercantile corporation. With a stock of goods on hand never exceeding $100,000 it might earn, with a skill and ability of its members through the large custom acquired, a liberal rate of interest on $500,000, and the stock would sell in the market for that sum. In such cases, the assessor, pursuing the rule contended for here, would determine the value of the franchise to be $400,000; whereas, as a matter of fact, the right to be a corporation would be utterly valueless to a firm, and the difference between the market value of the stock and the value of the tangible property would simply be the good-will of the business; this would exist whether the concern was incorporated or not; and yet the difference is assessed only to corporations and not to individuals.

A more glaring instance of the absurdity of the rule applied is that of a newspaper whose value is almost entirely made up of skill, ability, enterprise and good-will. Take the case of the two leading newspapers of this city, the Chronicle and Call, owned by private proprietors. Each is valued at about $300,000, and probably yields its proprietors a liberal interest upon that amount. Probably the only property connected with either of these papers which the assessor would assess are the printing presses and fixtures, worth, say, $30,000; but if either paper should be incorporated into a joint-stock company, with a capital stock of $300,000, its stock would probably sell for that amount, as the value of the stock in the market is largely determined by the rate of interest paid as dividends upon it. The assessor then, in that case, would assess the franchise, that is, the privilege of conducting the same business in the name of an artificial being, at the difference between the value of the printing press and fixtures, and the market value of the stock, namely: $270,000. So the mere change in the conduct of the business of such a newspaper, from the hands of a natural person to those of an artificial person, would result in an assessment upon the latter ten times greater than upon the former, and yet this artificial person is a purely business corporation; it does not have the power of eminent domain, or exercise the royal prerogative of collecting tolls; the only franchise it possesses is the right to be a corporation. * * *

THORNTON, J. * * * Blackstone says, in relation to franchises:

"Franchises and liberty are used as synonymous terms, and their definition is a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being, therefore, derived from the crown, they must arise from the king's grant, or in some cases may be held by prescription, which, as has been frequently said, presupposes a grant. The kinds of them are various and almost infinite," and adds "that they may be vested in either natural persons or bodies politic, in one man or in many." And again on this subject he says: "To be a county palatine is a franchise, vested in a number of persons. *It is likewise a franchise for a number of persons to be incorporated, and subsist as a body politic, with a power to maintain perpetual succession, and do other corporate acts; each individual member of such corporation is also said to have a franchise or freedom.*" (2 Bl. Com. 37.)

Kent defines franchises as "privileges conferred by grant from government, and vested in individuals." (3 Kent's Com. 458.) He also says: "Corporations or bodies politic are the most usual franchises known in our law." (Id. 459.)

In Pierce v. Emery, 32 N. H. 507, Perley, C. J., speaking for the court, remarks: "*A corporation is itself a franchise belonging to the members of the corporation; and a corporation, being itself a franchise, may hold other franchises as rights and franchises of the corporation.*" *And further:* "*A corporation, being itself a franchise, consists and is made up of its rights and franchises.*"

In City of Bridgeport v. N. Y. & N. H. R. Co., 36 Conn. 266, Butler, J., speaking for the court, uses this language in regard to a railroad corporation: "The term 'franchise' has several significations, and there is some confusion in its use. The better opinion deduced from the authorities seems to be that it consists of the entire privileges embraced in and constituting the grant." (See title "Franchise" in Abbott's Law Dict., and cases there cited.)

It is true that the privileges so granted by the government do not pertain to the citizens of the state by common right. But what is the "common right" here referred to? Is it not a right which pertains to the citizens by the common law, the investiture of which is not to be looked for in any special law, whether established by a constitution or an act of the legislature? Coke says: "*De commun droit*—of common right—this is by the common law, because the common law is the best and most common birthright that the subject hath for the safeguard and defense not only of his goods, lands and revenues, but of his wife and children. * * * This common law of England is sometimes called right, sometimes common right, and sometimes *communis justitia.*" (Coke's Inst. 142*a*.) The definition of franchises as special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally of common right, had its origin in Bank of Augusta v. Earle, 13 Pet. 575. A very learned and accurate writer, Mr. Emory Washburn, in his work on Real Property (2d vol. 267), adopts this definition, and cites as authority the case above referred to from 13 Peters. The same

definition is quoted by Angell & Ames, in their work on Corporations, from the case referred to. (See Ang. & Ames on Corp., § 4.)

In the case in 13 Peters it was contended that under the laws and constitution of Alabama the right of banking was a franchise. The court refused to so hold, on the ground that the right of banking, at common law, belonged to every citizen. (See, also, Curtis v. Leavitt, 15 N. Y. 170, opinion of Shanklin, J.) The discussion on the point in the opinion shows clearly that "common right" is used with the signification of common law."

We are of opinion that the common right refers to the right of citizens, generally at common law. Such rights of citizens, though frequently spoken of as franchises, are not the franchises here meant; and it may be conceded that where such rights are granted to corporations, they are not franchises. But independent of the right to exist as a corporation, and to exercise powers in its corporate capacity, there are privileges granted to the water-works, which do not, by the common law, belong to citizens generally; such as the right to lay down pipes in the streets, ways and alleys of a city, and to collect rates for water furnished, which was held to be a franchise in San Francisco v. Spring Valley Water-Works, 48 Cal. 493, and in San Jose Gas Co. v. January, 57 Cal. 616. Conceding for the argument that the constitution, by section 19 of article xi, grants this right to every person, it does not follow that it is not a franchise. They are vested by a grant of the sovereign power, and not by the common law; and the generality of the grant does not deprive them of the character of franchises.

The right to collect rates for use of water supplied to the city and county of San Francisco, or the inhabitants thereof, which the appellant has possessed at least ever since the act of 1858 went into effect, is expressly declared to be a franchise by the constitution of the state in the second section of article xiv, thereof. As has been said above, the very existence of a corporation as such is a franchise, and it exercises its franchise in every act which it performs as a corporation. In the Bank of Augusta v. Earle, above cited, the supreme court of the United States, speaking through Taney, C. J., in relation to the making of contracts by corporations, which, by common right, individuals could make, said: "*In making such contracts, a corporation, no doubt, exercises its corporate franchise. But it must do this whenever it acts as a corporation, for its existence is a franchise.*"

A corporation, whose existence is a franchise, may possess powers and privileges, which, in themselves, are not franchises (such as the right to bank, discussed in Bank of Augusta v. Earle, above cited, or the right to buy and sell property, real and personal), but it usually owns, along with such privileges, some that are franchises; but whether the powers be entirely of the kind which are franchises or not, its existence and right to employ its corporate powers is a franchise. This we think abundantly established by the cases above cited.

We have no doubt that it was the intention of those who framed and ratified the constitution to place such franchises in the category of

property to be taxed. The word "franchises," as used in the first section of article 13, is used generally without any qualifying words, and is intended to embrace all franchises of the character above referred to, whether vested in individuals or bodies politic. A franchise conferred on an individual to lay down pipes in the streets of a city and to collect rates for water furnished a city or its inhabitants is to be taxed in the same way as when vested in corporations. The law in this respect is the same in regard to all persons, whether natural or artificial.

It is contended that the clause, "and all other matters and things real, personal and mixed, capable of private ownership," in section 1 of article 13, qualifies the word "franchises" which precedes it. We do not think so. The structure of the sentence forbids any such construction. What is said before the employment of these words is complete of itself, and needs nothing to show what was signified. The words used show clearly that they were intended to add something to what preceded them, to refer to kinds of property not previously mentioned, not to qualify anything. They were doubtless inserted out of abundant caution to show that all kinds of property, whether specifically enumerated or not, were intended to be included in the property to be taxed, though not embraced in the specific classes previously mentioned. They constitute a declaration that in enumerating the property to be taxed it was not intended to confine the enumeration to "moneys, credits, bonds, stocks, dues, franchises," but to include all other kinds of property, and that by no construction of the word property, as used in the section, were any kinds of property to be left out.

But it is immaterial whether these words qualified "franchises" or not, for the reason that the franchises so referred to are capable of private ownership. To hold that a private corporation does not own its franchise right, power and privileges would be both novel and untenable. Admitting that under the law of the state there may be legislation which might impair their value, it does not follow that it is not owned as property, with all the rights which attach thereto. All these rights exist until the legislative authority has acted so as to impair them or take them away; and until such legislation is enacted the rights of property remain unimpaired. There has been no legislation yet of the character as regards the appellant that has been called to our attention, or that we have been able to discover.

This franchise of a corporation is sometimes classed as real estate—of that kind styled incorporeal hereditaments. (Enfield Toll Bridge Co. v. Hartford and New Haven R. Co., 17 Conn. 40; s. c., 17 Conn. 462; Price v. Price's Heirs, 6 Dana 107; 1 Blackstone's Com., 20–22, 37, 38.) In the case cited from 17 Conn. 40, this was said of a bridge corporation. The shares of stock of the water-works are by statute made personal estate. (See act of 1853.) But whether real or personal estate, they are property. Such franchises, as long as they exist, are protected as property by the guarantee universal in the states of the Union, which forbids their being taken except for public

purposes and on compensation being made. (1 Cooley's Con. Lim., 4th ed., 655, and cases cited in note 4.) During their existence they are as fully protected by law as any other species of property. On this subject see Wilmington R. Co. v. Reid, 13 Wall. 268; 3 Kent's Com. 458; Hamilton County v. Massachusetts, 6 Wall. 633; People v. Selfridge, 52 Cal. 331; T. & T. R. Co. v. Campbell, 44 Cal. 89; O. R. Co. v. O. B. & F. V. R. Co., 45 Cal. 365. (See cases just above cited from 17 Connecticut, and Norwich Gas-light Co. v. Norwich City Gas Co., 25 Conn. 36.)

The franchise of a corporation *is and can be well defined to be the right of the corporation to exist and exercise the powers and privileges vested in it by its charter.* (Burr. on Tax., § 83.) *The franchise is the faculty of the corporation. As said by Redfield in his work on railways: "The faculty of a corporation is its organic life; its corporate existence by which it is enabled to carry on business; that which it derives from its charter of incorporation its corporate franchise."* (2 Redf. on Railways, 3d ed., 452.) *In this state, the charter is the statute or statutes granting and defining the powers of the corporation, under which it is constituted and exists, together with the instruments required to be executed by the provisions of such statute or statutes. These are sometimes called the constating instruments.* (Field on Corp., § 34, n. 3.) *Such franchises are legal estates, not mere naked powers, and are powers coupled with an interest, which vest in the corporation by virtue of its charter or constating instruments.* (Society for Savings v. Coite, 6 Wall. 606; Provident Institution v. Massachusetts, 6 Wall. 622; Hamilton Co. v. Massachusetts, 6 Wall. 638; Porter v. R. R. I. & St. L. R. Co., 76 Ill. 561.) That the state has full power to tax them, see same cases, and State R. R. Tax Cases, 92 U. S. 603. In the case from 76 Illinois, above cited, it is said: "It is clear upon authority that the franchise of a corporation is property, and as such it may be a proper object of taxation." (P. 573.) In Veazie Bank v. Fenno, 8 Wall. 547, Chase, C. J., used this language: "Franchises are property, often very valuable and productive property, and seem to be as properly objects of taxation as any other property." Daniel, J., delivering the opinion of the court in West River Bridge Co. v. Dix et al., 6 How. 529, said: "We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred than other property. A franchise is property, and nothing more." (See also Wilmington R. Co. v. Reid, 13 Wall. 264, and Monroe Savings Bank v. The City of Rochester, 37 N. Y. 367.) In this last case Fullerton, J., delivering the opinion of the court, said, in regard to a statute declaring the privileges and franchises granted by the legislature to savings banks or institutions for savings, personal property, and liable to taxation as such: "In declaring the privileges and franchises of a bank to be personal property, the legislature has adopted no novel principle of taxation. *The powers and privileges which constitute the franchise of a corporation are in a just sense property, and quite distinct and separate from the property, which,*

by the use of such franchise, the corporation may acquire. They are so regarded by the law, and so regarded by common acceptation."

That such franchises can be taxed according to the valuation arrived at through an assessment is recognized in the case of the Freight Tax, 15 Wall. 282, and in the case of the State Tax on Railway Gross Receipts, 15 Wall. 296. In the case of the State Railroad Tax Cases, above cited from 92 U. S. Reports, a tax on the assessed value of franchise and capital stock by the state of Illinois was sustained, approving the decision to that effect in Porter v. R. R. I. & St. L. R. R. Co., above cited from 76 Illinois. (See also Gordon v. Appeal Tax Court, 3 How. (U. S.) 133, and Judge Redfield's comment on this case in 2 Redf. on Railways, 453.) As to the extent of the power of the state to tax, see Providence Bank v. Billings, 4 Pet. 562, and Hamilton Co. v. Massachusetts, 6 Wall. 639. In the case in 4 Peters, Marshall, C. J., said: "All powers * * * over which the sovereign power of a state extends are subjects of taxation. The sovereignty of a state extends to everything which exists by its authority, or is introduced by its permission." (4 Pet. 563.) The same doctrine was declared in Osborne v. Bank of the United States, 9 Wheat. 738. From the foregoing cases, it would seem that there can be no doubt of the power of a state to tax the franchise at its assessed value. There may be more difficulty in arriving at its value than that of a parcel of land or personal chattels, but still its value may be estimated. When it is condemned for public use, the compensation to be paid can be fixed. As is justly said in Porter v. R. R. I. & St. L. R. R. Co., 76 Ill. 578: "We have never known it to be asserted that the value of a franchise is so indefinite and uncertain that it can not be made the measure of a recovery when it is wrongfully invaded; or that when it is taken and condemned for pubic use, it can not be ascertained what compensation shall be made to its owner. It is recognized in those respects as being capable of a definite valuation. * * * If its value may be ascertained for those purposes, it may as readily be ascertained for the purposes of taxation." As to value of franchises, and that they possess a value beyond that belonging to the tangible property of the corporation, see cases just above cited. (Commonwealth v. Hamilton Mfg. Co., 12 Allen 298, and Commonwealth v. Cary Improvement Co., 98 Mass. 23.)

In this state, the constitution having declared that franchises are property, and that all property in the state not exempt from taxation shall be assessed in proportion to its value, to be ascertained as provided by law (Const., art. xiii, § 1), it would seem to follow that the tax must be according to the valuation made by the officer appointed for that purpose. If the state can impose a tax on the franchise of a corporation in the nature of an excise or duty, it does not exclude the taxation by a valuation made by an assessor.

That such a franchise as that held by the appellant was taxable in this state, we think has been held by this court in two cases: Burke v. Badlam, 57 Cal. 594; and San Jose Gas Company v. January, 57 Cal. 614. * * *

When the matters in controversy in Burke v. Badlam originated, the legislature had acted in regard to the assessments of property, and enacted as follows:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock; nor shall any holder thereof be taxed therefor." (Pol. Code, § 3608.) (It may be remarked here that the constitutional validity of this section was affirmed in Burke v. Badlam. (See 57 Cal. 602.) * * * "The terms 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor;" and "the term 'personal property' includes everything which is the subject of ownership not included within the meaning of the term real estate."

[Each person (including corporations) also must furnish a statement of all property (including franchises) to the assessor, who is to enter the franchise and its value separate from the other property; the assessor is to turn this statement over to the board of supervisors, who is to equalize all assessments.] * * *

It appears from the record in this case that the board of supervisors, in the exercise of its power of equalization, assessed the franchise of the water-works by taking the aggregate of the market value of the shares of stock in the company on the 7th of March, 1881, and deducting therefrom the value of the real and personal property of the company, and held the difference to be the value of the franchise. The market value of the shares was shown to the board by the testimony of witnesses. Such a mode of arriving at the value of the franchise appears to have been adopted by the assessor in San José Gas Co. v. January, 57 Cal. 614, and this mode was held to be within the powers vested in the assessor. It was also impliedly approved as a correct mode in Burke v. Badlam, above cited. (See Commonwealth v. Hamilton Mfg. Co., 12 Allen 306.) * * *

There is a further point which we think it proper to notice. It is contended that good-will enters into and forms an element in the value of the shares of stock. No case has been produced to us, nor have we been able to find any holding or even intimating that this is so. We find no such element of value in the least hinted at, by any one who has written on the subject, nor has any such been called to our attention. We can not recognize any such element as giving value to shares in a trading corporation. It would be strange to predicate good-will as pertaining to or extending to an abstraction, to an "artificial being, invisible, intangible, and existing only in contemplation of law."

Our conclusion is that the board of supervisors, in its capacity of a board of equalization, had jurisdiction of the person and subject-matter in the matters involved in this cause, and the judgment of the court below is affirmed.

ROSS, MYRICK, MCKINSTRY, MCKEE and SHARPSTEIN, JJ., concurred.

MORRISON, C. J., took no part is this decision.

Note. See South Pacific R. Co. v. Orton, 32 Fed. Rep. 457, *infra*, p. 354, and §§ 441-3, 680-1, *infra*; 1901, Detroit Citizens' Ry. v. Detroit, 125 Mich. 675, 84 Am. St. R. 599.

Sec. 24. (2) And particularly: This primary franchise belongs to the members in their individual capacity rather than to the corporation itself, and is inalienable except by consent of the state.

THE STATE, EX REL. J. WARING, PLAINTIFF IN ERROR, v. THE GEORGIA MEDICAL SOCIETY, DEFENDANT IN ERROR.[1]

1869. IN THE SUPREME COURT OF GEORGIA. 38 Ga. 608–631; 95 Am. Dec. 408.

[Waring filed a petition for writ of mandamus, to restore him to membership in the Georgia Medical Society, upon the ground that the action of the society "in expelling him from membership and depriving him of his right and franchise as a corporator in said corporation is unconstitutional and contrary to law." The society had authority to make such a constitution and by-laws not repugnant to the laws of the state or the United States, and these provide (among other things) that members "shall be gentlemen of respectable social position;" and "any member who shall be guilty of ungentlemanly conduct during the session of the society, or who shall conduct himself, out of the society, in such a manner as would render him ineligible to membership, shall be expelled from the society according to the wishes of two-thirds of the members of the society present, provided that in every instance specific charges be set forth and handed to the individual at least one month before the society takes action thereon." The charges made were that Waring had become surety for Richard White, a *person of color*, under indictment for larceny, who had been elected clerk of the court, in opposition to the wishes of the entire respectable community; and that he had also become surety for certain other persons of color, who were charged with riot, in such manner as would render him ineligible to membership; also for charging for a dispensary prescription, which was allowed gratis by the city; also consulting with a physician not a member of the society, contrary to one of the rules forbidding this. Dr. Waring was given proper notice and expelled by the proper vote. The society answered, claiming the court had no jurisdiction, and also setting forth the facts as to the charges, notice and expulsion, as above given. Waring moved to quash this answer as being insufficient; the lower court overruled the motion, and Waring sued out his bill of exceptions to this court.]

[1] Statement of facts condensed; arguments omitted.

BROWN, C. J. 1. It was insisted, in this case, that the Georgia Medical Society was in existence long before it was incorporated, and that its objects were in no way changed by its application for and acceptance of its present charter from the state. This may be very true, but its legal responsibilities were changed by the acceptance of the charter. While it remained a voluntary society, the courts had no jurisdiction over it, if it violated no law of the state, and its members had no property in their membership which the law could protect. But its acceptance of the charter subjected it to the supervision of the proper legal authorities having jurisdiction in such cases: 4 Wheat. 674–5; 6 Conn. 544–5.

2. When the voluntary society accepted the charter, it became a private, civil corporation, and the corporators, then in being, acquired a property in the franchise, and every person who has since become a corporator has acquired a like property. The property which the corporator acquires is not visible, tangible property; but it is none the less property, because it is invisible and intangible. It is not a corporeal hereditament; but it is incorporeal. Blackstone, in his Commentaries, volume 2, page 21, says: That incorporeal hereditaments are divided into ten sorts; one of these consists of *franchises*. Bouvier, in his Law Dictionary, volume 1, page 593, says the word franchise has several meanings, one of which he gives as follows: "*It is a certain privilege conferred by grant from the government and vested in individuals. Corporations or bodies politic are the most usual franchise known to our law.*" The law books are full of the doctrine that persons may have a property in incorporeal hereditaments, franchises, etc. Property, says Bouvier, volume 2, page 381, is divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise and the like; the latter consists in *legal rights* as choses in action, easements and *the like*. Blackstone says, volume 2, page 37, it is likewise a franchise for a number of persons to be incorporated and subsist as a body politic, with power to maintain perpetual succession, and to do other corporate acts, and each *individual member* of such corporation is also said to have a franchise of freedom. *We think it well settled by these and other authorities, that a corporator in a private, civil corporation, has a property in the franchise, of which he can not be deprived without due process of law.*

3. It was insisted by the learned counsel for the plaintiff in error, that the ninth by-law of this corporation is unauthorized by the charter, and that the corporation is not justifiable in expelling a member for its violation; that to deprive a corporator of his property in the franchise under it is to deprive him of his property without due process of law. We think the ninth by-law a proper one in view of the objects of the society, and we hold that the charter conferred upon the corporation the power to ordain and establish it, and that they have the power to expel a member when a proper case arises under it.

But we hold that the society has not an uncontrollable discretion in its construction and enforcement. They can not, under pretext of

enforcing this rule, take personal or private revenge, or make it the instrument of religious intolerance, or political proscription. When a member feels that he is aggrieved or injured by the illegal or oppressive action of the body, it is his right to appeal to the courts for redress and protection; and it is the right and duty of the court to investigate such charges, when properly before it, and to judge of the legality of the action of the society in expelling a member or depriving him of any other legal right.

4. The rule of law on this subject is thus stated by Judge Blackstone, volume 1, page 381. The king being thus constituted by law, visitor of *all civil corporations*, the law has also appointed the place where he shall exercise this jurisdiction, which is the court of king's bench, where, and where only, all misbehaviors of this kind of corporations are inquired into and redressed, and all their controversies decided. In this state the same visitorial power of correcting the misbehaviors of these corporations, and deciding their controversies, is vested in the superior courts of the counties where they are located, which in England belongs to the king's bench. See 5 John. Ch. R. 335.

It was contended, with much zeal and ability, by the able counsel for the defendant in error, that mandamus is not the proper remedy, even if we admit that the rights of Dr. Waring have been infringed, or that he has been deprived of them by the illegal action of the society. The rule, as laid down by this court in a number of cases is that a person having a clear legal right, under the laws of this state, is entitled to the writ of mandamus, if he has no other remedy to enforce it. 4 Ga. 26 and 116, 12 Ga. 170, 26 Ga. 665.

But it is insisted that the code, section 3143, has changed this rule, and that mandamus does not now lie as a private remedy between individuals to enforce private rights. We do not think this section of the code was intended to deny the writ to the corporator, who is deprived of his rights by the corporation, when he has no other adequate remedy for their enforcement. *A corporation having been created, invested with certain powers, and charged with certain duties to be performed for the benefit of the public, is not a private individual in the sense of the word as used in said section of the code, and a corporator whose rights are withheld or violated by the corporation, who is without other remedy, is entitled to the writ.*

In the Commonwealth, ex rel., etc., v. The Mayor of Lancaster, 5 Watts 152, Gibson, C. J., says: "An *action* to enforce the right could not be maintained against the corporation because performance of a *corporate function* is not a duty to be demanded by action, and unless recourse could be had to the *functionary* in the first instance, the relator might have a cause for redress without a remedy." See 4 Ga. 44.

Here the discharge of a corporate duty is treated as an office or function, and the corporation as a functionary. In this sense, no doubt, the legislature, in the adoption of the Code, intended to treat them.

The object of this society, as cited in their charter, was "for the purpose of lessening the fatality induced by climate and incidental causes, and improving the science of medicine." The whole community have an interest in the success of this laudable undertaking; and if the functions conferred by the charter, for the benefit of the public, are not faithfully performed, and one of the corporators, who has no other adequate redress, is injured by the conduct of the corporation (the functionary), the courts will grant him relief by mandamus.

6. The record in this case shows no sufficient cause to justify the society in expelling Dr. Waring from his rights and privileges as a corporator. He was expelled for doing that which the law of this state not only authorizes but encourages. His offending consists in the fact that he became one of the sureties on the official bond of a colored citizen of his county, who had been elected clerk of the superior court of the county, by a majority of the legal votes cast at the election for that office, and in the further fact that he became surety on the bonds of certain other colored citizens who were charged with the offence of riot, for their appearance at court to answer the charge as the law directs. The very fact that the law requires the clerk of the superior court to give bond and security for the faithful discharge of his duties, is sufficient to justify any citizen of the county in becoming one of his sureties, and to protect him, in contemplation of law, from the imputation of having forfeited his position as a gentleman by so doing.

Again, it is not the object of law to punish citizens of this state, whether white or black, by imprisonment, for offenses of which they have never been convicted. When they are charged with violations of the penal code, the requirement of the law is, that they appear at the proper time and place, and answer the charge; and to secure such appearance, they are required to give bond and security, and it is only on failure to give the bond that they can be imprisoned. As innocent persons are often confined in prison under charges, because of their inability to give bond, the law favors bail whenever the offense is, by law, bailable. And the law favors this even in the case of the guilty, till the trial. This is not only best for the public, as it saves the tax-payers the expense of keeping them in jail, but is just to the accused, who receive the legal punishment for their crimes, if guilty, under the sentence of the court after legal conviction. How, then, does a citizen forfeit his corporate rights as a member of a civil corporation, or his position as a gentleman, by doing an act that is not only encouraged by the laws of his state, but is a positive public benefit?

But it is said Dr. Waring was not expelled from becoming surety on the bonds above mentioned, but for ungentlemanly conduct in the presence of the society. What ungentlemanly conduct? The ninth by-law requires that "specific charges" be set forth and handed to the accused at least one month before the society takes action thereon. What specific charges of ungentlemanly conduct in presence of the society, were ever handed to Dr. Waring? What did he say or do in

the presence of the society, to forfeit his position as a gentleman? The record is silent. That silence is significant. That which is material and is not averred by the society in their answer is presumed not to exist. No ungentlemanly conduct in presence of the society is set forth in their response, and this court must presume none existed.

Dr. Waring was convicted of the charges first mentioned in reference to the suretyship, and brought formally before the society and censured. To this illegal and unauthorized proceeding he submitted. But, not satisfied with this, at the next meeting of the society he was again brought up, and his resignation demanded, and he was given till the succeeding meeting to comply with the imperious and unauthorized demand. This he declined to do. And a preamble and resolutions were then passed, setting a future day when the society would vote on his expulsion for refusing to resign, and for discourteous behavior towards the society at two former meetings. In what the discourteous behavior consisted we are not informed by the record. In the meantime, however, the gracious privilege of avoiding expulsion by resignation was still held out to Dr. Waring. When the time came for the much-cherished object by the infliction of the extreme penalty of expulsion, Dr. Waring was at home sick, and unable to attend, but he wrote the society, disclaiming all intentional discourtesy to it or its members, and protested against the irregularity and illegality of the course resolved upon, as set forth in said preamble and resolutions. But all to no effect. His expulsion was predetermined, and that determination was executed. A more illegal or unjustifiable proceeding has seldom been brought before a court.

After argument had, and a thorough examination of this case, it is the unanimous judgment of this court that the judgment of the court below be reversed, and the judge of the superior courts of said county is hereby instructed and ordered to grant a peremptory mandamus, commanding and compelling the said "The Georgia Medical Society" to restore the said Dr. James J. Waring to all his rights and privileges as a corporator in said society.

Note. See, *infra*, p. 1171; Evans v. Philadelphia Club, 50 Pa. St. 107–127, and cases cited; and Belton v. Hatch, 109 N. Y. 593, 4 Am. St. 495, *infra*, p. 178. Also 1896, Board of Trade of Chicago v. Nelson, 162 Ill. 431, 44 N. E. 743; 1892, Spilman v. Supreme Council of Home Circle, 157 Mass. 128; 1887, Pitcher v. Board of Trade, 121 Ill. 412; 1844, Commonwealth, ex rel., v. Pike Beneficial Soc., 8 W. & S. (Pa.) 247; 1883, Medical & Surg. Soc. of Mont. Co. v. Weatherly, 75 Ala. 248, 253; 1875, Meyer v. Johnson, 53 Ala. 237, 325; 1878, Board of Trade v. People, 91 Ill. 80; 1863, Sayre v. Louisville, etc., Association, 1 Duval (Ky.) 143, 85 Am. Dec. 613; 1864, National M. F. Ins. Co. v. Yeomans, 8 R. I. 25, 86 Am. Dec. 610; 1855, Hiss v. Bartlett, 3 Gray 468, 63 Am. Dec. 768, note 773; 1857, Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665, note 677; 1866, Society v. Commonwealth, ex rel., 52 Pa. St. 125, 91 Am. Dec. 139; 1866, Dane v. Derby, 54 Maine 95, 89 Am. Dec. 722, note 736.

Sec. 25. Same.

FIETSAM v. HAY ET AL.[1]

1887. IN THE SUPREME COURT OF ILLINOIS. 122 Ill. 293–297, 3 Am. St. R. 492.

Appeal from the circuit court of St. Clair county.

Mr. Justice MULKEY delivered the opinion of the court:

The People's Bank of Belleville, incorporated under a special act of legislature, approved and in force March 27, 1869, having become insolvent on the 17th of April, 1878, made a general assignment of all its property and effects for the benefit of creditors. The assignee presented a petition to the county court of St. Clair county, at its March term, 1887, for leave to sell "all the rights, privileges, powers and immunities which were granted by the said act incorporating said bank." The judge of the county court being interested in the result of the proceeding, the venue was changed to the circuit court of St. Clair county, where, upon due consideration of the petition, that court entered an order dismissing the same. The present appeal is from the order of dismissal.

The correctness of the decision of the circuit court depends entirely upon whether the title to the franchise created and conferred by the bank charter passed as an asset of the bank, to the assignee, under the assignment. That its language is sufficiently comprehensive, and adequate to pass the franchise to the assignee, if, as matter of law, the bank could transfer it at all, we have no doubt. This is not questioned. The question, therefore, is whether a corporate franchise, in the absence of statutory authority, is in law capable of being assigned or transferred. Differently put, the question, as formulated by the parties themselves, is, "did the franchise of the said bank pass with the deed of assignment to the assignee as a salable asset of the said bank?"

The word "franchise" is often used in the sense of privileges generally, but in its more appropriate and legal sense the term is confined to such rights and privileges as are conferred upon corporate bodies by legislative grant. It is in the latter sense, alone, the word is now to be considered.

The franchise proposed to be sold is a corporate franchise, and the artificial body or political entity to which it pertains is what is known to the law as an aggregate corporation. Such a corporation has been well defined to be "an artificial being created by law, and composed of individuals who subsist as a body politic under a special denomination, with the capacity of perpetual succession, and of acting, within the scope of its charter, as a natural person." *Now, a franchise is nothing more than the right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the*

[1] Arguments omitted.

corporation's charter. This right of a body of men to be and act as an artificial person, without, as a general rule, incurring individual responsibility, is declared by Blackstone to be "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject." (2 Blackstone, 37.) Such right or franchise is defined by Bouvier to be "a certain privilege conferred by grant from government, and vested in individuals." (1 Bouvier, 545.) *Now, it is clear from these definitions, and from the very nature of a corporation, that a franchise or the right to be and act as an artificial body, vests in the individuals who compose the corporation, and not in the corporation itself.* This fact, we think, is not without significance in reaching a conclusion upon the main question to be determined, outside of the numerous authorities bearing directly on the subject.

It will be kept in mind that the corporate body, for purposes of ownership, and, indeed, for most purposes, has a distinct identity from that of the individual corporators. The latter may be wealthy, when at the same time the former is insolvent, and vice versa. *The corporation has no right to appropriate, sell or otherwise dispose of any of the property or effects of a corporator.* The relation of debtor and creditor may subsist between them in the same manner as between the company and other persons. The company's entire property may be swept away from it by sequestration, or other means, and yet its franchises will remain vested in the corporators, until they are either abandoned or forfeited to the state. All these propositions are familiar to the courts and the profession, and are all well sustained by authority.

If, then, the franchise is vested in and belongs to the corporators, and not to the corporation itself, how could the latter transfer or assign it to another? On the plainest of principles this could not be done without legislative authority for that purpose, and we find nothing, either in the statute or the company's charter, conferring such authority. While it is conceded the legislature might confer on the artificial body the power to sell or assign the franchise to strangers, yet this would be, in effect, to authorize it to commit a species of suicide, for it is manifest the corporation could not exist a moment after the franchise conferred upon its members had been transferred to others. Indeed, when we consider the attributes and essential elements of corporate existence, resulting from the grant of the franchise, and without which the artificial body could not accomplish the objects of its creation or perform the duties imposed upon it by law, the sale or assignment of the franchise without special legislative authority would seem to be wholly inadmissible. It is proposed here, it will be noted, to sell simply the franchise of the bank. Assuming this can be done, the question arises what would be the effect of such a sale? It clearly could not have the effect of making the purchasers, if more than one, an aggregate corporation, with the general banking powers conferred by the bank charter. To assert such a proposition would be simply startling; and yet, if in such case the purchasers would take anything at all, they certainly could not take less than the

right to be a banking corporation, with all the powers and privileges conferred by the charter, for these rights are of the very essence of the franchise; and consequently the one could not be thus acquired without, by the same act, securing the others—a view which, as already indicated, has no sanction in reason or authority.

While statements are to be found on this subject in some of the text-books, as well as in some of the decided cases, which can not be reconciled with the conclusion we have reached, yet we are clearly of opinion that a corporation, in the absence of statutory authority, has no right to sell or transfer its franchise or any property essential to its exercise, which it has acquired under the law of eminent domain. This proposition, in our judgment, is sustained both by reason and the decided weight of authority. Black et al. v. Delaware and Raritan Canal Co., 24 N. J. Eq. 455; Freeman on Executions, §§ 179, 180; Pearce on Railroads, 496–1; Jones on Mortgages, § 161; Rorer on Judicial Sales (2d ed.), 222; Archer v. Terre Haute and Indianapolis R. Co., 102 Ill. 493; Bruffett v. Great Western R. Co., 25 Ill. 353; Chicago and Rock Island R. Co. v. Whipple, 22 Ill. 105; Ottawa, Oswego and Fox River Valley R. Co. v. Black, 79 Ill. 262.

The circuit court having reached this conclusion, its order and judgment will be affirmed.

Judgment affirmed.

Note. 1867, Cleveland, etc., R. Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84; 1869, Miner's Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; 1887, Chicago Gas Light Co. v. People's Gas L. Co., 121 Ill. 530, 2 Am. St. 124; 1864, Caldwell v. Alton, 33 Ill. 416, 85 Am. Dec. 282; 1863, Story v. Plank Road Co., 16 N. J. Eq. 13, 84 Am. Dec. 134; 1862, People v. Railroad Co., 24 N. Y. 261, 82 Am. Dec. 295; 1859, Coe v. Railroad Co., 10 Ohio St. 372, 75 Am. Dec. 518; 1825, Ammant v. Turnpike Road, 13 S. & R. (Pa.) 210, 15 Am. Dec. 593; 1877, Hudson v. Cuero Land, etc., Co., 47 Tex. 56, 26 Am. Rep. 289; 1865, Commonwealth v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672, *infra*, p. 1070; 1862, Bardstown & L. R. Co. v. Metcalfe, 4 Met. (Ky.) 199, 81 Am. Dec. 541, *infra*, p. 1074; 1893, Brunswick G. L. & Co. v. United Gas, etc., Co., 85 Me. 532, 35 Am. St. R. 385, note, p. 390; Jones v. Guarantee Co., 101 U. S. 622, *infra*, p. 1078; 1872, State of Ohio, *ex rel.*, etc., v. Sherman, 22 Ohio St. 411, *infra*, p. 1082; 1892, Overton Bridge Co. v. Means, 33 Neb. 857, 29 Am. St. R. 514; 1901, Detroit Citizens' Ry. Co. v. Detroit, 125 Mich. 673, 84 Am. St. R. 589.

Sec. 26. (3) The secondary franchises and privileges as well as all other rights except the primary franchise, belong to the corporation, or artificial being, rather than to the individual members.

MEMPHIS AND LITTLE ROCK RAILROAD COMPANY v. RAILROAD COMMISSIONERS.[1]

1884. IN THE SUPREME COURT OF THE UNITED STATES. 112 U. S. 609–623.

[This was a bill in equity filed in the chancery court of Pulaski county, Arkansas, seeking to enjoin the board of railroad commis-

[1] Statement of facts condensed, arguments omitted.

sioners of the state from appraising, for the purposes of taxation, any part of the property of the plaintiff in error, on the ground that it is exempted from taxation by a contract with the state contained in its charter of incorporation. The supreme court of the state, on appeal, affirmed the decree of the chancery court dismissing the bill. That decree of the supreme court was brought here by writ of error, for review, on the allegation that it enforced a law of the state impairing the obligation of a contract in violation of the rights of the plaintiff in error under the constitution of the United States.

The Memphis and Little Rock Railroad Company was incorporated in 1853, with power to borrow "money on the credit of the company, and on the mortgage of its charter and works" (§ 9); and its capital stock was to be exempt from taxation until its road paid a dividend of 6 per cent., and its road, fixtures, etc., were to be exempt from taxes until twenty years after it was completed. (Sec. 28.) At the time of its incorporation the constitution of Arkansas permitted corporations to be created by special acts, and there was no restriction as to the power to exempt such corporations from taxation. The supreme court of the state, in Oliver v. Memphis and Little Rock Railroad Company, 30 Ark. 128, had held that the exemption from taxation in the charter of this road was a contract between it and the state, that was not to be impaired. The railroad company in 1860 issued its bonds, secured by mortgage covering "the charter by which said company was incorporated and under which it was organized, and all the rights and privileges and franchises thereof," and also all lands, etc., belonging to said company. October 13, 1874, a new constitution of the state went into effect providing that corporations should be formed only under general laws, and no special act should be passed conferring corporate powers; that all property should be taxed according to its true value; that all laws exempting from taxation (except churches, etc., especially named and not including railroad companies) should be void; that the power so to tax corporations should never be surrendered or suspended by any contract on the part of the state, and that the legislature shall not pass any general or special law for the benefit of any corporation then existing, except upon condition that such corporation should thereafter hold its charter subject to the provisions of the constitution.

December 9, 1874, the legislature passed a law "whereby the purchasers of a railroad of any corporation of the state, and their associates, acquiring title thereto by virtue of a judicial sale, or of a sale under a power contained in a mortgage or deed of trust, were authorized to organize themselves into a body corporate, vested with all the corporate rights, liberties, privileges, immunities and franchises of and concerning the railroad so sold, not in conflict with the constitution of the state, as fully as the same were held, exercised and enjoyed by the corporation before such sale." A certificate of such organization was to be filed with the secretary of state. The road was not completed till November, 1874. In 1876, a bill to foreclose the mortgage was brought by the trustees under the same, and a de-

cree rendered, ordering a sale embracing the property, franchises and charter of said Memphis and Little Rock Railroad Company, and a sale was so made to certain trustees for the bondholders. In April, 1877, these bondholders organized themselves into a company under the name of "The Memphis and Little Rock Railroad Company as reorganized," and a few days later, the trustees named in the sale, conveyed to said reorganized company "the property and franchises, including the charter of 1853," and under this it claims exemption from taxation in any way different from the provisions of the charter of 1853.]

Mr. Justice MATTHEWS delivered the opinion of the court. [After reciting the facts substantially as above stated, he continued:]

The case of the plaintiff in error rests entirely upon the words of the ninth section of the act of incorporation of the Memphis and Little Rock Railroad Company of January 11, 1853, by which it was empowered to borrow money "on the credit of the company and on the mortgage of its charter and works." It is argued that these words confer power upon the company to convey to its bondholders, by way of mortgage and on foreclosure, to purchasers absolutely, all the property of the company, and all its franchises, including the franchise of becoming and being a corporation, in the sense of acquiring the right to organize as such under the act as successor to, and substitute for, the original company, precisely as if the act had named them as corporators and endowed them with the corporate faculty. And this being assumed, it is thence inferred that the exemption contained in section 28 of the act applies to the substituted corporation as though no change of corporate existence had taken place; and thus, it is insisted, the case is taken out of rule of decision established in Morgan v. Louisiana, 93 U. S. 217; Wilson v. Gains, 103 U. S. 417, and Louisville and Nashville R. Co. v. Palmes, 109 U. S. 244. According to the principle of those decisions, the exemption from taxation must be construed to have been the personal privilege of the very corporation specifically referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor. This salutary rule of interpretation is founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirement of the grants, construed *strictissimi juris*.

It is not claimed that the assignment of the charter, by way of mortgage and subsequent judicial sale, constituted the purchasers to be the identical corporation that the mortgager had been; for that would involve an assumption of its obligations and debts as well as an acquisition of its privileges and exemptions; but, it is insisted, that it resulted in another corporation in lieu of the original one, entitled to all the provisions of the charter, by relation to its date, as though it had been originally organized under it.

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But such a construction of the words, authorizing a mortgage of the

charter and works of the company, is, in our opinion, beyond the intention of the law and altogether inadmissible.

There is no express grant of corporate existence to any new body. At the time when this charter was granted, in 1853, there was no general law in existence in Arkansas authorizing the formation of corporations. All such grants were by special act. Neither was there any law authorizing the purchasers of railroads at judicial sale under mortgages of the property and franchises of the company, to organize themselves into corporate bodies, such as was first passed in 1874. There is not in the act of January 11, 1853, for the incorporation of the Memphis and Little Rock Railroad Company, any reference to such a right as vested in the mortgage bondholders or other purchasers at a sale under a foreclosure of the mortgage, nor is there any mode or machinery prescribed in the act for such an organization. The desired conclusion rests entirely on the inference deduced from the mortgage of the charter, and is an attempt to create a corporation by a judicial implication. But, as was said by this court in Central Railroad and Banking Co. v. Georgia, 92 U. S. 665, 670, "it is an unbending rule that a grant of corporate existence is never implied. In the construction of a statute every presumption is against it."

The application of this rule is not avoided by the claim that the present is not the case of an original creation of a corporate body, but the transfer, by assignment of a previously existing charter and of the right to exist as a corporation under it. The difference is one of words merely. The franchise of becoming and being a corporation, in its nature, is incommunicable by the act of the parties and incapable of passing by assignment. "The franchise to be a corporation," said Hoar, J., in Commonwealth v. Smith, 10 Allen 448, 455, "clearly can not be transferred by any corporate body of its own will. Such a franchise is not, in its own nature, transmissible." In Hall v. Sullivan Railroad Co., 21 Law Reporter 138 (2 Redfield's Am. Railway Cases 621; 1 Brunner's Collected Cases 613), Mr. Justice Curtis said: "The franchise, to be a corporation, is, therefore, not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected." No such positive provision is contained in the act under consideration, and no mode for effecting the organization of a series of corporations under it is pointed out, either in the act itself or in any other statute prior to that of December 9, 1874.

The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. *The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation be-*

longs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises. If, in the present instance, we suppose that a mortgage and sale of the charter of the railroad company created a new corporation, what becomes of the old one? If it abides for the purpose of responding to obligations not satisfied by the sale, or of owning property not covered by the mortgage nor embraced in the sale, as it may well do, and as it must if such debts or property exist, then there will be two corporations coexisting under the same charter. For, "after an act of disposition which separates the franchise to maintain a railroad and make profit from its use, from the franchise of being a corporation, though a judgment of dissolution may be authorized, yet, until there be such judgment, the rights of the corporators and of third persons may require that the corporation be considered as still existing." Coe v. Columbus, Piqua and Indiana Railroad Co., 10 Ohio St. 372, 386, per Gholson, J.

If, as required by the argument for the plaintiff in error, we regard and treat the franchise of being a corporation as an incorporeal hereditament, and an estate capable of passing between parties by deed, or of being charged by way of mortgage and of being sold under a power or by virtue of judicial process, the logical consequences will be found to involve insuperable difficulties and contradictions. In the present case, for example, after the execution of the first mortgage, we should have the railroad company continuing as a corporation *in esse*, and the trustees for the bondholders, or their beneficiaries, or assigns, a corporation *in posse;* and, after condition broken, the company would hold the title to its own existence as a mere equity of redemption. That equity it makes the subject of a second mortgage, and, in default, the beneficiaries under the power of sale became purchasers of the franchise, and organize themselves, by virtue of it, into the Memphis and Little Rock Railway Company. The latter can hardly claim the status of a corporation at law, as the legal title to the franchise of being a corporation had never passed to it, on the supposition that it might pass by a private grant; and, if a corporation at all, it could only be regarded as the creature of equity, according to the analogy of equitable estates, a nondescript class hitherto unknown in any system of law relating to the subject.

It finally was displaced by the judicial sale, under which the plaintiff in error organized as successor to both. In the meantime, the original corporation has never been dissolved, and, for all purposes not covered by the mortgage, still maintains an existence as a corporate body, capable of contracting, and of suing and being sued. A conception which leads to such incongruities must be essentially erroneous.

If we concede to the argument for the plaintiff in error the position, that the language used, which authorizes the mortgage of the charter, may be taken in a literal sense, still the assignment would transfer it,

in the very state in which it might be at the date of the transfer. But at that date the only corporation which the charter provided for had already been organized. The only powers conferred upon corporators to that end had already been exercised and exhausted. The bondholders, under the mortgage, and their assignees, the purchasers at the sale, therefore took, and could take, nothing else than the charter, so far as it remained unexecuted, with such franchises and powers as were capable of future enjoyment and activity, and not such as, having already spent their force by having been fully exerted, could not be revived by a conveyance. This would include, by the necessity of the case, the franchise to organize a corporation, which can only be exerted once for all; for the simple act of organization exhausts the authority, and, having once been effected, is legally incapable of repetition.

It is a mistake, however, to suppose that the mortgage and sale of a charter by a corporation, in any proper sense which can be legally imputed to the words, necessarily conveys every power and authority conferred by it, so far, at least, as to vest a title in them, as franchises, irrevocable by reason of the obligation of a contract. In many, if not in most, acts of incorporation, however special in their nature, there are various provisions which are matters of general law and not of contract, and are, therefore, subject to modification or repeal.

Such, in our opinion, would be the character of the right in the mortgage bondholders, or the purchasers at the sale under the mortgage, to organize as a corporation, after acquiring title to the mortgaged property, by sale under the mortgage, if, in the charter under consideration, it had been conferred in express terms, and particular provision had been made as to the mode of procedure to effect the purpose. It would be matter of law, and not of contract. At least, it would be construed as conferring only a right to organize as a corporation, according to such laws as might be in force at the time when the actual organization should take place, and subject to such limitations as they might impose. It can not, we think, be admitted that a statutory provision for becoming a corporation *in futuro* can become a contract, in the sense of that clause of the constitution of the United States which prohibits state legislation impairing its obligation, until it has become vested as a right by an actual organization under it, and then it takes effect as of that date, and subject to such laws as may then be in force. Such a contract, so far as it seems to assume that form, is a provision merely that, at the time, or on the happening of the event specified, the parties designated may become a corporation according to the laws that may then be actually in force. The stipulation, whatever be its form, must be construed as subject and subordinate to the paramount policy of the state, and to the sovereign prerogative of deciding, in the meantime, what shall constitute the essential characteristics of corporate existence. The state does not part with the franchise until it passes to the organized corporation; and, when it is thus imparted, it must be what the government is then authorized to grant and does actually confer.

It is immaterial that the form of the transaction is that of a mort-

gage, sale or other transfer *inter partes* of the franchise to be a corporation. "The real transaction, in all such cases of transfer, sale or conveyance," as was said by the supreme court of Ohio in the case of The State v. Sherman, 22 Ohio St. 411, 428, "in legal effect, is nothing more or less, and nothing other, than a surrender or abandonment of the old charter by the corporators, and a grant *de novo* of a similar charter to the so-called transferees or purchasers. To look upon it in any other light, and to regard the transaction as a literal transfer or sale of the charter, is to be deceived, we think, by a mere figure or form of speech. The vital part of the transaction, and that without which it would be a nullity, is the law under which the transfer is made. The statute authorizing the transfer and declaring its effect is the grant of a new charter couched in a few words, and to take effect upon condition of the surrender or abandonment of the old charter; and the deed of transfer is to be regarded as mere evidence of the surrender or abandonment."

It is, of course, the law in force at the time the transaction is consummated and made effectual that must be looked to as determining its validity and effect. This is the principle on which this court proceeded in deciding the case of Railroad Co. v. Georgia, 98 U. S. 359. The franchise to be a corporation remained in, and was exercised by, the old corporation, notwithstanding the mortgage of its charter, until the new corporation was formed and organized; it was then surrendered to the state, and by a new grant then made passed to the corporators of the new corporation, and was held and exercised by them under the constitutional restrictions then existing.

Our conclusions, then, are that the exemption from taxation contained in the 28th section of the act of January 11, 1853, was intended to apply only to the Memphis and Little Rock Railroad Company as the original corporation organized under it; that it did not pass by the mortgage of its charter and works, as included in the transfer of the franchise to be a corporation, to the mortgagees or purchasers at the judicial sale; that the franchises embraced in that conveyance were limited to those which had been granted as appropriate to the construction, maintenance, operation and use of the railroad as a public highway and the right to make profit therefrom; and that the appellant, not having become a corporate body until after the restrictions in the constitution of 1874 took effect, was thereby incapable in law of having or enjoying the privilege of holding its property exempt from taxation.

The decree of the supreme court of Arkansas is accordingly affirmed.

Note. *Power to mortgage franchises must be expressly given, or it does not exist.* 1856, Pierce v. Emery, 32 N. H. 484; 1859, Coe v. C., C., etc., R. Co., 10 O. S. 372; 1858, Lauman v. Lebanon Val. R., 30 Pa. St. 42; *infra*, p. 1081; 1875, Daniels v. Hart, 118 Mass. 543; 1888, People v. Cook, 110 N. Y. 443; 1890, Snell v. City, 133 Ill. 413, 8 L. R. A. 858, 24 N. E. 532; *contra*, 1857, Hall v. Sullivan R., 11 Fed. Cas. 257 (No. 5,948); 1863, Miller v. Rutland, etc., R. Co., 36 Vt. 452; 1862, Bardstown, etc., R. Co. v. Metcalfe, 4 Met. (Ky.) 199, *infra*, p. 1074; 1899, Mich. Tel. Co. v. St. Joseph, 121 Mich. 502, 80 Am. St. R. 520.

The legislature may expressly authorize the mortgage of the franchise. 1864, Atkinson v. Marietta, etc., R. Co., 15 O. S. 21; 1866, East Boston, etc., R. Co. v. East. R. Co., 13 Allen (Mass.) 422.

Exemption from taxation, effect of transfer. 1896, Pearsall v. R. Co., 161 U. S. 646; *infra*, p. 1413; 1894, Keokuk R. Co. v. Missouri, 152 U. S. 301; 1888, Railroad Company v. Commw., 87 Ky. 661; 1884, Railroad Co. v. Berry, 44 Ark. 17.

Sec. 27. (4) When a franchise is offered by the state and accepted by those to whom it is offered, it is in the nature of a grant or executed contract.

1789, BULLER, J., in King v. Passmore, 3 T. R. 246. "And I do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of incorporation to be a compact between the crown and a certain number of subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place. Now, if those persons have so far violated their trust by negligence or misconduct that they are no longer capable of governing the place, there is an end of the compact. The ground of the charter was the government of the place, and when that can not be carried on, I see no reason why the crown can not grant another charter to a different set of persons."

Note. See also: 1694, Philips v. Bury, 1 Ld. Raym. 5, s. c. 2 T. R. 346; 1815, Terrett v. Taylor, 9 Cranch (U. S.) 43.

Sec. 28. Same.

WALES, TREASURER, ETC., v. STETSON.[1]

1806. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 2 Mass. 143–146, 3 Am. Dec. 39.

The declaration was in trespass and contained two counts. The first was for passing the turnpike gate without payment of the legal toll; and the second was for cutting down the gate.

The parties submitted the cause to the court on a statement of facts, in substance as follows:

That the corporation was duly authorized by law to make the road, and, when made and approved by the court of sessions for the county of Norfolk, to erect a gate thereon, near the dwelling-house of Joseph Hunt; that the road was so made and approved; that by the act of incorporation, "If any person shall cut, break down, or otherwise injure or destroy the said turnpike gate, or shall forcibly pass, or attempt to pass, by force without first paying the legal toll at such gate, such person shall forfeit and pay a fine not exceeding $50, nor less than $5, to be recovered by the treasurer of said corporation, to their use in an action of trespass."

That the gate was erected on a part of the turnpike road where was before an ancient public highway; that it was near the house of Joseph Hunt, but that it might have been placed nearer to the said house, and in a part of the turnpike road which was not before a public highway.

That said Stetson did, on the twenty-ninth day of March, 1806,

[1] Arguments omitted.

forcibly pass the said gate without payment of toll, and in the evening of said day did cut down said gate.

If, upon these facts, the court are of opinion that the corporation had a right by law to erect said gate at the place where it was erected, then the defendant agrees to be defaulted; if otherwise the plaintiff is to become nonsuit.

The opinion of the court was delivered by PARSONS, C. J. After considering the several points made in this cause by the counsel, we are satisfied that the question submitted must be decided according to the legal construction of the act incorporating the proprietors of this turnpike. We are not prepared to deny a right in the general court to discontinue by statute a public highway. It is an easement common to all the citizens, who are represented in the legislature. The authorizing of the erection of bridges over navigable waters is, in fact, an exercise of a similar right. *We are also satisfied that the rights legally vested in this, or in any corporation, can not be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation.*

In the consideration of the provisions of any statute, they ought to receive such a reasonable construction, if the words and subject-matter will admit of it, as that the existing rights of the public, or of individuals, be not infringed. And we are of opinion that this act of incorporation reasonably admits such construction. The corporation had a right to make the turnpike over such parts of the old road as lay in their way. This affects no existing rights, as the easement remains. But before we construe the statute as giving an authority to obstruct a former highway by erecting a gate thereon, it should appear that such construction is necessary to give a reasonable effect to the statute. In this case no such necessity appears; but from the case as stated it appears that the corporation might have exercised their right to erect a gate, and to receive the toll, as empowered by the statute, without impeding the travel on the old highway. The statute authorizes the corporation to erect a gate on the turnpike road near the dwelling-house of Joseph Hunt; and it is agreed in the case that a gate might have been erected on the turnpike, and near the dwelling-house of J. Hunt, and not upon any part of the old highway. This gate being on the old highway is a public nuisance, and the defendant had a right to abate it. Let the plaintiff be called.

Note. 1853, State Bank of Ohio v. Knoop, 16 How. (U. S.) 369; 1854, Thorpe v. Rutland & Bur. R. Co., 27 Vt. 140; 1819, Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, *infra*, p. 708; 1857, Nichols v. Somerset, etc., R. Co., 43 Me. 356; 1805, Trustees v. Foy, 1 Murphy (N. C.) 58, 3 Am. Dec. 672, *supra*, p. 34; 1855, Dodge v. Woolsey, 18 How. (U. S.) 331, *supra*, p. 88; 1867, Zabriskie v. Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617, *infra*, p. 1466; 1850, Commonwealth v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450, *infra*, p. 417; 1862, Durfee v. Old Colony R. Co., 5 Allen (Mass.) 230, *infra*, p. 1462; 1872, Yeaton v. Bank of Old Dominion, 21 Grattan (Va.) 593, *infra*, p. 750; 1872, Tomlinson v. Jessup, 15 Wallace (U. S.) 454, *infra*, p. 754; 1864, Hawthorne v. Calef, 2 Wallace (U. S.) 10, *infra*, p. 752; 1856, White Mountain R. Co. v. Eastman, 34 N. H. 124, *infra*, p. 758. *Compare*, 1809, Currie v. Mut. Ass. Soc., 4 Henning & Munf. (Va.) 315.

Sec. 29. (5) These franchises are property, and can not be taken without cause, but may be forfeited for misuser or nonuser.

1691. HOLT, J., in King v. Mayor of London, Show. 280. "I am of the opinion that a corporation may be forfeited, if the trust be broken, and the end for which it is instituted be perverted."

HIGGINS ET AL. v. DOWNWARD.[1]

1888. IN THE COURT OF ERRORS AND APPEALS OF DELAWARE. 8 Hous. (Del.) 227–257, 40 Am. St. Rep. 141.

SAULSBURY, Chancellor. "A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as the single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyance for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use." Chief Justice Marshall's opinion in the case of College v. Woodward, 4 Wheat. 626. A franchise is a certain privilege conferred by grant from the government, and vested in individuals. Corporations or bodies politic are the most usual franchises known to our law. Bouv. Law Dict., 545. By section 17, article 2, of the constitution of this state, it is declared that "no act of incorporation, except for the renewal of existing corporations, shall be hereafter enacted without the concurrence of two-thirds of each branch of the legislature, and without a reserved power of revocation by the legislature; and no act of incorporation which may be hereafter enacted shall continue in force for a longer period than twenty years without the re-enactment of the legislature, unless it be an incorporation for public improvement."

The Wilmington and Reading Railroad Company was a private corporation for public improvement, and therefore its existence was not limited to the period of twenty years under this provision of the constitution. There was no time fixed by positive provision in the charter of the Wilmington and Reading Railroad Company when the corporation should cease to exist. Had there been, the corporation, in the absence of a renewal of its charter before that period, would

[1] Facts sufficiently stated in the opinion of the court. Arguments, and opinion of Comegys, J., concurring, omitted.

have become dissolved without either a representative or the possibility of one, as no provision is made by our laws for a representative in such a case; and at the instance of its dissolution the debts due to it would have become extinguished, not the right to or the remedy for the debts suspended, merely, but the debt itself annihilated. Bank v. Lockwood's Adm'r, 2 Har. (Del.) 14. A judgment, being No. 181 to the November term, 1869, was recovered by the Wilmington and Reading Railroad Company, a corporation then existing under the laws of Delaware and Pennsylvania, against the defendants. A *fi. fa.* was issued, being No. 224 to the November term, 1870, on this judgment, and levy made on goods and chattels. Subsequent executions were issued on this judgment, the last being an *alias vend. exp.*, No. 92, to September term, 1887. On May 29, 1886, the judgment was marked for the use of the Wilmington and Northern Railroad Company, by the direction of the attorney of the plaintiff, and the judgment was afterwards, on June 12, 1886, marked for the use of John C. Higgins by direction of the president of the Wilmington and Northern Railroad Company. The defendants allege that at or about the year 1877 the Wilmington and Reading Railroad Company had ceased to have any legal existence as a corporation, or any right to perform or do any act whatever, and that the said judgment which had been recovered by it became void and of no effect.

The sixth reason assigned for setting aside the sheriff's sale is that the transfers or assignments alleged to have been made by indorsements on the record, and by and through which the said John C. Higgins claims title thereto, were illegal, unauthorized and void, and ineffectual to vest in said John C. Higgins any right or title whatever. This reason, so far as it relates to the authority of the attorney directing the judgment to be marked to the use of the Wilmington and Northern Railroad Company is not before us, exceptions thereto having, for the sake of expediting the hearing of the questions reserved, been abandoned, so that the real and only question before us is, was the Wilmington and Reading Railroad Company dissolved by the act in relation thereto passed February 22, 1877? Or, in other words, did the legislature, by passing that act, revoke the charter of the Wilmington and Reading Railroad Company? On the 3d of March, 1868, the Wilmington and Reading Railroad Company executed a mortgage upon its road, etc., for the payment of money. A suit was afterward instituted in the United States Circuit Court for the foreclosure of this mortgage. The final decree in the case was made April 25, 1876, directing the sale by the trustees of the railroad and property. The sale was made under the decree November 4, 1876. The deed made by the trustees to the purchasers conveyed "the railroad of the Wilmington and Reading Railroad Company, extending from a point on the Philadelphia and Reading Railroad at or near Birdsboro, in the county of Berks, state of Pennsylvania, to the city of Wilmington, in the state of Delaware, with all the rights, privileges, immunities and franchises of the said Wilmington and Reading Railroad Company, under any and all grants of the state of Pennsyl-

vania, but exclusive of the franchises granted by the state of Delaware." These franchises granted by the state of Delaware were not included in the mortgage for which foreclosure was decreed, and, of course, were not included, but excluded, by the decree of foreclosure. They were not sold by the trustees to the purchasers of said road. Of course, therefore, the purchasers of said Wilmington and Reading Railroad did not by such sale become entitled to said franchises granted by the state of Delaware.

On the 22d of February, 1877, the legislature of Delaware passed an act to incorporate the purchasers of the Wilmington and Reading Railroad. This act, after reciting in its preamble that the railroad of the Wilmington and Reading Railroad Company, with its appurtenances, was sold in pursuance of a mortgage executed by said company under authority of laws of this state, and that it was necessary to the proper enjoyment of the rights acquired by said sale that the purchaser should be incorporated with authority to consolidate with any company organized or to be organized under the laws of the state of Pennsylvania, operating such portion of the road so sold as is situated within the state of Pennsylvania, incorporated the persons purchasing the said Wilmington and Reading Railroad, under a decree of the circuit court of the United States for the eastern district of Pennsylvania, a body politic and corporate, by the name of the "Wilmington and Northern Railroad Company." By this act the company were vested with all the right, title, interest, property, possession, claim and demand at law or in equity of, in and to such railroad, to wit, the railroad of the Wilmington and Reading Railroad Company, with its appurtenances, and with all the rights, powers, immunities, privileges and franchises of the corporation as whose property the same was sold, and which may have been granted thereto or conferred thereupon by any act or acts of assembly whatsoever in force at time of such sale. These franchises, granted by the state of Delaware, not being included in the mortgage executed by the Wilmington and Reading Railroad Company, and consequently not sold under the decree of foreclosure thereof made by the circuit court of the United States for the eastern district of Pennsylvania, the purchasers at such sale acquired no title thereto, and no property therein. If they acquired any such title or property it could only have been under and by virtue of the act to incorporate the purchasers of the Wilmington and Reading Railroad before referred to. This act purported to vest such purchasers, among other things, with the privileges and franchises of the corporation as whose property the same was sold, and which may have been granted thereto or conferred thereupon by any act or acts of assembly whatever in force at time of such sale.

The condition of a corporation whose charter has expired is not the same as that of a corporation which has failed to elect its officers, and, as the consequence of that failure, is rendered inactive. The life of the one is out of it by its own constitution, and not from a failure to do what its charter enabled them to do, to give them active being; the other was entitled by its charter to a continued active life,

but it has failed to continue that activity by the election of its necessary officers. Its active powers, but not its being, are gone. The one is dead; the other is dormant. The principles of law which apply to the rights of a corporation thus dormant or disabled are not the same as those which are applicable to the rights of a corporation which is dissolved, or civilly dead. In the former case debts due are extinguished; not so in the latter case. No judgment of ouster or other similar judgment, or judgment of like effect, has ever been judicially declared against the Wilmington and Reading Railroad. The act to incorporate the purchasers of the Wilmington and Reading Railroad did not in express terms revoke the charter of the Wilmington and Reading Railroad, nor necessarily deprive the latter of its franchises granted by the acts of assembly of the state of Delaware. The Wilmington and Reading Railroad had never forfeited its charter as judicially ascertained by any judgment of a court of law; and even the former act did not so declare. *A franchise is property, and it can not wantonly or of whim be taken away by a legislative act and transferred to another.*

The act of February 22, 1877, must receive a reasonable interpretation. It must be interpreted to mean that which the legislature of the state of Delaware had a right to do, and not that which the legislature had not a right to do. The rights, powers, immunities, privileges and franchises conferred by the legislature on the purchasers of the Wilmington and Reading Railroad must be interpreted to be such rights, powers, immunities, privileges, and franchises as those conferred by the legislature on the Wilmington and Reading Railroad by any act or acts of the general assembly which the Delaware legislature had the right to confer, and to vest the same in said purchasers, because the legislature had the right to make such a grant; but *the legislature had no authority to take from the Wilmington and Reading Railroad rights, powers, immunities, privileges and franchises, the same never having been judicially declared forfeited, nor revoked constitutionally by legislative authority. If the legislature had revoked the charter of the Wilmington and Reading Railroad, it could have granted rights, powers, immunities, privileges and franchises of the same nature and kind as those which the Wilmington and Reading Railroad had theretofore possessed, but not the same identical rights, powers, immunities, privileges and franchises, because the charter being revoked, it would follow that the rights, powers, immunities, privileges and franchises ceased and determined, and were not the subject of transference to another company by legislative grant.* The words, "of the corporation as whose property the same was sold, and which may have been granted thereto or conferred thereupon by any act or acts of assembly whatsoever in force at the time of such sale," must be interpreted as having relation to what was sold, and not to that which was not sold, and could not have been legally sold under the said decree of foreclosure. According to this interpretation, the words used would have force and effect. A con-

trary interpretation, would render the words of the act of assembly inoperative and void.

It appears from the case stated that the judgment in respect to which controversy exists in this case was on May 29, 1886, marked for the use of the Wilmington and Northern Railroad Company by Victor Du Pont, attorney for plaintiff, and on June 12, 1886, for the use of John C. Higgins, by direction of H. A. Du Pont, president of the Wilmington and Northern Railroad Company. It also appears in like manner that there had been no meeting of the stockholders of the Wilmington and Reading Railroad Company after the sale thereof under the decrees of foreclosure aforesaid. If these facts be so, the Wilmington and Reading Railroad as a corporation was not dead, nor the debts due it extinguished, so far, at least, as it existed under the laws of the state of Delaware. In this respect it was only dormant; capable of being revived, but incapable of action without such revival. Its life or death rested with the legislature. The views above expressed in reference to extinct and dormant corporations are in accordance to the opinion of the court in the case of Bank v. Lockwood's Adm'r. "There is," says Morawetz (Priv. Corp., §§ 1002, 1003), "a broad and fundamental distinction between the dissolution of the corporation and the loss of its franchise or legal right to exist. Much confusion may be avoided," he says, "by bearing in mind this distinction." Again, he says: "If the charter of a corporation limits its existence to a definite period of time, the franchise or right to exist would expire at the time limited." Again: "*The franchise to exist and carry on business as a corporation continues indefinitely unless the time of its duration is expressly limited in the grant.*" *If the corporation should be guilty of any wrongful act, or neglect of duty, which would give the state a right to declare the franchise forfeited, the franchise would nevertheless continue until the forfeiture has been claimed and enforced by the state through the proper legal proceedings. The commission of a wrongful act or neglect of duty by a corporation would evidently not per se put an end to the actual existence of the corporate association. After a long-continued non-user it may be presumed that a corporation has surrendered its franchises to the state; but the mere fact that a corporation has been without officers or organization, and has performed no corporate acts during a number of years, does not put an end to its franchises, although this may be a good ground for declaring them forfeited by judicial proceedings.*"

The charter of a corporation does not expire by reason of the omission or commission of acts on the part of the company for declaring a forfeiture, but the franchises continue in full force until the penalty of forfeiture is claimed by the state granting the franchise, and this can be done only through a legal proceeding by which the cause of forfeiture is judicially ascertained, and not in a purely collateral proceeding. Says Pierce (R. R. 11): "The non-use or misuse of its franchises by a corporation, or its breach of the conditions on which its duration is by the law of its creation made to depend, is a cause of forfeiture. Such defaults, however, do not of themselves work a

forfeiture, but they take effect only when judicially determined in a direct proceeding instituted for the purpose. A non-user or misuser is a ground of forfeiture, although not expressly declared to be such by statute." The same writer says: "A cause of forfeiture which has not been judicially declared in a direct proceeding can not be taken advantage of collaterally." The legal modes of proceeding against a corporation for usurpation—non-user or misuser of a franchise—is *scire facias*, or an information in the nature of a quo warranto, each prosecuted at the instance and on behalf of the state.

What becomes of the corporate property of a corporation in the event of its dissolution? The court in the case of Bank v. Lockwood's Admr's, before referred to, say that on the dissolution of a corporation as by the expiration of the period of its charter, its real estate reverts to the grantor, its personal estate to the people, and the debts due to it are extinguished. This is doubtless so at the common law, and in a proceeding at law as a *scire facias* on a judgment; but the more modern doctrine upon this subject seems to be that the capital of a corporation becomes upon its dissolution a fund to be administered in equity for the payment of its creditors, and afterwards for distribution among its stockholders. The creditors have a lien on the assets, and may follow them into the hands of stockholders and persons who are indebted to the corporation. The rights of stockholders in the assets are subordinate to those of creditors. See Pierce R. R. 13, and authorities cited. In my opinion, when the constitution of this state speaks of the reserved power of revocation of a corporation by the legislature, it means an express revocation by the legislature, and not otherwise.

It will be seen from what I have already said that the judgment set forth in the case stated, being No. 181 to the November term, 1869, of the superior court, whether it be a valid and subsisting judgment or not, did not pass to the Wilmington and Northern Railroad Company by virtue of the acts of assembly, mortgage foreclosure proceeding, sale and conveyance recited in the case stated, so as to give the said Wilmington and Northern Railroad Company the right to enforce said judgment by execution issued against the defendants, and that John C. Higgins, who claims to be the assignee of said company to said judgment, has not the right to enforce said judgment against the defendants. * * *

Note. See 1886, Appeal of Pittsburgh R. Co., 122 Pa. St. 511, 9 Am. St. R. 128; *infra*, p. 1342; 1887, Fietsam v. Hay, 122 Ill. 293; 3 Am. St. R. 492, *supra*, p. 141; 1844, State v. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109; *infra*, p. 1298; 1890, People v. North Riv. Sug. Ref. Co., 121 N. Y. 582, 18 Am. St. R. 843, *supra*, p. 100; 1889, State v. Minnesota Thresher Co., 40 Minn. 213, 27 Am. & E. C. Cas. 286; 1892, People v. Buffalo, etc., Co., 131 N. Y. 140; 1888, State v. Madison, etc., R., 72 Wis. 612, 40 N. W. 487; 1891, People v. Broadway R., 125 N. Y. 29; 1884, State v. Railway Co., 40 O. S. 504.

NOTES TO ARTICLE IV.

Corporation as a franchise.—Pollock and Maitland, History of English Law, p. 493, say: "Between [the universities] and the boroughs, however,

there was just this likeness: neither the borough nor the university was to any great degree an owner of lands or of goods; on the other hand it was a holder of franchises. * * * The English temporal corporations, when they first appear as ideal persons, appear not in the character of mere private persons, but in the character—we may almost say it—of governmental officers and magistrates who hold property in right of their offices. Their lands, their goods are few; what they own is jurisdiction, governmental powers and fiscal immunities. This is a characteristic feature of our temporal corporations in the first stage of their existence; the artificial person comes into being in order that he may govern and do justice. * * * This is well marked in the history of Oxford. * * * This is so also with the merchant gilds. They look to a modern eye now like voluntary associations of traders, and now like organs of municipal government. * * * We may well suppose that the juristic person made its appearance at a comparatively early time in the gild hall of the brethren. Not that the gild was a trading corporation in the modern sense. In mercantile transactions with outsiders it appears rather as a *societas* than a *universitas*. It had no property engaged in trade. * * * But the main property of the gild, as of the university, consists not of lands and goods, but of *franchises*, jurisdictional powers and fiscal immunities."

In argument, Serjeant Pemberton, in King v. London, 1 Show. 275, 6, 1692, said: "A corporation is an artificial body, consisting of particular persons, as members constituent thereof, and like unto a natural body to many purposes; that which doth unite them is the liberties and privileges granted for that purpose. It is but a *franchise* granted originally to them by king or parliament. In all concessions of liberties and franchises, there is a tacit condition annexed to them, that they use them well; which upon doing otherwise determines them; an abuse forfeits them all. 20 Ed. 4, pl. 5, pl. 6, 2 Inst. 222. The way for the king to take an advantage of such an abuser is a *quo warranto*, or information in nature of it, that is the king's writ of right; here these abusers are examined, and then judgment is either given for acquittal or for the king." "But here [after judgment of seizure] it is otherwise, and therefore I conclude that the franchise by which they claim to be a corporation was out of them, and in the king, as extinct; for it is such a franchise as the king can not have by way of user, and therefore it must be gone, and determined, and if so, the corporation is dissolved; that which ties them together is their franchise; take away that, and they are so many single persons; for the franchise not only unites them, but distinguishes them, one as *mayor*, and another as *an alderman*, and the like; then that being gone, none of them are such." 20 Ed. 4, pl. 5, pl. 6, 2 Inst. 222.

In Carth. 217, this same argument is said to have stated these views as follows: "A corporation is an artificial body, composed of divers constituent members, *ad instar corporis humani*, and the ligaments of this body politic or artificial body are the *franchises* and *liberties* thereof, which bind and unite all its members together; *and the whole essence and frame of the corporation consist therein.*"

Blackstone says: "It is likewise a franchise for a number of persons to be incorporated and subsist as a body politic; with power to maintain perpetual succession, and do other corporate acts; and each individual member of such corporation is also said to have a franchise or freedom." Commentaries, Book II, p. *37, 1766. Judge Cooley, in his note to this statement, in his edition of Blackstone's Commentaries, 1870, p. *40 note, says: "Among the most important of modern franchises are the franchise to be a corporation. * * * And not only is the right to be a corporation a franchise, but so is every particular right or privilege possessed by a corporation under its charter, *which could only be exercised by legislative permission.*" Blackstone says further, citing Finch 164 (1613): "Franchises and liberty are used as synonymous terms; and their definition is, a royal privilege or branch of the king's prerogative, subsisting in the hands of the subject * * * they may be vested in either natural persons or bodies politic; in one man, or in many; but the same identical franchise that has before been granted to one can not

be bestowed on another, for that would prejudice the former grant." (But as to this, see, Piscataqua Bridge v. N. H. Bridge, 7 N. H. 35, *infra*, p. 309, *contra*.)

Mr. Kyd, Law of Corporations, p. 14 (1793), says: "A corporation has also been called a franchise; the propriety of this appellation depends on the more or less extensive meaning in which the word 'franchise' is used; in its most extensive sense it expresses every political right which can be enjoyed or exercised by a freeman; in this sense the right of being tried by a jury, the right a man may have to an office, the right of voting at elections, may, with propriety, be called franchises; *and in this sense the right of acting, as a corporation*, may be called a franchise, *existing collectively in all the individuals of whom* the corporation is composed; in this sense, and in this sense alone, 'the franchise of *being* a corporation' can have any precise meaning.

"In a less general and more appropriate sense, the word 'franchise' means a royal privilege in the hands of a subject, by which he either receives some profit or has the exclusive exercise of some right; of the first kind are the goods of felons, waifs, estrays, wrecks or the like; of the second are courts, gaols, return of writs, fairs, markets and many others. They are estates and inheritances, which may be granted and conveyed from one to another, as other estates, which is not the case with a corporation; in this sense a corporation can not be called a franchise; the latter is a privilege, or liberty, which can have no existence without reference to some person to whom it may belong; the former is a political person, capable, like a natural person, of enjoying a variety of franchises; it is to a franchise as the substance to its attribute; it is something to which many attributes belong, but is itself something distinct from those attributes."

Justice Washington, in Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518. 1819, on p. 657, says: "A corporation is defined by Mr. Justice Blackstone, 2 Bl. Com. 37, to be a franchise. It is, says he, "a franchise for a number of persons to be incorporated and to exist as a body politic, with a power to maintain perpetual succession and to do corporate acts, and each individual of such corporation is also said to have a franchise, or freedom." This franchise like other franchises is an incorporeal hereditament issuing out of something real or personal, or concerning or annexed to, or exercisable within a thing corporate. To this grant or this franchise, the parties are the king, and the persons for whose benefit it is created, or trustees for them. The assent of both is necessary." (See Skelly v. The Jefferson Bank, 9 Ohio St. 606, on 623, where the court shows how this definition of a franchise was used in the decision of the Dartmouth College case.)

In People v. Tibbets, 4 Cow. (N. Y.) 358, 380 (1825), it is said: "To be a corporation is a franchise (2 Bl. Com. 37), for the usurpation of which an information always lies (citing People v. Utica Ins. Co., 15 Johns. (N. Y.) 386, 389, *supra*, p. 113; R. v. Nicholson et al., 1 Str. 299). And the question is whether the intrusion into offices created for the government or exercise of the franchise is equally within the act as an usurpation of the franchise itself?" *Held*, it was, and that *quo warranto* would be allowed against persons who intrude themselves into the office of directors of an insurance company. (To same effect see: 1833, State v. Buchanan, Wright (Ohio) 233; State v. Harris, 3 Ark. 570; 1862, Smith v. State Bank, 18 Ind. 327; 1837, Commonwealth v. Gill, 3 Whart. (Pa.) 228; 1881, Creek v. State, 77 Ind. 180; 1887, State v. Mayor, etc., 10 Atl. (N. J.) 377.

Kent, Commentaries, vol. ii, p. 267, 1827, says: "A corporation is a franchise possessed by one or more individuals, who subsist, as a body politic, under a special denomination, and are vested by the policy of the law, with the capacity of perpetual succession, and of acting in several respects, however numerous the association may be, as a single individual." He says, also, vol. iii, p. 458, "Another class of incorporeal hereditaments are franchises, being certain privileges conferred by grant from government, and vested in individuals. In England they are very numerous, and are understood to be royal privileges in the hands of a subject. They contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the conditions and duties prescribed

in the grant, * * and they are necessarily exclusive in their nature. The government can not resume them at pleasure, or do any act to impair the grant, without a breach of contract." (But as to this, see *infra*, p. 309, *contra*.)

The exclusive nature of corporate franchises (in these cases to build and maintain a bridge) was the subject of much discussion in the cases of Charles River Bridge v. Warren Bridge, 7 Pick. (Mass.) 344, on 520 (1829), where the nature of franchises are discussed. The supreme court of the United States in the same case, 11 Peters (U. S.) 420 (1837), determined that the mere grant of a franchise did not make it exclusive. In Enfield Bridge Company v. The Connecticut River Company, 7 Conn. 28, it was held the state could not grant to another company the right to erect a bridge in the exact location previously granted to another company. In the Americant Jurist, vol. 6, p. 87 *et seq.* (1831), there is an article discussing these two cases, and going into the nature of franchises somewhat in detail. In Trustees of Maysville v. Boon, etc., 2 J. J. Marsh. (Ky.) 225, on 228, it is said: "A ferry is a *franchise real*, and may be forfeited for *non-user*." See, also, Trustees of New Gloucester School Fund v. Bradbury, 11 Maine 118, on 124, 26 Am. Dec. 515, on 518 (1834), where Justice Washington's statement in Dartmouth College Case (*supra*) is given and relied on.

In Price v. Price's Heirs, 6 Dana (Ky.) 107, it is said: "The right conferred upon each shareholder [in a railroad company] is unquestionably an incorporeal hereditament. It is a right of perpetual duration; and though it springs out of personalty, as well as lands and houses, this matters not. It is a franchise which has ever been classed in that class of real estate denominated an incorporeal hereditament." "It will descend as realty, and is subject to dower as such." Citing 2 Bl. 20, 1, 2, 37–8; Co. Litt. 19, 20. Com. Digest, Franchise.

In Montpelier Academy v. George, 14 La. 395, 33 Am. Dec. 585, on 590 (1840), Carleton, J., says, as to the franchise, after quoting Blackstone: "There is a grantor and grantee whose assent is necessary; the king parts from his prerogative under an implied promise not to bestow the same franchise on another corporate body. It, therefore, involves a contract not to reassert the right, grant it to another, or impair it." Citing King v. Passmore, 3 T. R. 246; Fletcher v. Peck, 6 Cranch (U. S.) 87; Philips v. Bury, 1 Ld. Raym. 5, s. c. 2 T. R. 346, 1 Kyd Corp. 25. To the same effect substantially is Regents of Univ. of Md. v. Williams, 9 Gill & J. (Md.) 365, on 407, 31 Am. Dec. 95 (1838).

In Enfield Toll Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 454, 44 Am. Dec. 556 (1846), the bridge company had the exclusive right to build and maintain a bridge over the Connecticut river at Enfield, and collect the tolls. After the bridge had been taken by the railroad company under the power of eminent domain, the bridge company claimed that, though this could be done, there still existed "something beyond the bridge franchise which had been invaded,—a contract has been impaired." The court, by Church, J., replied: "The contract constitutes the franchise. All franchises emanating from the government are the results of contracts between the state and individuals. To say, therefore, that although such franchises may be taken for public use upon compensation, and at the same time to insist that the contract or covenant by which they are created is unconstitutionally impaired, is an absurdity."

That a contract may as well exist between the state and corporate bodies as between individuals, which are beyond their franchises, and beyond legislative control, is true; but *the contract creating the corporation and defining its powers and privileges, is not of this character. This is identical with the franchise itself, and subject to the same laws.*"

In Yarmouth v. North Yarmouth, 34 Maine 411, on 418, 56 Am. Dec. 666, on 670 (1852), it seemed funds derived from the sale of a school farm were vested in trustees who were incorporated, in trust for school purposes in North Yarmouth. Afterward the legislature divided this town into two, Yarmouth and North Yarmouth, the former of which claimed part of the funds, under the act of the legislature which directed the funds to be so divided.

The trustees resisted and it was *held*, HOWARD, J.: "This fund was never in the town, but was vested by the act, in the trustees as a corporation for the use mentioned, forever. They did not constitute a municipal, or public corporation, although the object of its creation might have been a public benefit. Their charter was a grant from the state, partaking of the nature of a contract, which they accepted, and in which the government had no interest. *This was a franchise, which involved the right to possess and control property*, and the right to perpetuate a corporate immortality. 2 Bl. Com. 37. Though springing from the grant, the franchise and the rights flowing from it were no more subject to the control or interference of the legislature than were private rights of property, unless on default of the corporation judicially determined." Cites: Co. Litt., § 413; Viner's Abr. Corp. A. 2; Philips v. Bury, 2 T. R. 346; Allen v. McKean, 1 Sumn. 276; Dartmouth Col. v. Woodward, 4 Wheat. 518 *infra*, p. 708; People v. Morris, 13 Wend. 325 (*infra*, p. 229); Penobscot Boom, etc., v. Lamson, 16 Maine 224 (*infra*, p. 283).

In Toledo Bank v. Bond, 1 O. S. 623 (1853), Bartley, J., says: "The franchise of a private corporation is a trust of civil authority, which, under our system of government, must remain at all times subservient to the public welfare, the chief end and object of the delegation of all civil power by the people, and is, therefore, not the legitimate subject-matter of contract or sale."

See also State, ex rel., etc., v. Medical Society, 38 Ga. 608, 95 Am. Dec. 408 (1869), *supra*, p. 136, where the nature of the members' right in a corporation is called a franchise. Compare with Board of Trade v. People, 91 Ill. 80, below.

In Morgan v. Louisville, 93 U. S. 217, on 223 (1876), Justice Field says: "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term franchises. It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporay character; so that, if any one of these exists, it is loosely termed a "franchise," and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as a part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction." To the same effect are Wilson v. Gaines, 103 U. S. 417; Louisville & N. R. Co. v. Palmes, 109 U. S. 244; Memphis R. Co. v. Commissioners, 112 U. S. 609 (*supra*, p. 143).

In Smith v. Mayor, etc., of New York, 68 N. Y. 552, on 555 (1877), the court, in distinguishing a franchise from property held under a franchise, said: "Under the laws of our state a mere franchise or incorporeal hereditament of any kind is not taxable, except by special statute. The plaintiff has a franchise to construct and maintain this pier, and take wharfage for its use. The pier itself is a structure built under his franchise. It is tangible, bulky property, and in no sense incorporeal. It is not like a mere right or privilege, which has no physical existence. A person may have a franchise to build and maintain a bridge, and take toll for its use. The bridge, as a structure, is not a franchise. He may not be taxed on his franchise, but he can be taxed upon the structure or real estate."

See, also, Spring Valley Water Works v. Schottler, 62 Cal. 69, 106 (*supra*, p. 120).

1878, The Board of Trade of Chicago v. The People, 91 Ill. 80. Relator was expelled from the board of trade and brought mandamus to compel that body to restore him to membership; a peremptory mandamus was issued, and

the respondent brings the suit directly to the supreme court, under a statutory provision that "Appeals and writs of error shall lie from final orders of the circuit court to the supreme court in cases involving a franchise or a freehold." Relator moved to dismiss as no *franchise* was involved. The court, by Mr. Justice Scott, says: "The inquiry, then, must be, does the membership of the relator come within the definition of a franchise as that term is used in the statute? Our conclusion is, it does not." After quoting Blackstone's definition, which was adopted in 73 Ill. 541, and several other cases cited, to the effect that "corporate franchises in the American states emanate from the government or sovereign power, owe their existence to a grant, or, as at common law, to prescription, which presupposes a grant, and are vested in individuals or a body politic," the court continues: "It must have been in this restricted sense the term "franchise" was used by the general assembly in the statute we are considering, and not in that broad sense contended for. No doubt the word "franchise" is sometimes used as synonymous with privileges and immunities of a personal character; but in law its appropriate meaning is understood to be something which the citizen can not enjoy without legislative grant. Many of our religious, benevolent, literary and scientific societies and associations are incorporated under general or special laws, but it was never understood that members of such societies or associations possessed or exercised any franchise. What they obtain is what is most appropriately termed "membership," which means freedom of the privilege it confers, and nothing more. That is precisely the case at bar. Relator had membership in this corporation and the freedom of its privileges, whatever they were, but in no just sense did he exercise any franchise granted to him or the corporation by the general assembly. It is lawful for any person or association of persons to transact commercial business without legislative grant for that purpose. A corporation for such purposes is a mere convenience and nothing more. A member of such corporation exercises no other right in the buying or selling of commodities than what any citizen of common right may do, except as in the present instance, by virtue of his membership he may transact such business in a room belonging to the corporation, which is a mere privilege and not a franchise, in the sense that term is used in the statute. One test that might well be applied is that in case of the non-user or misuser by the party owning membership in such a corporation an information would not lie against him at the suit of the people."

In Memphis & L. R. Co. v. Berry, 112 U. S. 609, on 619 (1884), *supra*, p. 143, Mr. Justice Matthews gives a description of corporate franchises, and shows that "the franchise of becoming and being a corporation, in its nature, is incommunicable by the act of the parties, and incapable of passing by assignment," citing Commonwealth v. Smith, 10 Allen 448, 455; Hall v. Sullivan R. Co., 2 Redfield's Am. Ry. Cases 621, and Coe v. Columbus, P. & I. R. Co., 10 O. S. 372, 386.

In New Orleans, S. F. & L. Co. v. Delamore, 114 U. S. 501 (1885), it is said: "A franchise to use and occupy the streets of a municipality by a railroad corporation, granted by the municipality, is such a franchise as may be mortgaged and pass to the purchaser at a sale under foreclosure of the mortgage."

So, too, in State v. East Fifth St. R. Co., 140 Mo. 539, 62 Am. St. R. 742, 38 L. R. A. 218, *infra*, p. 706 (1897), *quo warranto* was brought in the lower court to oust the street railway company of its privilege of operating its railway upon certain streets in Kansas City, because of *non-user*, the city having under authority of the state granted the privilege to said company. The defense was *no franchise of the state*, if any franchise at all, had been violated by the non-user. The court of review says: "It may be said that corporate existence is as much a franchise as the franchises of the corporation. The former is not property in the ordinary acceptation of the term, can not be transferred by ordinary conveyance or sale under execution, unless the statutes of the state so provide; while corporate franchises are property, can be transferred by voluntary conveyance or by sale, under execution against the corporation." *Held*, suit was properly brought by the state, and ouster was declared. Compare People, ex rel. Jackson, v. Suburban R. Co., 178 Ill. 594

(1899); Tower v. Tower & S. S. R. Co., 68 Minn. 500, 64 Am. St. R. 493 (1897); Wright v. Milwaukee Elec. R., etc., Co., 95 Wis. 29, 60 Am. St. R. 74 (1897); Milwaukee Electric R. Co. v. Milwaukee, 95 Wis. 39, 60 Am. St. R. 81 (1897); Belleville v. Citizens' Home R. Co., 152 Ill. 171, 26 L. R. A. 681 (1894), and People v. Mutual Gas L. Co., 38 Mich. 154 (1878).

In New Orleans Water-Works Co. v. Rivers, 115 U. S. 674 (1885), the court says: "An exclusive franchise granted by the legislature to supply water to the inhabitants of a municipality by means of pipes and mains laid through the public streets is violated by a grant to an individual in the municipality of the right to supply his premises with water by means of a pipe or pipes so laid, and is a contract protected by the United States constitution." To the same effect in regard to gas pipes for lighting, etc., are Louisville Gas Co. v. Citizens' Gas L. Co., 115 U. S. 683, and New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650.

Perhaps the best definition of franchises is that given by Bradley, J., in California v. Central Pacific R. Co., 127 U. S. 1, on 40 (1887), as follows: "What is a franchise? Under the English law, Blackstone defines it 'as a royal privilege, or branch of the king's prerogative subsisting in the hands of a subject,' 2 Bl. Com. 37. Generalized and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they can not be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of legislative grant. This is a franchise. *No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise.*"

Mr. E. R. A. Seligman, in his Essays on Taxation, ch. vii, p. 180, criticises this definition as being too narrow, since, in his judgment, it unduly emphasizes the element of public control and public interest. He defines a franchise as "simply a right conferred by government of conducting an occupation either in a particular way or accompanied with particular privileges." We prefer the definition of the supreme court, as given by Justice Bradley, and believe it is desirable to emphasize the element of public control.

A very short but clear definition is given by Justice Field in Home Ins. Co. v. New York, 134 U. S. 594 on 599 (1889), as follows: By the term *corporate franchise*, we understand is meant the right or privilege given by the state to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present."

In Macon, etc., R. Co. v. Gibson, 85 Ga. 1, 21 Am. St. R. 135 (1890), under the Georgia Code providing that, "In all cases of private charters hereafter granted, the state reserves the right to withdraw *the franchise*, unless such right was expressly negatived in the charter," the court said: "It is quite too narrow a definition of the word *'franchise'* used in this statute to hold it as meaning only the right to be a corporation. The word is generic, *covering all the rights granted by the legislature.*"

So, too, in State v. Boston, etc., R. Co., 25 Vt. 442, it is said: "All the functions of a corporation are in one sense franchises. The right to hold

property in the corporate name, to sue and be sued in that capacity, to have and use a corporate seal, and by that to contract, and some others, perhaps, are franchises, which constitute the very definition of a corporation." Similarly in Pierce v. Emery, 32 N. H. 507, it is said: "The different powers of a private corporation, like the right to hold and dispose of property, are its franchises." Compare State v. Minnesota T. M. Co., 40 Minn. 213 (1889). For other definitions and statements describing franchises, see State, Kansas v. Corrigan Con. St. R., 85 Mo. 263, 55 Am. R. 361; Homestead St. R. Co. v. Pittsburgh & H. E. St. R. Co., 166 Pa. St. 162, 27 L. R. A. 385; Detroit Citizens' St. R. v. Detroit, 22 U. S. App. 570, 64 Fed. R. 628, 26 L. R. A. 667; People v. O'Brien, 111 N. Y. 1, 2 L. R. A. 255; Wilmington Water Power Co. v. Evans, 166 Ill. 548; M. & S. Society of Montgomery County v. Weatherly, 75 Ala. 248, 253; Port of Mobile v. Louisville & N. R. Co., 84 Ala. 119; Williams v. Citizens' R. Co., 130 Ind. 71, 15 L. R. A. 64; Baltimore Trust G. Co. v. Baltimore, 64 Fed. R. 153; Wheat v. Alexandria, 88 Va. 743; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 595; Huff v. Winona, etc., R. Co., 11 Minn. 180, 192; Chesapeake, etc., Canal Co. v. B. & O. R. Co., 4 Gill & J. (Md.) 1, 191; Society for Sav. v. Coite, 6 Wall. (U. S.) 594, 606; Adams v. Yazoo & M. V. R. Co., 24 So. (Miss., 1898) 200. Also particularly Justice Story's and Justice Washington's opinions in Dartmouth College v. Woodward, 4 Wheat. 518, *infra*, pp. 723–741.

Mr. Morawetz, Treatise on Law of Private Corps., 2d Ed., 1886, says, § 8: "Under the common law of England and the United States, a corporation can not be formed like a partnership, merely by a contract between the individuals composing it. The right of forming a corporation and of acting in a corporate capacity must be treated as a *franchise*, or special privilege, which may not be assumed without a grant of authority from some governing power." In § 922, he says: "The word 'franchise' is generally used to designate a right or privilege conferred by law. Thus, when the legislature grants a charter of incorporation, it confers upon the grantees of the charter the right or privilege of forming a corporate association, and of acting within certain limits in a corporate capacity, and this *right or privilege is called the corporate franchise*." In § 923: "What is called the franchise of forming a corporation is really but an exemption from a general rule of common law prohibiting the formation of corporations. In former times, this exemption was granted only in exceptional cases, by a special charter in each instance. It was, therefore, looked upon as something valuable—as a gift of a special privilege to the grantees of the charter—and was called a franchise. At the present day, however, the prohibition of the common law has been in a great measure repealed by the general incorporation laws. What was formerly the exception has now become the general rule. All persons have now the right of forming corporate associations, upon complying with the simple formalities prescribed by statute. The right of forming a corporation and of acting in a corporate capacity, under the general incorporation laws, can be called a *franchise*, only in the sense in which the right of forming a limited partnership or of executing a conveyance of land by deed is a franchise." In note 3, § 922, he says: "The corporate franchises are sometimes said to belong to *the corporation;* but this is not accurate. They belong to the shareholders." See also §§ 648, 649, 650, 651, 652, 653. These views of Morawetz are cited approvingly in State v. Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. R. 166 (1888), holding that the sale of the franchise of being a corporation is inoperative to invest the purchaser with corporate power.

Judge Thompson, Commentaries on Corporations, section 5353 (1895), says: "In respect to the power of a corporation to alien its franchises, a distinction has been taken by the courts between what may be regarded as *primary* and what as *secondary* franchises. The franchise of being a corporation —of having a corporate existence—is a franchise of the former character; and the franchise of carrying on a particular business or holding particular property is of the latter character. * * * No one but the sovereign can create a corporation; and hence one corporation can not create another, by selling to the latter its own privilege of having a corporate existence; though, as al-

ready seen, the members who compose the corporation may, after it has been organized and its shares have been issued, by transferring their shares to others, introduce a totally new membership into the corporate body and retire therefrom themselves. * * * The rule had a very substantial value when the franchise to be a corporation was generally granted by the king in his council * * * when such grants could not be obtained except in consideration of the rendition of important services to the king or to the state. But under our American constitutions, under which a body of co-adventurers may freely organize themselves into a corporation by complying with certain statutory forms and paying a moderate tax, the franchise of being a corporation is scarcely more valuable than the franchise,—if there could be such a thing,—of being a partnership. It is a myth; and the rule under consideration would be the silliest casuistry except for its value as a rule of *interpretation* of *railway* and other corporate *mortgages*."

Judge Elliott in his Law of Private Corporations (1900), devotes one chapter (5) to "Franchises and privileges," giving an excellent condensed view of the subject.

It is submitted that the above statements of Judge Thompson and Mr. Morawetz in regard to the *corporate franchise* are very much overdrawn, if not entirely incorrect. It might be pertinent to inquire, why is it, if *the right to be a corporation is of no value*, that so many corporations are formed? Why is it that four-fifths of the wealth of the United States is held under corporate organization? Why is no great enterprise undertaken except under a corporate form of organization? *The franchise of being a corporation is valuable;* the fact that the state makes it easy to obtain this franchise does not take from its value, any more than the fact that every male over twenty-one can vote makes the right to vote of no value. The corporate form of organization is the most efficient form of business organization yet discovered by the business world, and is consequently considered the most valuable by business men. It furnishes the greatest possibility of concentration of means, the completest unity of management, and the least individual personal responsibility both financially and morally of any business machine yet invented, to say nothing of the possibility of fraud, speculation, and exploitation that lax corporation laws, both now and heretofore, have made possible if not actually invited.

But, after all, are our general incorporation laws a mere repeal of the common law—a mere exemption from the common law prohibition of forming corporations without consent of the king or state? Or was a special charter itself a mere repeal of or exemption from such rule of the common law? The *legal theory*—the doctrine of the legislature, or the doctrine of the courts, is not so, and never has been so, and it is hoped never will be so. The common law prohibition is not repealed, or in fact modified in any essential particular, but is the same as it was in Blackstone's time or before. A *franchise* at common law was something more than a license—it could not be revoked by the king after granting it, except for a justifiable cause judicially determined. It was something more than a *law*, also; it was an estate or interest like an estate in land; a repeal of the law granting it did not take it away in any other way than the repeal of a law granting land, by the transcendent power of parliament, took away the estate in the land—that is, by a forfeiture or bill of attainder, or something of that kind. A *franchise to be a corporation* was of the same character—a grant of a privilege—might be many, or only one, but at least one, that is, the right to do the designated business under the corporate form of organization. But it was still more than this: it was a grant upon a condition, a kind of condition subsequent—the condition being the faithful performance of the business to be conducted under the corporate form of organization—in other words, that there be no "non-user, misuser or abuser" of the privilege. It was very much the same as the condition always annexed to the grant of a freehold estate in land—it was in the theory of the common law always held from the king upon the condition that the holder do not commit treason or felony; if he did, the land would then be forfeited upon conviction after indictment and trial in the king's bench. So, too, the corporate franchise

was held upon a like condition—non-user or misuser led to forfeiture upon judgment in *scire facias* or *quo warranto* proceedings in the king's bench. This *theory of* a *franchise* yet remains with us, and is in no way repealed. Under our United States constitution, and the decisions of the supreme court, the transcendent power of parliament to declare forfeitures of either land or franchises, is taken from our legislative bodies—of the states at least (Fletcher v. Peck, 6 Cranch 87, and Dartmouth College v. Woodward, 4 Wheat. 518). But the right to forfeit franchises for misuser or non-user, in the proper judicial proceedings, yet remains. It perhaps matters but little to the state whether A., B. and C., either separately, jointly, or in a partnership, refine sugar or petroleum. If they engage in this business they may do so when and where they please, stop when they please, or agree not to make any more—the latter contract, under some circumstances being simply unenforcible, but not a cause of forfeiture or punishment. But if A., B., C., D., etc., form a corporation for making or refining sugar or oil, the case is different; the business is not different—it is neither more nor less public, nor more nor less a franchise than it was before; the privilege is not in making sugar or oil, but bringing into existence and using in this business the valuable, efficient, impersonal and in many ways morally less responsible, agency or organization known as the *corporation;* this is the privilege, a privilege of "public concern," a *franchise*, always having as an inseparable incident, always granted upon the implied condition that it will not be misused or abused. For not making oil, or sugar, or even agreeing not to do so, the charter, the franchise of being a corporation for such purpose, can be taken away by the state. (See People v. North River Sugar Ref. Co., 121 N. Y. 582, 18 Am. St. R. 843, *supra*, 100; State v. Standard Oil Co., 49 O. S. 137.) Herein lies the essential difference between a corporation and a partnership or joint stock company. (See Gleason v. McKay, 134 Mass. 419, *infra*, p. 167.

The franchise to *conduct any business as a corporation*, or through a corporate organization, is now, and has always been since the time of the Romans, "*a matter or privilege of public concern*," given by the state only on condition that it be not abused. Kent says: "Solon permitted private companies to institute themselves at pleasure, provided they did nothing contrary to the public law. But the Romans were not so indulgent as the Greeks. They were very jealous of such combinations of individuals, and they *restrained those that were not especially authorized*, and every corporation was *illicit* that was not ordained by a decree of the senate or emperor. *Collegia licita*, in the Roman law were, like our incorporated companies, societies of men united for some useful business or purpose with power to act like a single individual, and if *they abused their right, or assembled for any other purpose than that expressed in their charter, they were deemed illicita*, and many laws from the time of the Twelve Tables down to the times of the emperors were passed against all illicit or unauthorized companies. In the age of Augustus, certain corporations had become nurseries of faction and disorder; and that emperor interposed, as Julius Cæsar had done before him, and dissolved all but the ancient and legal corporations. * * * And the Emperor Trajan, in refusing to incorporate a fire company, said, 'that societies of that sort had greatly disturbed the peace of the cities; and whatever name he gave them, or for whatever purpose they might be instituted, they would not fail to be mischievous,'" citing Taylor's Elements of Civil Law, 567–570; Suetonius, Ad. Aug. 32, and J. Cæsar 42, vol. 2, pp. 268–9.

Does not this experience of the old Romans, the experience of England in the early part of the last century, with John Law's schemes and the South Sea Bubble, and the experience of our own day attest the wisdom of the common law rule that the "right to be a corporation is a franchise of public concern, held upon the implied condition that it will not be abused, under penalty of forfeiture," and that it is well to hold fast to such rule? It, of course, has been the policy of corporations and corporation counsel to minimize the *franchise* as much as possible, under nearly every circumstance, except where they have had to fight for their existence; and the above expressions of the leading text writers of the day have helped (perhaps unwittingly) to make ob-

sure this wholesome doctrine, both in the minds of the people and of many judges as well. The legislatures, too, of several states have substantially abdicated the power of the state to retain control over the creatures of its bounty by authorizing the formation of joint-stock companies with nearly all the powers of corporations, without the liability to render an account at the hands of the state in *quo warranto* proceedings. The older writers—Blackstone, Kyd, Kent, Angell & Ames and Grant—all hold fast to these old and tried doctrines, and are, therefore, better guides in these matters than later writers.

ARTICLE V. CORPORATIONS AS DISTINGUISHED FROM OTHER INSTITUTIONS.

Sec. 30. (1) From partnerships.

GLEASON v. McKAY.[1]

1883. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 134 Mass. 419–426.

[In 1866 McKay was the owner of certain letters-patent for improvements in machinery used in the manufacture of shoes; from the proceeds of the business he had built a machine shop for the manufacture of these machines. He was the legal owner, but others were equitably interested in various amounts. He executed an instrument of trust, declaring himself to hold the business in trust for all who were, or might become, interested therein, upon condition that those so interested who accepted the declaration of trust and had a certain certificate evidencing their interest, should constitute and be an association, to be known as the McKay Machine Association, but no member shall have any right or authority to make any contract or bargain, or transact any business whatever for the association, without special authority; it was to continue thirty years; death of members was not to dissolve or have any effect on the association, except that those who succeeded to ownership of shares should succeed to the rights of the decedent; that the association should be the equitable owner of the business, which was to be divided into 50,000 shares, to be distributed among the members in proportion to their interests, which were to be evidenced by certificates indicating the number of shares, the same to be transferable, by assignment in writing and surrender to the trustee, who was to issue a new certificate, keeping record of the same; the general management was to be in an executive committee of three or five, to be chosen by the whole body of shareholders; and this committee was to divide proceeds from time to time in proportion to the respective interests; provision was also made whereby the business might be transferred to a corporation, when a majority should so determine, and thereafter no member was to have or claim any right to the property or business, and the declaration of trust was to cease; provision was also made for choosing a new trustee in case of death or resignation of McKay. McKay was taxed, as trustee of said

[1] Statement of facts condensed, and compiled partly from Hoadley v. County Commissioners of Essex, 105 Mass. 519; arguments omitted.

association, upon its real estate, machinery, tools and all personal property. The commonwealth, in addition to the foregoing taxes, sought to collect a tax upon the aggregate value of the shares of the association. This was resisted.]

MORTON, C. J. The principal question in this case is whether the statute of 1878, chapter 275, as applied to the defendant, is constitutional. The first section of the statute provides that "chapter 283 of the acts of the year 1865, and the acts in amendment thereof, are hereby extended to apply, so far as applicable to companies, copartnership and other associations having a location or place of business within this commonwealth, in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer. And the tax provided for in said chapter 283 shall be paid by such company, copartnership or association upon the aggregate value of the shares of said capital stock, in the manner provided in said chapter for taxes upon corporations."

The power of taxation, using the word in its generic sense as including all rates and impositions laid or levied upon the people, is conferred upon the legislature by the constitution, and is to be held and exercised subject to the limitations imposed by the constitution. Oliver v. Washington Mills, 11 Allen 268. The legislature is given the power "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and persons resident, and estates lying within the said commonwealth," and also power "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the same." Const. of Mass., chap. 1, art. 4.

It is clear that the statute in question was not intended to lay a tax upon property within the first of these clauses. It does not purport to do this. It merely extends to certain copartnerships and associations the provisions of the St. of 1865, c. 283, which chapter has been held to levy an excise upon corporate franchises, and not to lay a tax on property, and which chapter can be sustained as constitutional only upon the ground that it levies an excise. Murray v. Berkshire Ins. Co., 104 Mass. 586. Commonwealth v. Hamilton Manfg. Co., 12 Allen 298. Regarded as a tax on property, the tax we are considering would be invalid because not proportional; it would be an imposition upon certain property at a rate different from that to which other property in the commonwealth is subject. But, as we have said, it does not purport to be a tax on property. In levying an imposition under this statute, no inquiry is made as to what property liable to taxation any copartnership, or other association which comes within its terms, has. Such property remains liable to taxation under the general laws. This imposition is based "upon the aggregate value of the shares of said capital stock." Such shares, if they can be said to be property, are not the property of the copartnership or association which is taxed, but of the individual partners or shareholders. It is very clear that this was intended as an excise upon some

franchises or privileges sought to be held by the copartnerships or associations in supposed analogy to the franchises of corporations. And the question is whether this imposition can be upheld as such excise within the second clause of the constitution, cited above. In this clause, there are two limitations upon the power of the legislature in imposing excises. They must be reasonable, and they must be excises upon some produce, goods, wares, merchandise or commodities, brought into, produced, manufactured or being within the commonwealth.

It will not be seriously contended that the privileges or rights which are taxed by this statute can be properly described as either produce, goods, wares or merchandise. Do they fairly come within the term "commodities," in the sense in which it is used in the constitution? Ever since the adoption of the constitution, the legislature in its practice, and this court in its adjudications, have given a very broad and extensive meaning to this term. It has been repeatedly held that corporate franchises enjoyed by grant from the government are commodities, and subject to an excise. So with corporate franchises granted by a foreign government, which by comity are permitted to be exercised within this commonwealth. So where the legislature has thought, upon considerations of public policy, that certain occupations or callings, of a public or *quasi* public character, should be carried on under governmental regulation it has been usual to impose a reasonable fee for a license. Portland Bank v. Apthorp, 12 Mass. 252; Commonwealth v. People's Five Cents Saving Bank, 5 Allen 428; Commonwealth v. Hamilton Manuf. Co., *ubi supra*; Commonwealth v. Cary Improvement Co., 98 Mass. 19; Connecticut Ins. Co. v. Commonwealth, 133 Mass. 161.

This imposition is clearly not in the nature of a license fee, but is an excise upon a franchise or privilege. The right to levy excises upon franchises has never been extended further than to corporate franchises specially granted by the government, or enjoyed and exercised by its permission.

The defendant in this case is not a corporation. It is merely a partnership, with all the incidents and responsibilities of a partnership. The firm property is taxable at its business domicile. Hoadley v. County Commissioners, 105 Mass. 519. *It enjoys no franchises conferred upon it by the legislature. It does not ask for or enjoy any corporate or special privileges. It has constituted its partnership under its common law rights and such legal agreements as it chooses to make. The peculiar feature that the interest of each member may be transferred without the special assent of the other members, is created by agreement of the partners under their natural rights at common law. We do not see how this peculiar feature can be called a commodity, subject to a special excise, any more than the agreement of copartnership itself, or any clause or part of it, or any other agreement, right or mode of transacting any business, can be called a commodity, and so liable to taxation at the will of the legislature.*

If this tax can be upheld, it seems to us that the necessary result

will be that the legislature has the power to select any business, occupation or calling carried on, or any natural right enjoyed, under the protection of our laws, and impose upon it at its will a special tax or excise. This would be extending the meaning of the word "commodities" beyond any reasonable limits. Its effect would be to break down the limitations which the constitution intended to impose upon the power of the legislature, for the purpose of securing the end that all sums necessary for the defense and support of the government should, as far as practicable, be raised by the equal taxation of the people.

We are therefore of opinion that the statute of 1878, chapter 275, so far as it applies to the defendant, is unconstitutional.

Judgment for the defendant.

Note. See 1830, Pratt v. Bacon, 10 Pick. (Mass.) 123; 1833, Russell v. McLellan, 14 Pick. (Mass.) 63; 1888, Pittsburg Melting Co. v. Reese, 118 Pa. St. 355; and see Warner v. Beers; People v. Coleman, Thomas v. Dakin; Edgeworth v. Wood, *supra*, pp. 2, 15, 19, 28.

The word *partner* is a contracted form of *partitioner*, and this indicates something of its meaning. Partnerships were known to the Roman law under the name of *Societas*, which was a contract based on the law which "natural reason establishes between all men," *i. e.*, the *jus gentium*. Most of the Roman law of the subject is found in *Dig.* xvii, tit. 2, *Pro Socio*. Title 25, Book iii of Justinian's Institutes relates to partnerships, and part of that is found in Gaius iii, 148–154. The trade or commercial partnerships were the most common, though other kinds were recognized. The Roman laws of partnership, so far as trade is conducted now as then, are still applicable. In England the partnership law was introduced by the merchants as a part of the *law or custom* of *merchants*, being one of the *particular* customs of the realm, somewhat in derogation of the common law, and consequently allowed, where the rights of others were involved, only upon strict proof of the existence and knowledge of the custom. In this way, many of the rules of the common law were made applicable to partnerships. But the peculiar doctrines of no survivorship; of the partners' act being that of all, if in reference to partnership matter; and of dissolution by death of a partner, were from the law merchant, and through it from the Roman law, and were contrary to the common law rules of joint tenancy, and tenancy in common. The same difference between a partnership and a corporation, *i. e.*, that the latter is a distinct entity having rights and owing duties as such, as now recognized, was made in the Roman law, and continued throughout the development of the common law of England.

These differences perhaps can be classified as follows:

	Corporation.	*Partnership.*
As to creation:	Only under special authority of the state.	By contract alone.
As to franchise:	Has a franchise.	Has no franchise.
As to management:	Only in the way indicated by law of its creation, and by the agents there provided for.	Each member has authority to bind within the limits of the purpose.
As to powers:	Has none, except necessary to carry out purpose indicated in charter, and this can not be changed except by consent of the state.	May be enlarged, or diminished, at any time, or extended to any other business, by consent of all concerned.

	Corporation.	*Partnership.*
As to succession of membership, death, withdrawal, or insolvency:	Has no effect on corporate existence.	Dissolves.
As to property, ownership:	In the corporation.	In the members.
As to conveyance:	By the corporation only.	By the members only.
As to suits, by or against:	In name of corporation only.	In name of members only.
As to shares:	Transferable without consent of corporation.	Not transferable without consent of others, or if so, dissolves partnership.
As to liability of members:	Limited.	Unlimited.
As to termination:	Only upon surrender by consent of the state, loss of integral part, or for non use or misuse of franchise on complaint of the state.	At the option of all the parties or by the death or withdrawal of any member,—not by the state except for illegal acts.

Sec. 31. (2) From joint-stock companies.

EDWARDS v. WARREN LINOLINE AND GASOLINE WORKS.

1897. In the Supreme Judicial Court of Massachusetts. 168 Mass. Rep. 564–569, 38 Lawyer's Rep. Ann. 791.

Trustee Process. The principal defendant was described in the writ as "a joint-stock company organized under the laws of Pennsylvania." The trustee, which was a Massachusetts corporation, filed an answer setting forth reasons why it should not be charged, and, on interrogatories propounded by the plaintiff, made answers, the nature of which appears in the opinion. The trustee moved that it be discharged. The superior court allowed the motion, discharged the trustee with costs, and dismissed the action; and the plaintiff appealed to this court.

The case was argued at the bar in November, 1896, and afterwards was submitted on briefs to all the justices.

Lathrop, J. It is conceded by the plaintiff that, as the jurisdiction of the court depends upon charging the Walworth Manufacturing Company as trustee, inasmuch as there was no service upon the principal defendant, the action was properly dismissed upon discharging the trustee.

The question then is whether the trustee was properly discharged, and this depends upon whether the principal defendant, an association formed under the laws of the state of Pennsylvania, is a partnership or a corporation.

The trustee's answers to interrogatories refer to Brightly's Purdon's Digest (12th ed), 1086–1088, and to the cases of Eliot v. Himrod, 108 Pa. St. 569, and Sheble v. Strong, 128 Pa. St. 315, as containing the law relative to the statement in the answer, that the principal defendant was a partnership and not a corporation.

From the digest it appears that such an association is styled a "part-

nership association," and not a corporation. By the terms of the various acts which have been passed upon the subject, such an association may be formed by three or more persons. The capital is alone to be liable for the debts. There is no personal liability of the members, except to the extent of any unpaid subscription, if certain provisions of the act are complied with. "Interests in such partnership associations" are declared to be personal estate and are transferable, under such rules and regulations as shall from time to time be prescribed; but if there are no such rules and regulations, the transferee of any interest in any such association is not entitled to any participation in the subsequent business of the association, unless elected to membership therein by a vote of a majority of the members in number and value of their interests. The business is to be conducted by a board of managers. The duration of the association may be fixed by the articles of association, but is not to exceed twenty years.

Power to adopt and use a common seal is given in case the association has occasion to execute a deed of conveyance or bonds and mortgages. Land sold to the association, or by it, is required to be conveyed in the name of the association. It is further provided: "Said association shall sue and be sued in their association name; and when suit is brought against any such association, service thereof shall be made upon the chairman, secretary or treasurer thereof, which service shall be as complete and effective as if made upon each and every member of such association." In Eliot v. Himrod, 108 Pa. St. 569, 580, it is said by Mr. Justice Trunkey, in delivering the opinion of the court: "The formation of a limited partnership association is materially different from the creation of a corporation. Such association is treated in the statute as a partnership which, upon the performance of certain acts, shall possess specified rights and immunities. In contemplation that the association may consist of many members, for convenience it is clothed with many of the features and powers of a corporation, such as the right to sue and be sued, grant and receive in the association name. But no man can purchase the interest of a member and participate in the subsequent business, unless by a vote of a majority of the members in number and value of their interests. No charter is granted to the persons who record their statement." Sheble v. Strong, 128 Pa. St. 315, 318, is to the same effect.

If the question presented were an open one in this commonwealth, it might well be held that such association could be considered to have so many of the characteristics of a corporation that it might be treated as one.

At common law, a joint-stock company formed for business purposes is considered in this commonwealth merely as a partnership. Tappan v. Bailey, 4 Met. 529; Tyrrell v. Washburne, 6 Allen 466.

The same rule has been applied to joint-stock associations formed under the laws of the state of New York, which do not differ, in any essential respect, from the laws of Pennsylvania. Taft v. Ward, 106 Mass. 518, and 111 Mass. 518; Bodwell v. Eastman, 106 Mass. 525, 526; Gott v. Dinsmore, 111 Mass. 45, 51; Boston and Albany Rail-

road v. Pearson, 128 Mass. 445. See, also, Frost v. Walker, 60 Maine 468; Dinsmore v. Philadelphia and Reading Railroad, 32 Leg. Int. 388, and 11 Phila. 483.

In Taft v. Ward, 106 Mass. 518, 524, speaking of the New York statutes, it was said by Chief Justice Chapman:

"These statutes provide, in substance, that any association, consisting of seven or more shareholders or associates, may sue and be sued in the name of the president or treasurer; that in such suit a judgment may be rendered against the company; and until an execution is issued against the company and returned unsatisfied, no action shall be maintained against individuals. These statutes seem to apply to all copartnerships consisting of seven or more members. The members of such companies are authorized to hold their interests in shares, which are assignable like shares of stock in a corporation, and the action against the members is regarded as supplementary to the action against the company. Waterbury v. Merchants' Union Express Co., 50 Barb. 157; Robbins v. Wells, 1 Robertson 666.

"So far as these statutes relate to the procedure in courts for the recovery of debts, they are limited to the state of New York; for each state adopts its own forms of remedy. Story Confl. Laws, sections 556–558. The plaintiff could not in this commonwealth bring an action against the president or secretary, and obtain a judgment against the company by its name; nor could he bring an action against the members, or any of them, as a supplement to such an action. In order to do so, we must hold that the statutes of New York prescribing forms of action are in force here. In this commonwealth, such a company is a mere copartnership."

There is nothing inconsistent with an association being a partnership that it has shares, or that the shares are transferable, or that the death of a member shall not work a dissolution of the partnership. Phillips v. Blatchford, 137 Mass. 510. See, also, Hoadley v. County Comms., 105 Mass. 519; Gleason v. McKay, 134 Mass. 419.

The case mostly relied upon by the plaintiff is Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, which was taken to the supreme court of the United States on a writ of error from this court. See Oliver v. Liverpool and London Ins. Co., 100 Mass. 531. It was a bill in equity, filed by the treasurer of the commonwealth under the statute of 1862, c. 224, section 11, to restrain the defendant from prosecuting its business until the tax assessed upon it by section 2 of the statute had been paid. This section provided that "each fire, marine, and fire and marine insurance company incorporated or associated under the laws of any government or state other than one of the United States," should annually pay a certain tax. The defendant was an English company formed for the business of insurance, and organized under a deed of settlement. Its property was divided into transferable shares. It had power to sue and be sued by the name of its chairman, and a suit did not abate by reason of the death of such officer. The company could sue its own members, and be sued by them. Execution on any judgment recovered against the com-

pany could be issued against any proprietor. The statute under which it was formed, and subsequent statutes declared that it should not be deemed to be incorporated. The company was composed in part of British subjects and in part of citizens of the state of New York.

This court, after stating that it was not a pure corporation nor a pure partnership, but was an association intermediate between corporations known to the common law and ordinary partnerships, and was so far clothed with corporate powers that it might be treated, for the purposes of taxation, as an artificial body, proceeded to say: "We think the defendants are an association of the kind to which the statute of 1862 was expressly intended to apply, as well as to bodies wholly corporate in their character, and that, being permitted by the comity of our laws to exercise their functions within this commonwealth, they can claim no exemption from regulations appropriate to their collective action on account of the citizenship or nationality of their individual members."

In the supreme court of the United States the decree of this court was affirmed on the ground that the company was a foreign corporation, but Mr. Justice Bradley, while agreeing in the result, differed on the question whether the company was a corporation. He was of opinion that it was one of those special partnerships called joint-stock companies, and that it could not sue or be sued in this country without legislative aid.

This view of Mr. Justice Bradley is in accord with the view of this court, and we are not aware that the view taken by the supreme court of the United States has been followed in this commonwealth. The decisions which we have already cited show that a foreign joint-stock company is considered as an association or partnership, and not as a corporation.

An examination of the statutes further shows that the legislature has clearly recognized the distinction between foreign corporations and associations; and that where it has deemed it best that an act should apply to an association as well as to a corporation, it has said so in plain language. Thus, the statute of 1882, c. 106, relating to the taxation of foreign mining, quarrying, and oil companies, and requiring the appointment of an agent here upon whom process may be served, uses the language, "every corporation, company, or association."

The statute of 1887, c. 214, in section 1, provides: "When consistent with the context, and not obviously used in a different sense, the term 'company' or 'insurance company' as used herein includes all corporations, associations, partnership, or individuals engaged as principals in the business of insurance." The language is the same in the statute of 1894, c. 522, section 1.

By the statute of 1888, c. 429, section 11, "fraternal beneficiary corporations, associations, or societies," organized under the laws of another state and then doing business here, were allowed to continue business without incorporation under the act. But by the statute of 1892, c. 40, section 1, this was amended by striking out the words "associations or societies."

The statute of 1884, c. 330, requires "Every corporation established under the laws of any other state or foreign country," and hereafter having a usual place of business here, before doing business, to appoint in writing the commissioner of corporations, or his successor in office, to be its true and lawful attorney, upon whom process might be served.

The statute of 1888, c. 321, allows "Manufacturing corporations established under the laws of other states," which have complied with the provisions of the statute of 1884, c. 330, to purchase and hold such real estate here as may be necessary for conducting their business.

By the statute of 1895, c. 311: "Foreign corporations engaged in the business of selling or negotiating bonds, mortgages, notes or other choses in action," are made subject to the provisions of the statute of 1884, c. 330.

The statute of 1896, c. 391, section 1, contains a provision relating to the personal liability, under certain circumstances, of "the officers and members or stockholders in any corporation established under the laws of any other state or foreign country." See also St. 1895, c. 157.

Many other instances of legislation might be given where the distinction between a corporation proper and a mere association or organization is shown to be clearly in mind.

Unless the principal defendant can be considered a corporation, it can not be sued here under the name which the laws of Pennsylvania authorize it to use. Such laws have no extra-territorial force or effect. The trustee, therefore, was properly discharged.

In the opinion of a majority of the court, the order discharging the trustee and dismissing the action must be affirmed.

Note. Joint stock companies with transferable shares perhaps could be formed at common law, or under the law merchant, without special authority. (See Harrison v. Heathorn, 6 M. & G. 79; Mexican & S. A. Co., 5 Jur. N. S. 615, 27 Beav. 480.) But it has been said that acting *as a corporation*, without authority, was an indictable offense at common law. (Kinder v. Taylor, 3 L. J. 68; Duvergier v. Fellows, 5 Bing. 248, 5 M. & P. 403, 4 Am. & E. Enc. 185, note 2.) But acting *as a corporation* also included the idea of a limited liability of members, and so far as innocent third parties were affected, this could not be done without authority. By the Bubble act of 1719 (6 Geo. 1, c. 18), *joint stock* companies were declared to be *common nuisances*, members were subjected to penalties, and it was an offense for brokers to deal in their shares. This act was repealed in 1825 (6 Geo. IV, ch. 91), though perhaps not often, if ever, enforced for a long period before. In 1826, banking companies were allowed to sue in the name of a certain officer, after complying with certain rules, and in 1834, the crown was permitted to extend this privilege generally to joint-stock companies. In 1844 (7 & 8 Vict., c. 110) all companies were allowed to be *incorporated*, but the partnership liability was continued, but in 1855, they were permitted to organize with a limited liability (18 & 19 Vict., and 19 & 20 Vict., c. 47). In 1862, all former acts relating to companies were consolidated into one act for the incorporation of companies, which, with some modifications, is still the law in England. In the United States, most of the states have provided for joint stock companies, with transferable shares, and in some cases with limited liability, but the rules of partnership are applied so far as possible where the statutes under which they are formed are silent.

1. **As to suits**—1896, State v. Adams Express Co., 66 Minn. 271, 38 L. R. A. 225, (Service of summons may be made on local agent of such foreign

joint stock company); 1889, Imperial Ref. Co. v. Wyman, 38 Fed. Rep. 574, 3 L. R. A. 503 (limited partnership created in Pennsylvania can not sue in the United States courts, as a "citizen" of that state, citizens of other states); 1881, Fargo v. L., N. A. & C. R. Co., 6 Fed. R. 787 (is a citizen of state creating for purpose of suing and being sued in United States courts); 1876, Maltz v. American Ex. Co., 1 Flip. (U. S.) 611, Fed. Cas. 9002, 3 C. L. J. 784 (is a citizen of creating state for purpose of being sued in United States courts); 1875, Wescott v. Fargo, etc., Co., 61 N. Y. 542 (president of such an institution is a corporation sole for purpose of suits.) But see note 1, p. 31.

2. As to failure to comply strictly with statute—1896, Staver, etc., A. Mfg. Co. v. Blake, 111 Mich. 282, 38 L. R. A. 798 (technical non-compliance with law does not make members liable as general partners, but see next case); 1889, Vanhorn v. Corcoran, 127 Pa. St. 255, 4 L. R. A. 386 (failure to comply makes members liable as general partners).

3. As to taxation—1885, State v. State Board of Assessors, 47 N. J. L. 36, 27 L. R. A. 684, 13 Am. & Eng. Corp. Cas. 403, 31 Atl. 220 (Pennsylvania partnership association may be taxed in New Jersey as foreign corporation); 1892, People, etc., v. Coleman, 133 N. Y. 279, 16 L. R. A. 183, 37 Am. & Eng. Corp. Cas. 1, *supra*, p. 15 (joint-stock companies in New York, are not corporations for purposes of taxation); 1889, People, etc., v. Wemple, 117 N. Y. 136, 6 L. R. A. 303, 29 Am. & Eng. C. C. 610 (the United States Express Company, a joint stock company, may be taxed in New York as an incorporated company.)

4. As to status generally—1896, Rouse, Hazard & Co. v. Detroit C. C. Co., 111 Mich. 251, 38 L. R. A. 794; 1891, Allen v. Long, 80 Texas 261, 26 Am. St. Rep. 735, 38 Am. & Eng. Corp. Cas. 68 (joint stock companies are governed by general principles of partnership); 1890, Oliver's Estate, 136 Pa. St. 43, 20 Am. St. Rep. 894 (partnership association is an artificial person, members do not own the property, and death of member does not dissolve). See also, 1890, Fifth Avenue Bank v. Colgate, 120 N. Y. 381, 8 L. R. A. 712; 1889, Abbott v. Hapgood, 150 Mass. 248, 5 L. R. A. 586, 22 N. E. Rep. 907; 1889, Tilge v. Brooks, 124 Pa. St. 178, 2 L. R. A. 796; 1888, Jennings' Appeal, 2 Monaghan 184 (Pa.), 2 L. R. A. 43; 1900, State v. U. S. Express Co., 81 Minn. 87, 83 Am. St. R. 366.

Sec. 32. (3) From fraternity or society.

LEWIS v. TILTON ET AL.

1884. IN THE SUPREME COURT OF IOWA. 64 Iowa 220–223, 52 Am. Rep. 436.

The petition, as amended, states that the defendants and others formed a benevolent society for the prevention and suppression of intemperance, known and designated as the Ottumwa Temperance Reform Club, and that they were chosen to represent such society as its executive committee: that in March, 1878, the defendants entered into a written contract of lease with plaintiff, by the terms of which said Ottumwa Temperance Reform Club was to and did occupy the premises described in said lease, at the yearly rental of fifteen hundred dollars (a copy of said lease is attached to the petition); that by virtue of said lease the defendants, and the society of which they were members, occupied said premises from March 1, 1878, to July 1, 1879, and enjoyed all the benefits resulting from such occupancy; that these defendants verbally contracted with the Ottumwa Gas Light Company to furnish said Ottumwa Temperance Reform Club the gas required

to light said opera house and rooms thereunder; that by virtue of said verbal understanding the gas company did from time to time, and as required, furnish said club a large amount of gas; that said club was not incorporated at the time the above contracts were made, and is not now; and that said account for gas has been assigned to plaintiff.

Upon the grounds above stated, the plaintiff sought to make the defendants individually liable. To the petition there was a demurrer, which was sustained, and the plaintiff filed an amended petition, stating various acts and things done, and reaffirming all the allegations of the petition, and thereupon asked judgment against the defendants individually. To the amended petition the defendants demurred. The demurrer was sustained, and the plaintiff excepted, and, electing to stand thereon, appealed.

SEEVERS, J. 1. As we understand the petition, the verbal contract entered into with the gas company is an original undertaking on the part of the defendants. At their request the gas was furnished the club, and, of course, it seems to us the defendants are bound to pay for the gas so furnished. It matters not to whom it was furnished. The gas company had the right to expect that the defendants would pay for whatever was furnished at their request. There is no allegation that credit was extended to the club, and the only presumption which can be indulged in is that the credit was extended to the defendants. As they contracted, they must pay.

2. The more serious question is whether the defendants are individually liable under the lease, which, on its face, shows that it was entered into between the plaintiff, as party of the first part, and the Ottumwa Temperance Reform Club, party of the second part, and is signed by the plaintiff, and by the defendants as follows:

"Executive Committee of the Ottumwa Temperance Reform Club, { R. L. Tilton, S. B. Thrall, David Eaton, Joseph Sloan."

It is insisted that the lease shows that credit was extended to the club, and that the contract was made with it; that the principal was named, and therefore the defendants can not be made individually liable. This line of argument possibly would be conclusive if there was a principal. But there is none. *The club is a myth. It has no legal existence, and never had. It can not sue or be sued. The defendants contracted in the name of a supposed principal; that is, they claimed there was a principal for whom they were acting, but it now appears that there was no principal known to the law.* But, under the allegations of an amended petition, it should be assumed, we think, that there was, as a matter of fact, a body of men associated together for a benevolent purpose, who had assumed the name above stated, for the avowed purpose, by their united efforts, of suppressing intemperance. There is, however, some doubt in our minds whether it can be said that the plaintiff extended credit to an organization that had no legal existence. As the law does not recognize such an organ-

ization, we are at a loss to know how or why it can be said as a matter of law that the plaintiff contracted with and extended credit to a mere myth. In legal parlance, the organization can not be named. It has no habitation or place of abode.

It is also insisted that a fund was provided for the payment of debts, and hence it must be presumed that the plaintiff contracted in reliance upon such fund, and therefore the defendants can not be made individually liable. What the fact may be we are not advised, but certainly this does not appear on the face of the petition, and we have looked into the lease, and there is no provision in it from which such an inference can be drawn.

It is also insisted that there is no known legal principle or rule under which the defendants can be made liable. It is said that they are not parties. This is true; that is to say, these defendants could not bind any other members of the organization as a partner in a joint enterprise, or a contract as to which he had no knowledge, and to which he did not assent. But we think "those who engaged in the enterprise (that is, became members of the organization) are liable for the debts. They contracted, and all are included in such liability who assented to the undertaking or subsequently ratified it." It was so held in Ash v. Guie, 97 Pa. St. 493; Fredendall v. Taylor et al., 26 Wis. 286; and this rule is supported to some extent by what was said by this court in Keller v. Tracy, 11 Iowa 530, and Drake v. The Board of Trustees, 11 Iowa 54.

But, it is said, these defendants did not contract. They certainly represented that they had a principal for whom they had authority to contract. They, for or on behalf of an alleged principal, contracted that such principal would do and perform certain things. As we have said, there is no principal, and *it seems to us that the defendants should be held liable, and that it is immaterial whether they be so held because they held themselves out as agents for a principal that had no existence, or on the ground that they must, under the contract, be regarded as principals, for the simple reason that there is no other principal in existence.* We think the demurrer should have been overruled.

Reversed.

Note. See cases cited under White v. Brownell, *infra*, p. 187.

Sec. 33. (4) From stock exchange.

BELTON v. HATCH.

1888. IN THE COURT OF APPEALS OF NEW YORK. 109 New York 593–594, 4 Am. St. R. 495.

Appeal from judgment of the general term of the supreme court in the first judicial department, entered upon an order made May 29, 1885, which affirmed a judgment in favor of defendant, entered upon an order overruling a demurrer to certain portions of the answer.

GRAY, J. Plaintiff, as the assignee of one Des Marets, formerly a member of the New York Stock Exchange, sues to recover the proceeds received by that organization from a sale of the membership, or, as it is sometimes technically termed, the seat of said Des Marets. It is alleged by plaintiff in his complaint that Des Marets, for many years a member of the New York Stock Exchange, in October, 1883, became insolvent, and, under the laws governing that body, was suspended; that subsequently its governing committee determined that the failure was caused by doing business in a reckless and unbusinesslike manner, and resolved that Des Marets was ineligible for readmission, and in December following the failure the stock exchange, pursuant to its constitution and by-laws, disposed of his membership and seat for the sum of $25,000, which sum it retained and refused to pay over to plaintiff, who demanded it as Des Marets' assignee. The complaint also alleges that the New York Stock Exchange is an unincorporated association, organized and located in New York city; that its members have voluntarily established certain rules, conditions and articles of association or copartnership, which are designated as their constitution and by-laws, which are signed and consented to by the members and which govern them, their officers and committees, and which control in the conduct of the transactions and concerns of the association and are binding and obligatory upon the members.

The answer of the defendant, after admitting the allegations of the complaint which I have mentioned, sets forth much of the constitution and by-laws of the exchange, and alleges the distribution of the proceeds of the sale of Des Marets' membership to have been made among his creditors in the exchange, pursuant to their provisions. The plaintiff demurred to this portion of the answer on the ground that it was insufficient in law upon its face. Although this matter was not stated as a separate defense, *totidem verbis*, yet as it was affirmative in its nature and constituted the defense and justification of the association in disposing of Des Marets' membership and in retaining the proceeds arising from such disposition, we shall not consider the demurrer as improperly interposed and will dispose of the questions raised by these pleadings.

Their decision involves the legal relations to each other of the members composing the association of the New York Stock Exchange, and the extent and validity of the powers reserved by its constitution and by-laws, and conferred upon its officers and committees in the management of its affairs and in the control over a member. The New York Stock Exchange is a voluntary association of individuals, united, without a charter, in an organization for the purpose of affording to the members thereof certain facilities for the transaction of their business as brokers in stocks and securities, and a convenient exchange or sales-room for the conduct of such transactions. It can not be said to be strictly a copartnership, for its objects do not come within the definition of one. *A copartnership results from a contract between the parties by which they agree to combine their property or labor, or both, in some common enterprise and for a common profit,*

to be shared in the proportion stated in their agreement. The objects of a voluntary association of brokers do not, however, involve any such combination, or any communion of profits from the business transacted by the members. Like a business club, its principal object is the promotion of the convenience of its members by furnishing facilities which aid them in doing their business, and are, therefore, of benefit to them. It may be said, however, that the rights of the associates are not substantially different from those of partners, so far as their rights in the property of the association are concerned. The interest of each member in the property of the association is equal, but it is subject to the constitution and by-laws, which are the basis on which is founded the association. They express the contract by which each member has consented to be bound, and which measures his duties, rights and privileges as such.

It seems most clear to me that this constitution and the by-laws derive a binding force from the fact that they are signed by all the members, and that they are conclusive upon each of them in respect of the regulations of the mode of transaction of his business, and of his right to continue to be a member. Whatever are the rights acquired by a member and created by his admission to membership, the rules by which the membership is created or dissolved, and which control the affairs of the organization and the relations of members, entered into those rights when created and remained a part of them. In this proposition there is nothing against public policy, for the reason that whatever a member acquires is subject to the self-imposed condition that his title and the rights which accrue from his membership are regulated by, and are dependent upon, the laws adopted by the association, and expressly consented to by him when he joined. When Des Marets, plaintiff's assignor, joined the exchange, it may be perfectly true that he acquired property; but it was property given by the act of those who, in giving it, accompanied the gift with conditions which were incident to and a part of the property; and it was in no sense property created by the individual's act. I consider that there is an obvious distinction between property of the individual's own creation, to which he attaches conditions, or in the disposal of which he exerts a direction, whereby the claims of others are affected, and property which comes to him subject to conditions which may deprive him of its use or enjoyment. And so here, if the constitution, which forms the basis of this association, appropriates to his creditors in the association, or to any of its corporate objects, the peculiar property of the member, who, by force of constitutional provisions, has lost his membership, that was an incident entering into his title to it. *When membership and the rights belonging to that status were conferred upon him, the gift was accompanied by a condition that the rights, of whatever nature, should revert to the association upon the happening of certain events, and he can not be heard to complain; nor can third persons, claiming to derive under him.* He should be held to his contract, which was reasonable, and when entered into prejudiced no rights of others, nor conflicted with any statutory or common-law

right. *A person acquires by his admission to membership only such rights as the constitution and by-laws of the association give him; and upon ceasing to be a member, by the competent judgment of the governing committee, he ceases to have any further concern or interest in the association, except it is given by its laws.*

The New York Stock Exchange, by the accumulation of a great fund from a large membership, by the wise and successful management of the members, and by the acquisition of valuable facilities for the transaction of business, has given to membership an important pecuniary value. It is fair to presume that this prosperity and success were, in an important degree, due to the regulations adopted looking to the conduct by a member of his business, and the restraints imposed upon reckless or dishonest methods. Membership may be property; but it is not property in every sense. If it is property, it is incumbered with conditions when purchased, without which it could not be obtained. (Hyde v. Woods, 94 U. S. 523.)

By the constitution of this association, the powers of government are vested in a governing committee, whose decision, after the trial of a member for offenses under its laws, is final. Standing committees are appointed by them, and the committee on insolvencies is charged with the duty of immediately investigating every case of insolvency and of reporting whether the same was occasioned by reckless dealing or by doing business for improper parties. Should the governing committee, upon this report, determine that a member's failure was caused by doing business in a reckless and unbusinesslike manner, he may be declared ineligible for readmission by a majority vote of the entire governing committee. By section 2 of article 13 of the constitution, it is provided that "in every case where a member is deprived of his membership, or declared ineligible for readmission by the governing committee by reason of any offense against or under the laws of the exchange, his membership may be disposed of forthwith by the committee on admissions."

The plaintiff, appellant, contends that in such a case as this of Des Marets' severance from membership, there was no power under the constitution to distribute the proceeds arising from the sale of his membership, and that, in the absence of some express reservation of the right to dispose of those proceeds, they are the property of the member. The vice in plaintiff's argument is in the assumption that a member has any absolute property of his own in such a case. As we have before seen, the rules of the association were an incident to the rights acquired by a person upon admission; and one of those rules was that for conviction of an offense against or under the laws of the exchange, a suspended member might be deprived of right to readmission to membership. When expelled he ceases to have any interest in the association. His privilege to transact his business at that place has been lost. The association may fill the vacancy caused by his expulsion, or not, as they please. They can not be compelled to do so; but if they elect to admit a new member, and can derive, from so doing, any profit, that is their unquestionable right, with the

exercise of which others are not concerned. They may do with their own as they like. As I construe section 2 of article 13, above cited, its effect is that of an express reservation of the right to deprive a member, found guilty of an offense under its provisions, of all rights, interest and claim whatever.

The right is given to a member in good standing to propose for admission in his stead some one acceptable to the committee on admissions, and any profit he derives from his negotiations with the candidate is his. So if a member becomes honestly insolvent and fails to qualify under the rules for readmission, or if he dies, after the claims of the association are discharged, the proceeds may be paid to him or his legal representatives, as the case may be. But in the case of a member who, by misconduct cognizable by the laws of the association, forfeits his right to continue to remain a member, there is reserved by the constitution the right to dispose of his membership. These rules are reasonable, and do not contravene any rule of public policy, and having been consented to by the plaintiff's assignor, deprived him of any interest or rights in the association, of which he had ceased to be a member. These views lead to an affirmance of the judgment appealed from.

All concur.

Judgment affirmed.

Note. See Board of Trade of Chicago v. Nelson, 162 Ill. 431, 53 Am. St. 312; American Live Stock Co. v. Chicago Live Stock Exchange, 143 Ill. 210, 32 N. E. Rep. 274; Green v. Board, etc., 174 Ill. 585, 51 N. E. Rep. 599 (and see Evans v. Phil. Club, *infra*, p. 1165, and note).

Sec. 34. (5) From cost book mining companies.

SKILLMAN v. LACHMAN ET AL.[1]

1863. IN THE SUPREME COURT OF CALIFORNIA. 23 California 198–208.

Appeal from the county court, Nevada county.

The facts are stated in the opinion of the court.

CROCKER, J., delivered the opinion of the court—NORTON, J., concurring, and COPE, C. J., concurring specially.

This is an action upon a promissory note for $102, with interest at 3 per cent. per month, against the defendants, as members of the "Gold Hill Company," originally brought before a justice of the peace, where a judgment was rendered against the defendants, from which they appealed to the county court, where judgment was again rendered against them for $260.46 cents, besides costs, that sum being the principal and interest of the note, and from which they appeal to this court. * * *

[1] Arguments and opinion of the court on question of jurisdiction omitted.

The principal point raised by the appellant is that the owners of the claim are tenants in common and not partners; that Sprout was one of the owners, and that one co-tenant can not bind his co-tenants by a note given in the name of the company. This question of the relation which exists between persons owning several interests in a mine, and engaged in working the same, is a very important one. Whatever may be the rights and liabilities of tenants in common of a mine not being worked, it is clear that where the several owners unite and co-operate in working the mine, then a new relation exists between them, and, to a certain extent, they are governed by the rules relating to partnerships. They form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but which has also some rules peculiar to itself—one of which is that one person may convey his interest in the mine and business, without dissolving the partnership. (Ferreday v. Wightwick, 1 Russ. & Mylne 49.) Still, there may be a partnership in the working of the mine, subject to the rules relating to an ordinary partnership in trade. (Story on Part., § 82.) And this relation of partnership may be constituted either by express stipulation or by implication deduced from the acts of the parties. (Rockw. on Mines, 575.) But in the case of an ordinary mining partnership, something more will be required to raise the presumption of liability arising from persons holding themselves out to the world as partners than would be necessary in the case of an ordinary partnership. Such persons, in the absence of other circumstances, can not fairly be presumed to have intended to render themselves liable to all consequences of a commercial partnership. (Rockw. on Mines, 575.) The same author concludes his examination of this question as follows: "If the works are carried on by persons as mere owners of land, concurring in a general system of management for their common benefit, the shares of each person will only be liable for his individual engagement, and to the payment of debts contracted by himself, or his authorized agent, without interfering with the shares of the other tenants in common." (Rockw. on Mines, 579.)

There have been several decisions relative to the rights and liabilities of shareholders in mining companies to the public and among themselves, which it may be well to examine. In the case of Vice v. Lady Anson (7 B. & C. 409), which was an action for goods sold and materials furnished for working a mine, in which the defendant held one share, evidenced only by a certificate issued by the secretary of the company, the plaintiff, at the time he furnished the goods, had no knowledge that she was a shareholder. She had paid the deposit on some shares, and had spoken and written of herself (in private letters) as a shareholder of the company. The judge held that the plaintiff did not actually give credit to the defendant, and was not misled by her, and that she never held herself out to the world as a partner, and therefore she could only be chargeable on the ground of being really interested. The fact that she thought she had an interest did not make her interested; and he held that the certificate conveyed no interest in the mine, and therefore she was not liable. The correct-

ness of this decision, that it was necessary to prove a conveyance of an interest in the mine, has been doubted.

The case of Dickinson v. Valpy (10 B. & C. 128) was an action by an indorsee of a bill of exchange, drawn and accepted by a mining company, against the defendant as a member of the company. The defendant had applied for and obtained shares in the company, on which he had paid several installments. The business of the company was transacted by a board of directors, and the bill had been drawn and accepted in pursuance of a resolution passed by them. It was held necessary for the plaintiff to show that the directors had power to bind the shareholders by drawing bills of exchange; and for that purpose, evidence should have been given of the nature and character of the business of the company, to show that in order to carry into effect the purposes for which it was instituted the drawing and accepting of bills was necessary, or to show from the practice of similar companies that it was *usual* to draw such bills. *It was also held, that although in ordinary trading partnerships the law implied that one partuer had power to bind another by drawing and accepting bills, yet that rule did not apply to mining partnerships, without showing that it was necessary to carry on its business.*

In Judson v. Bourne (6 M. & W. 461), it was held that the members of a mining company have authority by law (in the absence of any proof of a more limited authority), to bind each other by dealings on credit for the purpose of working the mines, if that appears to be necessary or usual in the management of the mines. In Hawtayne v. Bourne (7 M. & W. 595), the managing agent of the mining company had borrowed money from a bank to pay debts due to laborers who had levied distress warrants upon the materials of the mine, and it was held that there was no rule of law that such an agent could, even in case of an emergency suddenly arising, raise money and pledge the credit of his principals for its repayment; that the authority of the agent was only that he should conduct and carry on the affairs of the mine in the usual manner, and there was no proof of express authority to borrow money, or that it was necessary in the ordinary course of the undertaking.

A joint-stock company was formed to work a mine, in which the defendant became a shareholder and took part in its proceedings. The prospectus, issued on the formation of the company, stated that all supplies for the mine were to be purchased at cash prices, and no debt was to be incurred, and the scrip certificates also bore an indorsement to the same effect. The plaintiff supplied goods for the necessary working of the mine on the order of a resident agent appointed by the directors to manage the mine, which was the customary course in such concerns. Held, that the defendant was liable to the plaintiff for the price of such goods, notwithstanding the statements in the prospectus and certificates, unless it were shown that the agent had, in fact, no authority from the defendant, and that the plaintiff had notice thereof. (Hawkin v. Bourne, 8 M. & W. 703.)

Where a defendant is charged with a debt in an action for work and

labor as a partner in a mining company, but is not shown to have either contracted such debt personally or represented himself to the plaintiff as a partner, the fact of his having been partner may nevertheless be shown by evidence short of strict proof that he had executed a deed of copartnership, or was legally interested in the mine. The fact may be proved by his admission made before or after the debt was incurred. (Ralph v. Harvey, 1 Q. B. 845.) One of several coadventurers in a mine has not, as such, any authority to pledge the credit of the general body for the money borrowed for the purposes of the concern. And the fact of his having the general management of the mine makes no difference, in the absence of circumstances from which an implied authority for that purpose can be inferred. (Ricketts v. Burnett, 4 Q. B. 686.)

Such is the uncertainty of mining operations that few are willing to risk all their means in such undertakings; and it is therefore customary for a number of persons to unite in the enterprise; and often the interests owned by each differ greatly in amount, according as each is able to furnish means, or is willing to take the risk. *As a general rule, it is impracticable for each proprietor to work his interest in the mine separate from the others, hence arises the necessity for an organization of some kind to work the mines, such as a corporation, joint stock company, or mining partnership. The company in the present case is one of the latter class. As each owner has a right to sell and convey his interest at any time, and as in ordinary partnerships such sale would dissolve the partnership, and compel a winding up and settlement of the business, which would be most disastrous to the mining enterprise, it has become an established principle that such sale does not dissolve a mining partnership, but it continues on as before. Such a radical change in the law of partnership necessitates other changes. One result is, that new members are thus introduced into the company without the consent, and often against the wishes, of the other members; and it would be most unjust to subject each proprietor to personal liabilities, which might sweep away all his property, created against his consent, by those who became members against his wishes.* Hence arises the necessity of establishing new rules for such partnerships, differing from those regulating ordinary partnerships, especially those relating to the power of any one member, or a majority of the members, or of the superintendent or managing agent, to make contracts binding upon the company or its members, and also regulating the extent and nature of the liability of each proprietor for the company debts, as between themselves and third persons. The rules regulating ordinary partnerships, will, to some extent, form a proper guide, but do not necessarily determine these questions. It is impossible to lay down a perfect code of rules upon this subject; but, like other legal rules, they must be settled as they arise in cases requiring their determination. Such rules must be governed by the peculiar condition and circumstances of the country, and must be founded upon sound principles of justice, and such as will protect the rights of individual pro-

prietors against the unauthorized acts of others, and at the same time properly secure the claims of creditors and insure the successful working of the mine.

In the present case it appears that the defendant Lachman, for a long time prior and up to June 25, 1858, held a mortgage on the interest in the mine of one Prior; that on that day he took a conveyance of that interest in satisfaction of the mortgage, and conveyed the same interest to one of the defendants, Sprout, on the twenty-eighth day of June, and received a mortgage on Sprout's interest in the mine to secure payment of the purchase-money. This appears to be, in fact, all the interest he had; but it was proved that both prior to and after the date of the note, which was dated June 20, he admitted to two persons, one of whom was a brother of the plaintiff, and who delivered most of the lumber, that he owned an interest in the mine. It does not appear that any of these statements of Lachman were the means of inducing the plaintiff to sell or deliver the lumber. These statements of the defendant Lachman do not operate as an estoppel upon him, unless it appears that the plaintiff was induced thereby to sell and deliver the lumber to the company. Neither the evidence nor the findings of the court contain any facts or evidence establishing this point.

But there is still a more important objection to the findings and judgment in this case. There was no evidence of any authority having been given by the company, or Lachman, to Sprout, a member of the company and the managing agent, or foreman, to execute a promissory note in the name of and binding the company for the indebtedness due the plaintiff, or any general authority to that effect. In fact, several members, including Lachman, testified that they never gave him any such authority. It is clear that the law does not, in the case of mining partnerships, imply any such authority either to a member of such partnership or to its managing agent. In this respect the rule of law is different from that of ordinary commercial partnerships. It was clearly the duty of the plaintiff to prove that the person executing the note in the name of the company had power and authority to do so. He might have had power to purchase the lumber for the use of the mine, but that is very different from authorizing him to execute a note in the name of the company, bearing interest at the rate of 3 per cent. per month. In this case the county court failed to draw the proper distinction between the liability of members of a mining partnership and ordinary trading partnerships, and in this it erred.

The judgment is, therefore, reversed and the cause remanded.

COPE, C. J. I think the conclusion arrived at by Justice Crocker is correct, and I, therefore, concur in the judgment.

Note. 1884, Bissell v. Foss, 114 U. S. 252 on 261; 1880, Kahn v. Smelting Co., 102 U. S. 641; 1871, Jones v. Clark, 42 Cal. 180

Sec. 35. (6) From unincorporated associations.

WHITE v. BROWNELL, PRESIDENT, ETC., ET AL.[1]

1868. IN THE COURT OF COMMON PLEAS, City and County of New York. General Term. 2 Daly (New York Common Pleas) 329–366.

Appeal to general term from an order dissolving an injunction to restrain the Open Board of Brokers from interfering with plaintiff's privileges as a member of that board.

By the court, DALY, F. J. The organization known as the Open Board of Stock Brokers, which the plaintiff asks this court to restrain from depriving him of his rights and privileges as a member of it, is not a partnership, and the plaintiff is not entitled, as has been argued, to the equitable remedies which courts afford for the protection of the rights of a copartner. It is not a union of persons joining together property, labor or skill for their common benefit, in any pursuit or business having a communion of profit and loss, and distinguishable by the feature that, if earned, there is to be a division of gains. It may be described as an association of persons engaged in the same kind of business, who have organized together for the purpose of establishing certain rules, by which each agrees to be governed in the conduct and management of his separate transactions or business; which is not a partnership.

The objects of the organization are set forth in the articles of association, which declare that greater facilities are requisite for the exchange and negotiation of commercial securities, a business which can be successfully transacted only where there is the utmost confidence; that, as such confidence is begotten only by public, open, fair and upright transactions, so that each party interested can know not only where, but how such business is done, the spirit of the age demands for such transactions a great public mart, open to all; and that, for the purpose of supplying these requirements, the persons signing their names associate themselves together, and adopt a constitution for an association to be known as the Open Board of Stock Brokers, each pledging himself to abide by the constitution, and by all by-laws, rules and resolutions which may be passed by the board. To carry out this object, the constitution provides that there shall be a room where the members of the board shall have seats and desks, conveniently inclosed within a railing, and that outside the railing, and in a gallery, seats shall be provided for the public; certain officers are designated who are to call stocks at the board, and a standing committee to arrange the order in which such securities are called. A record is to be kept by the secretary of all sales and purchases made

[1] Statement of facts except as given in opinion omitted. Arguments omitted and only a part of the opinion given.

at the board. He is required to prepare an account of the same for the newspapers, and no fictitious sales are to be allowed. It is, in fact, the creation of a public mart for the sale of stocks or other commercial securities, each purchase or sale of which is not for the joint benefit of the body, but is, as it would be in any other place, an individual transaction between the parties making it. It is analogous to what, in other branches of commerce, has long been familiarly known by the word "change," a fixed place, where merchants meet at certain hours for the transaction of business with each other, subject to such general rules or understanding as they think proper to be governed by. There may be property belonging to this body, derived from the payment of dues or fines, or consisting of the furniture of the room where the board meets; but the possession of it is a mere incident, and not the main purpose or object of the association. A member has no severable proprietary interest in it, or a right to any proportionable part of it upon withdrawing. He has merely the enjoyment and use of it while he is a member, but the property remains with and belongs to the body while it continues to exist, like a pew, the ultimate and dominant property in which is in the congregation, and not in the pew-holder; and when the body ceases to exist, those who may then be members become entitled to their proportionate share of its assets. (In re The St. James Club, 13 Eng. Law and Eq. Rep. 592; Fassett v. The First Parish in Boylston, 19 Pick. 361.) This board of stock brokers is, in fact, analogous to the organization which came under consideration in Caldicott v. Griffith (8 Exchq. Rep. 898), called The Midland Counties Guardian Society for the Protection of Trade, which was decided not to be a partnership.

So far, therefore, as the plaintiff claims the equitable interference of this court upon the assumption that this association is a co-partnership, or upon the ground that the rules which regulate the action of courts of equity in cases of partnership are to be applied to it, the claim can not be supported.

It is not an incorporated body, and as a number of cases have been cited upon the argument in which courts of equity have interfered and restored a member of a corporation who had been expelled or obstructed in the exercise of his franchise by the acts of the corporation, which are relied upon by the plaintiff as authorities applicable to the present case, it will be necessary to inquire into the reasons why corporations can not expel members except in certain extreme cases, and to show that these reasons do not apply to a voluntary unincorporated body, which comes into existence by the mutual agreement of the persons forming it, and is thereafter carried on under rules which the body adopts for its government. *A member of a corporation, whether it be municipal, eleemosynary or private, is in the enjoyment of a franchise, the right to which is not derived from the body, but is created by statute, or exists by prescription, and therefore can not be taken away by the act of the corporation, except, as I have said, in certain extreme cases. As it is a right conferred by statute, or derived from immemorial custom, which implies the existence of a grant, it can*

neither be taken away by the act of the corporation or withheld by the act of the corporation, from any one eligible to the enjoyment of it. Thus, in The People v. The Medical Society of the County of Erie (32 N. Y. R. 187), an incorporated medical society was compelled by *mandamus* to admit a licensed physician to membership, who was excluded under a by-law which had been adopted by the corporation.

In a corporation, there is a distinction between what is called *amotion*, or the right to remove an officer, which is a power inherent in every corporation, and *disfranchisement*. The former may be exercised without interfering with the franchise, as the officer, when removed, still continues a member; but disfranchisement is an absolute expulsion of the member from the body, and the taking away of his franchise, which can not be done unless the power is given by the charter creating the corporation, or the member has been guilty of crime, a conviction of which would work a forfeiture of all civil rights, including the corporate franchise, or has committed acts which tend to the destruction of the corporation, such as the defacing of its charter, the obliteration or alteration of its records, or other acts tending to impair or destroy its title to its rights or privileges; in which case, the expulsion of the member is but the exercise of a power incident to the right of self-preservation. Evans v. The Philadelphia Club, 50 Pa. St. R. 107;[1] Bagg's Case, 11 Coke R. 93; Earle's Case, Carthew's R. 173; Commonwealth v. St. Patrick's Benevolent Society, 2 Binney R. 441; Fuller v. The Trustees of Plainfield Academy, 6 Conn. 532; People v. The Medical Society of Erie, 24 Barb. 570; Willcock on Municipal Corporations, 270; Grant on Corporations, pp. 263, 264, 265, 266).

But in an unincorporated voluntary association, like the one now under consideration, the privilege of membership is not given by statute or derived through prescription, as in a corporation, but is created by and conferred by the organization itself. It is not a franchise—a franchise being a particular privilege vested in individuals, which is conferred by grant from a sovereign or government (Finch's Law, 164; 3 Kent's Com., 458); *while on the contrary, the privilege of membership in a voluntary association is derived exclusively from the body that bestows it, and may be conferred or withheld at its pleasure.* The law can not compel such an organization to admit an individual to membership, as may be done in the case of a corporation, nor can it interfere to restore a member who has been deprived of the privilege for not complying with the conditions upon which the enjoyment of it was made to depend. A member of a body of this description has, as such, undoubtedly, rights which the law will protect, but they do not rest upon the same ground, and are by no means coextensive with the franchise enjoyed by a member of a corporation. They depend upon the nature of the organization, upon the object for which it was formed, and upon the rules, regulations, constitution or by-laws which are explanatory of its purpose, and which the body has adopted for its government.

[1] *Infra*, p. 1165.

Individuals who form themselves together into a voluntary association for a common object may agree to be governed by such rules as they think proper to adopt, if there is nothing in them in conflict with the law of the land; and those who become members of the body are presumed to know them, to have assented to them, and they are bound by them (Innes v. Wylie, 1 Car. & Kir. R. 262; Brancker v. Roberts, 7 Jur. N. S. 1185; Hopkinson v. The Marquis of Exeter, London Times, Dec. 31st, 1867, Law R., 5 Eq. Ca. 63).

Such an organization may prescribe the conditions upon which persons will be admitted to membership, as well as the conditions upon which the continuance of membership will depend; and where they have no regulation upon the subject, they may expel a member by a vote of the majority, if he has been notified of the charge against him, and afforded an opportunity of being heard in his defense (Innes v. Wylie, 1 Car. & Kir. R. 262). Voluntary bodies of this kind will be held to the fair and honest administration of the rules which are in force when any proceeding is instituted against a member; but where a member is expelled in conformity with the rules, and the proceedings are regular and in good faith, it is final, and no judicial tribunal can interfere. (The Commonwealth v. The Pike Beneficial Society, 8 Watts & Serg. 250). The only question, therefore, that can arise in the present case is whether the plaintiff was suspended from the privileges of a member of this Open Board of Stock Brokers in accordance with the constitution and by-laws which that body has adopted for its government; for if he was, he has no ground of complaint.

[The court held that plaintiff was expelled in accordance with the by-laws, and so affirmed the decree dissolving the injunction.]

Note. 1887, Davison v. Holden, 55 Conn. 103, 10 Atl. Rep. 515; 1881, Ash v. Guie, 97 Pa. St. 493, 39 Am. Rep. 818; 1855, Pipe v. Bateman, 1 Iowa (1 Clarke) 369; 1893, Burt v. Oneida Community, 137 N. Y. 346, 33 N. E. Rep. 307, 19 L. R. A. 297; 1893, McDowell v. Joice, 149 Ill. 124; 1888, Liggett v. Ladd, 17 Ore. 89, 21 Pac. Rep. 133; 1891, Crawford v. Gross, 140 Pa. St. 297, 21 Atl. Rep. 356; 1891, Wicks v. Monihan, 130 N. Y. 232, 14 L. R. A. 243, 29 N. E. Rep. 139; 1889, Lawler v. Murphy, 58 Conn. 294, 8 L. R. A. 113, 20 Atl. Rep. 457; 1896, Cheney v. Goodwin, 88 Maine 563, 34 Atl. Rep. 420; 1895, Society of Shakers v. Watson, 68 Fed. Rep. 730, 15 C. C. A. 632, 37 U. S. App. 141; 1893, Grand Rapids Guard v. Bulkley, 97 Mich. 610, 57 N. W. Rep. 188; 1883, Ray v. Powers, 134 Mass. 22; 1883, Burt v. Lathrop, 52 Mich. 106; 1883, Heath v. Goslin, 80 Mo. 310, 50 Am. Rep. 505; 1843, Eichbaum v. Irons, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540; 1841, Todd v. Emly, 7 M. & W. 427, s. c. 8 M. & W. 505.

Sec. 36. (7) From state institutions.

NEIL v. THE BOARD OF TRUSTEES OF THE O. A. & M. COLLEGE.[1]

1876. In the Supreme Court of Ohio. 31 Ohio State, 15–23.

Motion for leave to file a petition in error to reverse the judgment of the district court of Franklin county.

[Action in lower court by the college board of trustees to collect subscription made by Rudisill and others and guaranteed by Neil, to contribute to a fund to be raised in order to secure the location of the college in Franklin county, the sums subscribed to be paid to the treasurer of the college at the times indicated. The college was located in Franklin county, as proposed, and the board sued for the sums so subscribed. Neil demurred to the petition on the ground (among others) that the board of trustees had not the legal capacity to sue.]

Boynton, J. * * * It is claimed by the plaintiff that the board of trustees of the college has not legal capacity to sue, and, therefore, that the judgment was improperly rendered in its favor. It is not, however, denied that the fourth section of the act establishing the college (67 Ohio L. 20) expressly confers upon the board the "right of suing and being sued, of contracting and being contracted with;" but it is contended that such act, "in so far as it attempts to constitute the defendant in error the board of trustees of said college, and clothe it with the power therein mentioned," is in conflict with the first section of the thirteenth article of the constitution, which declares that the "general assembly shall pass no special act conferring corporate powers," the claim being that the board is, to all intents and purposes, created a corporation and clothed with corporate functions and privileges. We are not able to yield our assent to this construction of the statute. The act is entitled "An act to establish and maintain an agricultural and mechanical college in Ohio." It creates a board of trustees, to be appointed by the governor, by and with the advice and consent of the senate, and commits to such board the government, control and general management of the affairs of the institution; and while the statute authorizes the board to make contracts for the benefit of the college, and to maintain actions, if necessary, to enforce them, and to exercise other powers similar to those conferred on bodies corporate, it does not assume to, nor does it in fact, create or constitute such board of trustees a corporation, and hence does not clothe it with corporate functions or powers. The State, ex rel. the Attorney-General, v. Davis, 23 Ohio St. 434. The college is a state institution, designed and well calculated to promote public educational interests,

[1] Arguments of counsel and opinion of court on other points omitted. Statement of facts condensed.

established for the people of the whole state, to be managed and controlled by such agencies as the legislature in its wisdom may provide. Similar powers, but perhaps less extensive, because less required, are conferred on the trustees of the various hospitals for the insane (73 Ohio L. 80), and on the board of managers of the Ohio Soldiers' and Sailors' Orphans' Homes (67 Ohio L. 53), and other institutions of the state. The powers thus conferred are essentially necessary to accomplish the objects for which these institutions were established. The power to establish them is found clearly granted in the seventh article of the constitution.

Leave refused.

Note. There is considerable difficulty in determining the character of these institutions, whether they are corporations or not. Several cases hold they are, and several hold they are not. Perhaps, it is not improper to call them public corporations, but they are obviously not the same as municipal corporations, or public *quasi* corporations such as counties, townships, school boards, etc. (See *infra*, pp. 214, 221, 222, 229.) They have, in the case of banks, at least in one state, been held to be private corporations. (See *infra*, p. 221.) The fullest information to be had on the character of these institutions is to be found in a note to State v. Regents of Univ. of Kan., 55 Kan. 389 (1895), in 29 Lawyer's Rep. Ann., p. 378. Here information is given under the heads Banks, Educational Institutions, Other State Institutions—Liabilities of Such, and Directors, Trustees and Officers of Such.

1. **Universities, etc.** Regents of University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; Oklahoma Agr. & M. Coll. v. Willis (Minn.), 40 L. R. A. 677; State v. Carr, 111 Ind. 335 (University of Indiana is not a public corporation); State v. White, 82 Ind. 278, 42 Am. Rep. 496 (Purdue University is subject to *mandamus*); State v. Regents of University, 55 Kan. 389 (subject to *quo warranto*); Weary v. State University, 42 Iowa 335 (University is not a corporation); University of Alabama v. Winston, 5 Stew. & P. (Ala.) 17 (University of Alabama is a public corporation); Lewis v. Whittle, 77 Va. 415 (Medical College of Virginia is a public corporation); Tulane Ed. Fund v. Board of Assessors, 38 La. Ann. 292 (University of Louisiana is a corporation); Regents of University of Michigan v. Det. Bd. of Ed., 4 Mich. 213 (University is a public corporation); to same effect, Regents of University of Michigan v. Y. M. Society, 12 Mich. 138; Sterling v. Regents of University of Michigan, 110 Mich. 369, 34 L. R. A. 150; Regents of University of Nebraska v. McConnell, 5 Neb. 423 (University of Nebraska is a public corporation); University of North Carolina v. Maultsby, 43 N. C. (8 Ir. Eq.) 257 (University of North Carolina is a public corporation); State v. Knowles, 16 Fla. 577 (Florida Agricultural College is a public corporation); Dunn v. University of Oregon, 9 Ore. 357 (Directors of University of Oregon are a corporation); State v. Lindsley, 3 Wash. 125 (University of Washington is a state institution); Butler v. Regents of University of Wisconsin, 32 Wis. 124 (University is a state institution); State Institutions, 9 Colo. 626 (Agricultural College and School of Mines are state institutions by the constitution and can not be moved); Lundy v. Delmas, 104 Cal. 655, 26 L. R. A. 651 (Regents not individually liable for damages).

2. **Banks, state.** See Bank of Tennessee v. Woodson, 5 Coldw. (Tenn.) 176; Bank of Kentucky v. Wister, 27 U. S. (2 Pet.) 318; Briscoe v. Bank of Commonwealth of Kentucky, 36 U. S. (11 Pet.) 257; Woodruff v. Trapnall, 51 U. S. (10 How.) 190; Darrington v. Branch Bank of Alabama, 54 U. S. (13 How.) 12; Curran v. Arkansas, 56 U. S. (15 How.) 304; Barings v. Dabney, 86 U. S. (19 Wall.) 1; Jones v. Bank of Tennessee, 8 B. Mon. 122, 46 Am. Dec. 540; McFarland v. State Bank, 4 Ark. 44, 37 Am. Dec. 761; Linn v. State, 2 Ill. 87, 25 Am. Dec. 71.

3. **Other institutions.** Cleaveland v. Stewart, 3 Ga. 283; Illinois Board of

Education v. Greenebaum, 39 Ill. 610; Downing v. State Board of Agriculture, 129 Ind. 443, 12 L. R. A. 664; Liggett v. Ladd, 23 Ore. 26 (Ag. Soc.); Selinas v. Vermont Agricultural Society, 60 Vt. 249; Hern v. Iowa State Agricultural Society, 91 Iowa 97, 24 L. R. A. 655. See, especially, the full notes upon the subject of *state institutions* generally, in 29 L. R. A. 378, and 40 L. R. A. 677.

ARTICLE VI. CLASSES OF CORPORATIONS.

Sec. 37. Every body politike, or corporate, is either ecclesiastical or lay; ecclesiastical, either regular, as abbots, priors, etc., or secular, as bishops, deans, archdeacons, parsons, vicars, etc.; lay, as maior or communaltie, baylifes and burgesses, etc. * * * And againe it is either sole, or aggregate of many. * * * And this body politike, or corporate, aggregate of many, is by the civilians called *collegeium* or *universitas*

Coke's Littleton, § 413, c. 1613.

(*a*) As to number of members, corporations are:

1. Sole.
2. Aggregate.

OVERSEERS OF THE POOR OF THE CITY OF BOSTON v. SEARS ET UX.[1]

1839. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 22 Pickering (Mass.) Rep. 122–135.

[Writ of right by plaintiff against defendants to recover certain lands in Boston, claiming upon the seizin of their *predecessors* within the last forty years. Defendants demurred.]

SHAW, C. J., delivered the opinion of the court. It is a well-settled rule of law, applicable to real actions, that it is not necessary, as in personal actions, to plead a statute of limitations, and, therefore, if it appear, on the face of the record, that the action is not brought within the time limited by law, the tenant may avail himself of it by general demurrer. Holmes v. Holmes, 2 Pick. 23.

By statute 1786, ch. 13, § 3, no person or body politic shall sue or maintain any action, for any lands, upon his or their own seizin or possession therein, above thirty years next before the *teste* of the same writ. And by statute 1807, ch. 75, § 1, no person shall sue or maintain any writ of right to any lands, upon the seizin of his or their ancestor or predecessor, beyond the term of forty years next before the teste of the same writ.

[1] Arguments and part of opinion omitted. Statement of facts condensed.

It is therefore manifest that if this writ is taken to be one on which the plaintiff corporation count on their own seizin; or, if they constitute a corporation of such a character that they could have no predecessor in legal contemplation, and, of course, could not count on the seizin of predecessors, then this action can not be maintained. This distinctly presents the question for consideration. On the part of the tenants, it is contended, that this is a common case of a corporation aggregate, consisting of many persons, with the usual incidents of an aggregate corporation, that as such they must declare upon their own seizin within thirty years. On the contrary, it is contended by the demandants, that although the plaintiff corporation is composed of many persons, yet that is more analogous to the case of a sole corporation, particularly in this, that they do not elect the members of their own body, that they all go out at once and new members come in at once, as the necessary consequence of an annual election by others, and, therefore, that the corporation of one year and that of another, when an election has intervened, bear to each other the legal relation of predecessor and successor.

It becomes, therefore, necessary to distinguish with some care between these different kinds of corporations. "The first division of corporations," says Blackstone, "is into aggregate and sole. *Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue forever. Corporations sole consist of one person only, and his successors, in some particular station, who are incorporated by law in order to give them some legal capacities, particularly that of perpetuity.*" We are not aware that there is any instance of a sole corporation in this commonwealth except that of a person who may be seized of parsonage lands to hold to him and his successors, in the same office, in right of his parish. There are some instances in which certain public officers are empowered by statute to maintain actions, as successors, such as judges of probate, county and town treasurers; but it is only where expressly provided by statute. "There are," says Chancellor Kent, 2 Commentaries (3d ed.), 273, 274, "very few points of corporation law, applicable to a corporation sole." "The corporations generally in use with us are aggregate or the union of two or more individuals in one body politic, with a capacity of succession and perpetuity."

It becomes then necessary to consider what are the **distinctions established by law, between a sole and an aggregate corporation.** The **first** and the most important is that a corporation aggregate has a perpetual existence without change, so that an estate once vested in it continues vested without interruption. Whereas, when a bishop or parson, holding estate as a sole corporation, dies or resigns his office, the fee is in abeyance until a successor is appointed. From this flows one necessary, but obvious legal consequence, which is that a grant to an aggregate corporation carries a fee without the word "successors"; but a grant to a corporation sole, without including successors, carries a life estate only to the actual incumbent, who is the first taker. Co.

Lit., 8*b*, 9*b*, 94*b*; 4 Cruise's Dig., 442. A life estate to an ideal being having a perpetual and uninterrupted existence must be coextensive with a fee or perpetuity, and words of limitation could not extend it. But where property vests in a bishop, parson or other sole corporation, he holds it to his own use and benefit whilst he holds the office, and afterward the estate and the enjoyment of it go together to his successor when established. The transmission of the estate is perpetual, but the beneficial enjoyment changes at each succession.

Another well settled distinction is that by the common law a sole corporation can not take personal property in succession, and that its corporate capacity is confined to real estate. 2 Kent's Com., 273. An aggregate corporation may take personal property for themselves and successors. The reason why a sole corporation can not, says Blackstone, is that such movable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor. 1 Comm., 477.

There are a great variety of other particulars, in which the incidents and characteristics which are considered essential to an aggregate corporation do not extend to a sole corporation because by the reason and nature of their respective modes of operation they do not apply; upon the principle that when the reason of a rule ceases the rule ceases.

An aggregate corporation may have and use a common seal by which the will of the body is expressed and its acts executed; they are to take and grant by their appropriate corporate name; may take and hold real and personal property; may make by-laws for the regulation of all matters within the scope of their authority, not contrary to the law of the land or repugnant to the provisions of the charter or act of incorporation; they must perform all corporate acts, by deed under their common seal, by vote or by the agency of officers or agents duly authorized for the purpose; they must appear by attorney and can not appear in person; the will of the majority, *orderly* taken at a meeting duly called and held, is the will of the body and must govern unless otherwise provided by charter or by-law; they must regularly keep a record, journal or other written account of their votes and proceedings, which is the proper evidence of their acts, and may elect and qualify a clerk or secretary for that purpose; they may elect a president or head, a treasurer, managers, directors and other suitable officers, with such powers as the terms import, and such as may be specially conferred upon them by vote or deed to manage their affairs; they may elect members to fill vacancies when it is not otherwise provided by the charter. Indeed this last qualification must be added in regard to almost all these enumerated powers, and it may be remarked generally that when these are denominated incidents to an aggregate corporation, it is to be understood that they are the most common and usual characteristics of such a corporation, and that they exist by implication, in cases where it is not otherwise provided in the charter; but that its constitution and organization, the mode in which individuals may become and cease to be members, and also its action in all respects, the manner, times, places and occasions on which meetings

may be held, the members or particular individuals who must be present and vote to constitute a valid act, the officers who may or must be chosen, the property they may hold, the powers they may exercise, the duration of their existence, may all be modified and regulated *ad libitum*, by the power which constitutes the corporation. Nothing seems essential to a corporation but a capacity to have perpetual succession, under a special denomination and in an artificial form, a capacity to take, hold and grant property, to sue and be sued by its corporate name, and in common to exercise powers and enjoy franchises and immunities. 2 Kent's Com., 277.

In all these respects the distinction between an aggregate and sole corporation, growing out of their different modes of constitution and forms of action, is striking and obvious. A bishop or parson acting in a corporate capacity, and holding property to him and his successor in right of his office, has no need of a corporate name; he requires no peculiar seal; he performs all legal acts under his own seal, in his own name and name of office; his own will alone regulates his acts, and he has no occasion for a secretary, for he need not keep a record of his acts; no need of a treasurer, for he has no personal property, except the rents and proceeds of the corporate estate, and these he takes to his own use when received. By-laws are unnecessary, for he regulates his own action, by his own will and judgment, like any other individual acting in his own right. But it is not necessary to pursue the comparison into all its details; the points suggested are sufficient to show the legal distinctions between the two classes of corporations.

With these views of the characters of these two kinds of corporations, it becomes necessary to examine the act under which the demandants were made a corporation, and under which they act, in order to ascertain their legal character and rights. This act was passed by the provincial government shortly before the revolution, in 1772. It recites that many charitably disposed persons had given sums of money and other interest and estate to the poor of Boston, and others were well inclined to make such charitable donations, but the overseers of the poor of the same town, not being incorporated, such good intentions had been frustrated, or not carried into full effect; it then enacts that the said overseers for the time being, be made and incorporated into a body politic by the name, etc., and that they and their successors in said office have a perpetual succession by said name. The second section provides that all money and estate, real or personal, before given, or which should be afterwards given to the poor of said town, not exceeding the amount and value therein limited, should be vested in the same overseers, and their successors in their said corporate capacity; and they were enabled to receive and manage the same for the use of said poor. The third section authorizes them to take and hold moneys, securities and personal property to the amount of sixty thousand pounds and no more. The fourth section again declares that the said overseers and their successors in said office, by the said name, shall have perpetual succession and power, by their said corporate name, to purchase and hold lands

not exceeding five hundred pounds annual income, to manage, lease and sell the same, and do all other acts, as natural persons may, as they shall judge best for the use and advantage of said poor. The fifth section authorizes them to have a common seal, to make by-laws, to choose a treasurer, clerk and other subordinate officers, and at pleasure to displace them. The sixth and last section declares that all instruments executed under their common seal, and all acts done or matters passed upon by consent of a major part of said overseers for the time being, shall bind said corporation and be valid in law.

Here are all the characteristics and incidents of a complete, full, aggregate corporation. It was to be composed of several persons. They were to hold personal as well as real estate, to make by-laws for their government, to have a common seal, to have perpetual succession, and to act by the vote of a majority. Indeed it is not denied that they are literally an aggregate corporation, consisting of many persons, in contradistinction to a sole corporation; but it is contended, that as they have no power of electing their own members, and thereby perpetuating their own existence, but all come in by annual election and go out at the end of the year, they constitute a body more analogous to a sole corporation than to an aggregate one. But this analogy is not such as wholly to change the character of such a corporation. Indeed, the analogy even in this respect is rather slight.

The strong argument is, that in this corporation there is no provision that the body shall perpetuate itself by an election of new members in place of those who die or resign. But this mode of perpetuating its existence is not essential; all that is essential is, that some mode be provided by the charter, or act by which it is constituted, by means of which it shall be so perpetuated. Blackstone, in the definition already cited, says, that "corporations aggregate consist of many persons, united together into one society, and are kept up by a perpetual succession of members, so as to continue forever." 1 Comm., 469. If such a succession is effectually provided for, it is all that is requisite. Here we are to consider that the legislature, in framing this act of incorporation, had in their view the general laws of the government, and the manner in which towns in general, and the town of Boston in particular, were organized. Those laws provided, that that town should annually choose twelve persons to be overseers of the poor, and the general laws provided, that if overseers were not specially chosen, the selectmen should act as overseers. Towns were of themselves corporations, having perpetual succession, consisting of all persons inhabiting within certain territorial limits, so that by the ordinary operation of the laws, a perpetual succession of overseers was secured. The better opinion is, that town officers thus annually chosen hold their offices until others are chosen and qualified in their place. But this is not essential to the argument; it is made the duty of towns to choose officers annually, it being for their interest to do so; and when chosen, they become, by force of the statute, members of the corporation, and thus all the purposes contemplated by the incorporation would be attained. And this mode of continuing a suc-

cession of members, without election by the corporation itself, applies to the great majority of corporations in this commonwealth. In all *quasi* corporations, as cities, towns, parishes, school districts, membership is constituted by living within certain limits. In all bridge, railroad and turnpike companies, in all banks, insurance companies, manufacturing companies, and generally in corporations having a capital stock, and looking to profit, membership is constituted by a transfer of shares, according to the by-laws, without any election on the part of the corporation itself. In some, the assent of the corporation is made necessary to such transfer and consequent membership. In some instances more nearly resembling the present, all the members of the corporation are chosen, annually or otherwise, by a body other than itself, as trustees of ministerial funds, chosen by the parish, deacons of Congregational churches and wardens and vestry of Episcopal churches, by the members of those churches; and in the latter case, the corporators are elected by persons not themselves being a corporation, and having a perpetual existence as voluntary associations, only by the ancient and established usages of the country. St. 1785, ch. 51.

In the present case abundant provision was made for perpetuating the corporation. Supposing the act to be framed with reference to the established and perpetual laws then in force, it was equivalent to declaring that those persons, who were then overseers of the poor, and those who should thereafter be annually and successively chosen by the town, forever, as such overseers, should be a body corporate and have perpetual succession. And this was an ample provision made in the act, for the perpetual succession of members, declared by the act itself. It was stated in the argument for the demandants, on the authority of Lord Coke, that by the ancient law an abbot or convent would not take as an aggregate corporation, because, though consisting of many, it had not power to perpetuate itself by election, but the abbot comes in by appointment. But this argument is not sustained by the authority. The reason assigned by Lord Coke is that the abbot only is capable of taking; the convent or monks are dead persons in law, and for that reason the estate vests in the abbot alone as a sole corporation. Co. Lit., 94*a*, 94*b*.

Some cases were cited from the New York Reports, supposed to have a bearing on this subject, in which it was held that overseers might sue and be sued upon the acts of their predecessors. Todd v. Birdsall, 1 Cowen 260; Grant v. Fancher, 5 Cowen 369. These cases have very little bearing upon the present question. They depend upon general statute provisions, very different from ours. These cases went on the ground that the overseers were not corporations, but exercised certain public trusts and duties, which, when done within the scope of their authority, devolved upon their successors in the same trust, in the nature of corporate obligations. Whatever may be the relation of the overseers of the poor in this commonwealth, by the general laws, in this respect, these demandants were specially incorporated for the purpose of taking and holding property, for the use of

the poor, and their rights and duties, in this respect, do not depend upon these general laws.

If the legislature who granted this act of incorporation, knew and recognized the distinction between an aggregate and sole corporation, it is very clear that they intended to constitute an aggregate corporation, to take and hold personal property, and provided for the appointment of a treasurer for that purpose. * * *

If it be asked what reason can be assigned why a sole corporation shall have forty years to bring a writ of right, counting on the seizin of a predecessor, and why an aggregate corporation generally, or such a corporation as the demandants, in particular, shall have only thirty years, in addition to the technical reasons already assigned, we think that there are some others bearing more directly on the merits.

A parson, acting in the capacity of a sole corporation, comes to the estate of his predecessor, as an heir does to his inheritance, a stranger. He is usually a young clergyman, knowing nothing of the parsonage, till about the time of his settlement. He is dependent on the duty and courtesy of the representative of his predecessor, to be furnished with the title deeds. Considerable time may elapse before he can become acquainted with the amount and condition of the estate, which he is bound to preserve and defend for the benefit of himself, his parish, and his successors. The condition of a corporation aggregate, situated like the demandants, vested with corporate powers for the better executing of a public trust, is altogether different. Looking at the matter practically, as the legislature may be presumed to have done, many, perhaps most of the overseers, will be re-chosen, and the board will change gradually. But suppose an entire new board comes in, the records, votes, and muniments of title are all in the hands of their clerk; the money, securities and personal property are held by the treasurer; confidential officers, the performance of whose duty is usually secured by oath and bond. They are in as good a condition to execute the trusts reposed in them, in regard to these charitable funds, as to understand and perform the other duties confided to them. They are in the same condition with all other city and town officers, and indeed all officers of the state government, and of all corporations, where they come in by annual election. In most cases of aggregate corporations, the trustees, directors, managers and executive officers, all those who are charged with the duty of investigating and maintaining the rights of such corporations, either to real or personal property, come into office by annual election, and yet they have but thirty years, within which to commence writs of right.

On the whole, the court are all of opinion that the demandants were constituted an aggregate corporation, with perpetual and continued succession; that a grant to them of real estate would have carried a fee without being to their successors; that in a writ of right they can count only upon their own seizin, within thirty years next before the commencement of the action, and that, not having so counted in the present case, the demurrer is well taken.

Note. 1807, Weston v. Hunt, 2 Mass. 500, (Parson as to parsonage lands is

a corporation sole); 1811, Brunswick v. Dunning, 7 Mass. 445–7, (Same); 1889, Archbishop v. Shipman, 79 Cal. 288, (Roman Catholic bishop holding church lands is a corporation sole); 1875, Westcott v. Fargo, 61 N. Y. 542, (President and treasurer of a joint stock company for purposes of suits under statutes are substantially corporations sole).

1. **Officers.** What were formerly classed as corporations sole in the old digests with us are now usually classed as officers, and found under that title in digests.

The King of England (Co. Lit. 43, 1 Bl. Com. 469, 1 Kyd 20), the chamberlain of the city of London for purpose of taking certain bonds to himself and successors (Fulwood's Case, 4 Coke 64; Cro. Eliz., 464); minister of a parish seized of its freehold (Pawlet v. Clark, 9 Cranch, U. S. 292); the governor of the state (The Governor v. Allen, 8 Humph. (27 Tenn.) 176, *infra*, p. 270); and certain county officers, in taking bonds, recognizances, etc. (Kinney v. Sanders, 3 Ired. (N. C.) 360; McDowell v. Hemphill, 60 N. C (1 Winst. Law) 96, have been held to be corporations sole. In Louisville Banking Co. v. Eisenman, 94 Ky. 83, 42 Am. St. Rep. 335, it is said there is no such being as a sole corporation in this state, and none such allowed to be created by the statute. This was said concerning a corporation in which one member had become the owner of all the shares, and in some measure misconceived the difference between a corporation sole and a corporation aggregate, the latter being one in which there is the capacity of having more than one member at a time, and the former one in which there is the capacity of having only one member at a time.

2. **One man companies.** In corporations with shares of stock, one man may become the owner of all the shares of stock, but this does not convert the corporation into a corporation sole, for there is yet the capacity to sell shares by the owner, and bring in other members. For most purposes, as Mr. Cook says (§ 709), "the existence, relations and business methods of the corporation continue." But in Maryland and Kentucky it is held that the corporate existence or franchise is suspended while one owns all the stock to the extent that the corporate property becomes liable for the debts of the sole owner in the same way as his own; but on the other hand, the sole owner does not become individually liable for debts created for the corporation and in its name. (Swift v. Smith, 65 Md. 428, 57 Am. Rep. 336; Louisville Banking Co. v. Eisenman, 94 Ky. 83, 42 Am. St. Rep. 335, 19 L. Rep. A. 684.) But such distinction has not usually been made. See 1897, Salomon v. Salomon, etc., L. R. App. Cas. 22; 1897, Harrington v. Connor, 51 Neb. 214, 70 N. W. Rep. 911; 1897, Randall v. Dudley, 111 Mich. 437, 69 N. W. Rep. 729; 1896, Parker v. Bethel Hotel Co., 96 Tenn. 252, 31 L. R. A. 706; 1896, National Water-Works Co. v. Kansas City, 78 Fed. Rep. 428; 1895, Bank v. Macon Construction Co., 97 Ga. 1; 1892, Union Pacific R. v. Chicago, etc., R., 51 Fed. Rep. 309; 1891, Humphreys v. McKissock, 140 U. S. 304; 1889, Farmers, etc., Trust Co. v. Chicago, P. & S. R. Co., 39 Fed. Rep. 143; 1886, England v. Dearborn, 141 Mass. 590; 1884, Button v. Hoffman, 61 Wis. 20, 50 Am. Rep. 131.

See note, pp. 889, 890.

Sec. 38. Same. (*b*) As to purpose, corporations are:
(1) Ecclesiastical, or religious.
(2) Lay, which are (a) Eleemosynary, or (b) Civil.

HARDIN v. TRUSTEES OF SECOND BAPTIST CHURCH.

1883. IN THE SUPREME COURT OF MICHIGAN, 51 Mich. Reports, pp. 137–139, 47 Am. Rep. 555.

Error to Wayne. (Jennison, J.) June 13. June 22.

Case. Plaintiff brings error. Affirmed.

COOLEY, J. The preliminary objection to the maintenance of this action is so unmistakably fatal that there can be no occasion or excuse for considering any other.

The plaintiff, who, previous to February 2, 1881, was a member in good standing of the Second Baptist Church of Detroit, brings suit against the defendant to recover damages for having been on that day unwarrantably and without trial upon charges expelled from membership. The suit is against the corporate body known in law as "The Trustees of the Second Baptist Church of Detroit," and which was organized by voluntary association under authority conferred by the Revised Statutes of 1838. The provision contained in that code is substantially the same which has always existed in this state, and which is simple and easily understood. Persons desirous of forming themselves into a religious society sign articles of association for the purpose, agree upon a name, elect trustees and put their articles on record when duly perfected. They thereby become a corporation by the name agreed upon, and may take, hold and convey property and exercise the ordinary functions of corporate bodies. The associates are not necessarily professors of any particular belief or faith, or members of any church; and corporate succession is kept up by conferring the privileges of corporators on all who regularly attend worship in the society and contribute to its support. And the trustees who are to manage the temporal affairs of the corporation may or may not be church members.

Connected with the corporation the statute contemplates that there will be a church, though possibly this may not be essential. In this case there is one. *The church has its members, who are supposed to hold certain beliefs and subscribe some covenant with each other, if such is the usage of the denomination to which the church is attached. The church is not incorporated, and has nothing whatever to do with the temporalities. It does not control the property or the trustees; it can receive nobody into the society and can expel nobody from it. On the other hand, the corporation has nothing to do with the church, except as it provides for the church wants. It can not alter the church faith or covenant; it can not receive members; it can not expel members; it can not prevent the church receiving or*

expelling whomsoever that body shall see fit to receive or expel. This concise statement is amply sufficient to show that this suit has no foundation. The corporation is sued for a tort which it neither committed nor had any power to prevent, and which has occurred in a proceeding where the interference of the corporation would have been an impertinence.

But it is said that the church is an integral part of the corporation, or rather, that it is the corporation in its spiritual capacity. Its being an integral part of the corporation proves nothing. Counties, towns and school districts are integral parts of the state, but the state is not for that reason liable for their torts. And as to spiritual capacity, the corporation has none; it is given capacity in respect to temporalities only. If the corporation had assumed to expel this plaintiff from the church, she might treat its action with contempt. But as she makes no complaint of wrongful corporate action, we must assume that the corporation has never invaded her rights. If the church has done so, the church alone is culprit.

The distinction between church and corporation in these cases is sufficiently explained in the following authorities: Baptist Church v. Witherell, 3 Paige 296, s. c. 24 Am. Dec. 223; Lawyer v. Cipperly, 7 Paige 281; Robertson v. Bullions, 11 N. Y. 243; Bellport v. Tooker, 29 Barb. 256, and 21 N. Y. 267; Burrel v. Associate Reformed Church, 44 Barb. 282; Miller v. Gable, 2 Denio 492; Ferraria v. Vasconcellos, 31 Ill. 25; Calkins v. Cheney, 92 Ill. 463; Keyser v. Stansifer, 6 Ohio 363; Shannon v. Frost, 3 B. Mon. 253; German, etc., Cong. v. Pressler, 17 La. Ann. 127; O'Hara v. Stack, 90 Pa. St. 477; Sohier v. Trinity Church, 109 Mass. 1; Walrath v. Campbell, 28 Mich. 111. See, also, Hale v. Everett, 53 N. H. 9.

The judgment must be affirmed with costs.

The other justices concurred.

Note. 1765, Rex v. Chancellor of Cambridge, 3 Burr. 1656, s. c. 1 W. Black. 550; 1815, Pawlet v. Clark, 9 Cranch 292; 1868, Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82; 1883, Sale v. First Regular Baptist Church, etc., 62 Iowa 26, 49 Am. Rep. 136; 1883, Landis v. Campbell, 79 Mo. 433, 49 Am. Rep. 239; 1890, Lilly v. Tobbein, 103 Mo. 477, 23 Am. St. Rep. 887; 1895, Russie v. Brazzell, 128 Mo. 93, 49 Am. St. Rep. 542; 1832, First Baptist Church v. Witherell, 3 Paige Ch. (N.Y.) 296, 24 Am. Dec. 223; 1890, Connelly v. Masonic, etc., Association, 58 Conn. 552, 18 Am. St. Rep. 296; 1894, Reorganized Church of Jesus Christ of Latter Day Saints v. Church of Christ, 60 Fed. Rep. 937, 45 Am. & Eng. Corp. Cas. 529; 1894, Auracher v. Yerger, 90 Iowa 558, 45 Am. & Eng. Corp. Cas. 554; 1883, White Lick Quarterly Meeting, etc., v. White Lick Quarterly Meeting, etc., 89 Ind. 136, 4 Am. & Eng. Corp. Cas. 87; 1894, Buettner v. Frazer, 100 Mich. 179, 58 N. W. Rep. 834; 1891, Winnepesaukee Camp Meeting Ass'n v. Gordon, 67 N. H. 98, 45 Am. & Eng. Corp. Cas. 576; 1883, Whitecar v. Michenor, 37 N. J. Eq. 6, 1 Am. & Eng. Corp. Cas. 258; 1888, Liggett v. Ladd, 17 Ore. 89, 27 Am. & Eng. Corp. Cas. 406.

Sec. 39. Same.

ROBERTSON ET AL. v. BULLIONS ET AL.[1]

1850. IN THE SUPREME COURT OF NEW YORK. 9 Barbour (N. Y.) Rep., pp. 64–150.

[In equity. Appeal from the vice-chancellor. In 1754 "the Associate Presbytery of Pennsylvania," subordinate to the Associate Synod of Scotland, was organized out of the American congregations of the Associate Church. In 1785, a church known as the Associate Congregation of Cambridge, N. Y., adhering to the Associate Presbytery of Pennsylvania, was formed. In 1802, connection with Scotland was dissolved, and the Pennsylvania Presbytery was terminated by being divided into four presbyteries, one being called the Associate Presbytery of Cambridge, and a synod called "Associate Synod of North America," organized. Local churches were called congregations. In 1826 the Cambridge Associate Congregation became incorporated. In 1786 certain land was conveyed by F. to seven persons designated as trustees of the Associate Congregation of Cambridge, "adhering to the Associate Presbytery of Pennsylvania," and to their successors forever. F.'s wife failing to join in the conveyance of 1786, in 1810 a new deed was made to fourteen persons (three being the same as formerly) described as trustees of the same congregation, "adhering to the principles of the Associate Synod of North America, and now under the inspection of the Associate Presbytery of Cambridge, belonging to the said synod, and whereof the Rev. Alexander Bullions is the present pastor," for the use and in trust for those who then were or should thereafter be in full communion, and should compose the said Associate Congregation.

In 1786, a church was built on this property, and in 1833, a new one. In 1808, Dr. Bullions was called as pastor "by the elders and other members of the Associate Congregation of Cambridge, in full communion, as professed by the Associate Presbytery of Cambridge, as subordinate to the Associate Synod of North America." And Dr. Bullions on ordination promised to submit himself to the admonition of the Cambridge Presbytery. In 1838, he was deposed and excommunicated by this Presbytery; its action was affirmed by the Synod of North America, the pastorate declared vacant, and other pastors sent by the Synod to preach temporarily, but a majority of trustees refused to allow them to preach, but permitted Dr. Bullions to continue. The bill prayed that the offending trustees be required to allow a clergyman in good standing to preach, that they be enjoined from using the church or its funds in support of any other, be required to account for all money so expended, that they be removed, and Dr. Bullions restrained from acting as minister. The answer alleged that the greater part of the subscriptions by which the new church was built was con-

[1] Statement of facts condensed. Arguments and much of the opinion omitted. Dissenting opinion of CADY, J., omitted. See decision of court of appeals, affirming the decree rendered by the supreme court, 11 N. Y. 243.

tributed by supporters of Dr. Bullions, of whom there were 340, including 221 communicants, all the elders and all the trustees at that time, while the complainants were only 75 persons including 60 communicants; that Dr. Bullions had been wrongfully deposed by the Presbytery, which was illegally constituted, and that neither he nor his supporters had departed from the principles of the Associate church. The vice-chancellor held that the property was vested in the trustees for the use of the congregation, in accordance with the discipline and government of the Associate church of North America, which did not allow excommunicated preachers to act as minister, and the appropriation of the property for such use would be enjoined. Also that the trustees be removed, and new ones be elected by those who adhered to the Associate Presbytery of Cambridge, including those who statedly worshiped with them; also that there be an accounting for the use of the property.

The statute under which the corporation was formed provided: "That it shall be lawful for the male persons of full age, belonging to any church, congregation, or religious society, now or hereafter to be established in this state, and not already incorporated, to assemble at the church, meeting-house, or other place where they statedly attend for divine worship, and by plurality of voices, to elect any number of discreet persons of their church, congregation or society, not less than three nor exceeding nine in number, as trustees, to take charge of the estate and property belonging thereto, and to transact all affairs relative to the temporalities thereof; and that at such election every male person of full age, who has statedly worshiped with such church, congregation or society, and has formerly been considered as belonging thereto, shall be entitled to vote; and the said election shall be conducted as follows: the minister of such church, congregation or society, or in case of his death or absence, one of the elders or deacons, church wardens or vestrymen thereof, and for want of such officers, any other person being a member or a stated hearer in such church, congregation or society, shall publicly notify the congregation of the time when, and place where, the said election shall be held, at least fifteen days before the day of election; that the said notification shall be given for two successive Sabbaths, or days on which said church, congregation or society, shall statedly meet for public worship, preceding the day of election; that on the day of said election, two of the elders or church wardens, and if there be no such officers, then two of the members of the said church, congregation or society, to be nominated by a majority of members present, shall preside at such election, receive the votes of the electors, be the judges of the qualifications of such electors, and the officers to return the names of the persons who by plurality of voices shall be elected to serve as trustees for the said church, congregation or society, and the said returning officers shall immediately thereafter certify under their hands and seals the names of the persons elected to serve as trustees for such church, congregation or society, in which certificate the name or title by which the said trustees and their successors shall forever

thereafter be called and known, shall be particularly mentioned and described; which said certificate being proved or acknowledged as above directed shall be recorded as aforesaid; and such trustees and their successors shall also thereupon by virtue of this act be a body corporate by the name or title expressed in such certificate."

The law also empowered the trustees to take into their custody and control all the temporalities belonging to the church, congregation or society, to sue and be sued, to purchase and hold property for the use of the same, to make repairs, to regulate the renting of pews, etc., and all other matters relating to the temporal concerns and revenues of such church. Appoint clerk, treasurer, etc. The law provided that no one but such as "shall have been a stated attendant on divine worship in said church, and shall have contributed to support" of same, shall be an elector. Another section provided that the salary of the minister should be fixed by a majority of electors, at a meeting called for that purpose; provision was also made for reducing the number of trustees to not less than three; for reporting yearly revenues to the chancellor, for selling all the property in certain contingencies, and upon dissolution, "for the religious society which was connected with such corporation to reincorporate" in a way prescribed.]

HAND, J. * * * Then what kind of corporations are they? The answer to this inquiry may be of some importance in this case. Chancellor Kent, in his Commentaries, denominates them "ecclesiastical corporations," and Angel & Ames, in their valuable work on corporations, upon this authority adopt the same application. (2 Kent, 274; Angel & Ames on Corporations, 33.) Neither cites any decision. Considering the high authority from whence the remark emanates, I express a dissent with much timidity; but with deference, I think it correct. I doubt whether, in a technical sense, there are any ecclesiastical corporations in this state, particularly under the third section of this act. As an ecclesiastical body they have no legal existence; they have no ecclesiastical power. They are not controlled by and can not control the church, or any church judicatory, or interfere in spiritual concerns. Their object and purpose is to manage the temporalities of the society. "Ecclesiastical corporations," says Blackstone, "are, where the members who compose it are entirely spiritual persons, such as bishops, certain deans and prebendaries; all archdeacons, parsons and vicars, which are sole corporations; deans and chapters at present, and formerly prior and convent, abbots and monks, and the like, bodies aggregate." And in describing the class of lay corporations, known as eleemosynary, he adds: "And all these eleemosynary corporations are, strictly speaking, lay, and not ecclesiastical, even though composed of ecclesiastical persons, and although they in some things partake of the nature, privileges and restrictions of ecclesiastical bodies." (1 Bl. 470. And see Phillips v. Bury, 1 Ld. Ray. 6; Cawdrey's Case, 5 Co. fol. 15; 2 Bac. Abr., 2; 1 Kyd, 22.)

It is not the profession of piety by the individuals that renders the corporation, of which they are the members, ecclesiastical. The corporation must be *spiritual* in a legal and not in a popular or scriptural

sense. Lay corporations may be for the advancement of religion, and the members may all be clergymen, even, but that does not make the corporation ecclesiastical. The king is said, in Cawdrey's case, to be "vicar of the highest of kings," and he is a corporation, but I believe he is not considered an ecclesiastical corporation. And if he were, it would be because he is the head of the church, an ecclesiastical body in law. Dartmouth College is an lay and not an ecclesiastical corporation, and would be if the individual members were all ecclesiastical persons. (Dartmouth College v. Woodward, 4 Wheat. 518. See the opinion of Mr. J. Story, Ang. & Ames, 34.) And one distinctive feature of ecclesiastical corporations is, that they are subject to the jurisdiction of the ecclesiastical courts or the visitatorial power of the ordinary. (1 Bl. 471, n. 1; Toml. Dic., 436; 1 Kyd, 22; Holt, C. J., 1 Show. 252.) Our religious corporations have no such amenabilities. There the ordinary is the visitor of ecclesiastical corporations, and from him there is an appeal. The king, as the "supreme ordinary," visits the metropolitan, and the metropolitan the bishop. Church wardens (in England) are said to be lay corporations, although instituted for the benefit and advancement of religion and to suppress profaneness and immorality, and to see that public worship be performed with due decency and reverence; and are elected by the parish or the minister and parish. (1 Bac. Abr., 597; Dawson v. Fowle, Hardr. 378. Holt, C. J., in Rex v. Rees, 12 Mod. 116. Toml. Dic. "Church wardens." 1 Lill. Abr. "Church wardens." 1 Burn's Eccl. L., 378.) It may be added, that our corporations have power to build school-houses and dwellings for the minister, and other buildings, etc. If these were ecclesiastical corporations, there would be no visitor, for the reason that no person or officer, with us, has any such jurisdiction. That system is a part of the ecclesiastical polity of England, and does not apply to our religious corporations. (2 Kent, 304.)

If lay corporations then they are either eleemosynary or civil. If the former, the visitatorial power is with the founders or their heirs; unless it has been delegated by them to some other person. If a civil corporation, they are not subject to this species of visitation at all. (2 Kent, 304.) Perhaps, for the purpose of ascertaining the power of a court of chancery in this case, it is not important to decide whether they are eleemosynary or civil; for that court has no visitatorial power over a private eleemosynary corporation. Where there is a failure or want of a visitor in such cases, in England, the crown becomes the visitor, and that power is exercised by the court of king's bench if not a charity (Rex v. Gregory, 4 T. R. 240, 1, n.), and if a charity, within the statute of charitable uses (43 Eliz., ch. 4), by a petition to the great seal and not by bill or information; and then the lord chancellor acts in his visitatorial capacity. (Ex parte Wrangham, 2 Ves. Jr. 609; Attorney-General v. Earl of Clarendon, 17 Ves. Jr. 499; Attorney-General v. Dixie, 13 Ves. Jr. 519; Attorney-General v. Smart, 1 Ves. Sen. 92; In re Bedford Charity, 2 Swanst. 524; Dann, Ex parte, 9 Ves. 547, 3 Atk. 109, 1 Jac. 1; Hill on Trustees, 460.) His jurisdiction over charities, it is said, is a personal author-

ity of the chancellor, and not within the ordinary powers of equity. (Corporation of Bedford v. Lenthall, 2 Atk. 553.) I am aware of the conflict of opinion in the English courts as to the extent of the jurisdiction of the king's bench in cases of private eleemosynary foundations. (King v. Cath. Hall, 4 T. R. 233; Eden v. Footer, 2 P. Wms. 326, 12 Mod. 116, F. N. B. 42; King v. Bishop of Chester, 2 Str. 797; Rex v. Gregory, 4 T. R. 240, 1, n.; Green v. Rutherfood, 1 Ves. Sen. 471; King v. Bishop of Ely, 2 T. R. 339; Ex parte Wrangham, *supra.*) Visitatorial power, perhaps, is not now professional language when speaking of the law courts; but the king's bench has a superintendent authority where other jurisdictions are deficient. And at all events, the power where it exists on the other side of the courts belongs to the great seal and not to chancery as a court of equity jurisdiction, except on the ground of trust.

But I am inclined to the opinion that these corporations are not eleemosynary, although occasionally so called. Eleemosynary corporations "are constituted for the perpetual distribution of the free alms or bounty of the founder of them, to such persons as he has directed," (1 Bl., 471); and are of two general descriptions; hospitals for the maintenance and relief of poor and impotent persons, and colleges for the promotion of learning, and the support of persons engaged in literary pursuits. Blackstone says, that the universities of Cambridge and Oxford are not eleemosynary corporations, "though stipends are annexed to particular magistrates and professors, any more than other corporations where the acting officers have standing salaries, for these are rewards *pro opere et labore*, not charitable donations only, since every stipend is preceded by service and duty." No writer upon elementary law uses the term in a different sense than that given by Blackstone, which also accords with its etymology. (2 Kent, 274; 1 Wooddes., § 474; 1 Kyd on Corp., 25; Phillips v. Bury, 1 Ld. Ray. 5, s. c. 2 T. R. 346, s. c. Holt, 724; Webst. Dic. tit. Eleemosynary; Babb v. Reed, 5 Rawle 151.) Those institutions are considered of this kind, where the plan is one of bounty, charity, and benevolence to others; not those which are for the use of, and beneficial and make return to, the donors. Even a school, unless it be a free school, does not come within the statute of charitable uses, 43 Eliz. (Attorney-General v. Hewer, 2 Vern. 387.) In this very case, the land was purchased and paid for by, and conveyed to the society for their own use, and the attorney-general is not a necessary party. Religious societies may be the means of dispensing the richest bounties, but the beneficiaries are, in a great measure, the founders themselves.

If, then, these corporations are not ecclesiastical nor eleemosynary, they fall into the remaining class, private and civil. I think they possess the nature and qualifications of private, civil corporations, created mainly for the purpose of aiding in the promotion and enjoyment of religion by managing the property of the church. Civil corporations are subject to no visitation, except in England by the king, who exercises this power in the king's bench, which is his representative, by mandamus or *quo warranto;* and here this power, in a degree,

belongs to the government and was exercised in our supreme court, which is the representative, in our judicial system, of the king's bench, and, in the same manner, if such power did formerly exist here at all, as the king's bench superintends the civil corporations of the kingdom. (3 Bl., 42; 2 Kyd on Corp., 174; 2 Kent, 304; Ordinance of 1704, establishing our Supreme Court; 2d R. L. App. 6.) Our statutes now give certain powers over corporations to the supreme court and the court of chancery, but religious corporations are expressly excepted from their operation. (1 R. S. 603, § 5, 605, § 11; 2 R. S. 462, §§ 33, 35; 466, § 57.) So the law, as to these, remains as before. The king of England and the legislature here, as founders in a certain sense of all civil corporations, are said to have visitatorial capacity; and they are visited and inspected, where no statute interposes, in the court of king's bench according to the rules of common law, and not elsewhere or by other authority. (1 Bl., 481; Attorney-General v. Utica Ins. Co., 2 John Ch. Rep. 371; Auburn Academy v. Strong, Hopk. R. 278; 2 Kent, 300.) But whether ecclesiastical, eleemosynary or civil, our court of chancery has no jurisdiction as visitor over these religious corporations. * * *

Another important inquiry is, who are the corporators? This is not without difficulty. Chancellor Walworth, in Lawyer v. Cipperly, says that the statute of 1784 recognized three distinct classes or bodies existing in a religious corporation; "the church or spiritual body, consisting of the office-bearers and communicants; the congregation or electors, embracing all the stated hearers or attendants on divine worship who are competent to vote for trustees; and the trustees of the corporation." (7 Paige, 285. See 16 Mass. 503, 4; 10 Pick. 193; 11 Pick. 494.) * * *

The chancellor adds, in The Baptist Church in Hartford v. Witherell, that, although a church or body of professing Christians is almost uniformly connected with such a society or congregation, the members of the church have no other or greater rights than any other members of the society who statedly attend with them for the purposes of divine worship. (3 Paige, 301.) If it be one of the integral parts of the corporation, and the church should become extinct, the corporation would be dissolved. That was so settled in the well-considered case of King v. Pasmore (3 T. R. 199). This would be so clearly, unless the corporators have power to restore the church. A neglect to elect trustees is provided for by the statute, and is, perhaps, more properly a suspension. (Phillips v. Wickham, 1 Paige 590. And see Angel & Ames on Corporations, 464, 734, 5.) The language of the third section is that it shall be lawful for the "male persons belonging to any other church, congregation or religious society" to choose the trustees. The whole statute has reference to religious associations. A "church" (ecclesia) may be: First, a temple or building consecrated to the honor of God and religion; or second, an assembly of persons united by the profession of the same Christian faith, met together for religious worship. (Jac. Law Dict. "Church;" Toml. Dic. "Church;" 5 Petersd. Abr., 409; Town of Pawlet v. Clark, 9 Cranch

292.) These give the legal, though the word has various popular, definitions. (Webster's Dic. "Church.") In our statute I think it is used in the sense of the second definition above. "Congregation" has perhaps no settled legal signification. The pleadings in this case state and admit that in the Associate Church it is used to designate a local church, and it would seem that the word "church" with them implies the church of that denomination in its aggregate capacity, the same as the term "Church of England," which is not a corporation. (Town of Pawlet v. Clark, 9 Cranch 292, Story, J.; Comm. v. Green, 4 Whart. 531.) The word "congregation" occurs frequently in the books made exhibits in this suit. (See the Ordination Vows, in the book containing the Narrative and the Declaration and Testimony, 174 *et seq.*; the Form of Church Government, "Of Particular Congregations," p. 572; Perdivan, b. 1, tit. 1, and, indeed, throughout; 2 Gib's Display 76, and Church Government, art. 3.) "Congregation" was an appellation given to the Protestants in Scotland in 1559, from their union. (Robertson's History of Scotland, b. 2.) The term is used in the penal laws of England against disturbing public worship, particularly those to protect the worship of Protestant dissenters. (1 W. & M., ch. 18.) But, as used in this statute, a congregation, I take it, is an assembly met, or a body of persons who usually meet in some stated place for the worship of God and religious instruction, and may or may not include a church or spiritual body.

And the same may be said of the term "religious society," used in the same connection in the third section. The church, congregation or society must, to organize, have stated "divine worship," for the electors must have attended the same to constitute them such by the third and seventh sections. Whether religion and *divine worship* in their broadest sense, or Christian sects only, are intended, it is not necessary now to inquire. The statute declares that the persons chosen trustees shall be a body corporate. Most of our statutes, in similar cases, use different expressions; as in the acts for the incorporation of literary, manufacturing, and medical societies, cities and villages, etc. And the 13th and 16th sections speak of the corporation being dissolved (not suspended) and authorizes the "religious society which was connected therewith" to reincorporate. But the 9th section permits a religious corporation to reduce the number of trustees, and the congregation or society, I think, is there intended. The 11th section speaks of the "society, to which the real estate so sold did belong;" and the act of 1826 declares that if there be an omission to elect trustees, the church, congregation or religious society shall not be deemed thereby to have been dissolved. Several ambiguous expressions of this nature are found in the statute. Upon the whole, I am inclined to think, all of the electors are corporators. They elect the trustees and from their own body, and these are the officers of the society. It is true, a right of election is often vested in others besides the corporators. This is almost invariably so with sole corporations. Church wardens, who are a corporation for certain pur-

poses, are elected by the parish, or by the minister and parish. But several opinions concur in the position that the electors are corporators. Those of Chancellor Walworth in the Baptist Church v. Witherell,[1] and Lawyer v. Cipperly,[2] have been stated. A. V. Ch. Sandford seems to have entertained the same opinion. (Cammeyer v. United German Lutheran Churches, 2 Sandf., ch. 186), and so I infer did Gardiner, president, in Miller v. Gable, in the court for the correction of errors. (2 Denio 548.) The persons entitled to vote are designated by the statute. At the first election, for the purpose of organizing, they must be male adults, belonging to the church, congregation or society, and must have statedly worshiped with the same, or have formerly been considered as belonging thereto. And after the first election they must have been stated attendants on divine worship in said church, congregation or society, at least one year previous, and have contributed to the support of the church, congregation or society, according to its usages and customs.

The statute, therefore, declares who are the corporators, and the court of chancery can not indirectly disfranchise a member by declaring that he does not possess the necessary qualifications. That power is expressly given to others by the act, and law courts, in case of controversy, alone can review the matter, if that can be done by any tribunal.

If the foregoing views are correct, then those parts of the decree appealed from in this case, which removed some of the defendants as trustees or officers of the corporation, and which declare that the adherents of Dr. Bullions are not members of the corporation, and who are electors therein, and which provide for a new election of trustees, are erroneous; the court of chancery having no power of amotion of an officer of these corporations, or to disfranchise a member thereof, or interfere with or control the election of its officers.

But, although a court of chancery has no jurisdiction with regard to the election or amotion of corporators, it may, in some cases, where a corporation is a trustee, take from it the trust fund, if the trust be abused. * * *

In this case the corporation, together with four of the six trustees, and Dr. Bullions, claiming to be and officiating as minister, are made defendants. It is admitted that the legal estate is in the corporation. The officers of the corporation, as individuals, have no more beneficial interest than any other corporators. It was said in Verplank v. The Mer. Ins. Co. that the relation of *cestui que trust* and trustee does not exist between the corporation and stockholders of an incorporated company. (1 Edw. Ch. Rep. 47, per McCoun, V. C.) But the vice-chancellor further added, that a relation was created between the stockholders and those directors, who in their character of trustees become accountable for any dereliction of duty or violation of the trust reposed in them. And he saw no objection to the exercise of an equity power over such persons, in the same manner as it would be exercised over any other trustees. Now a trustee is a "person in whom some estate, interest or power, in or affecting property of any

[1] 3 Paige 296. [2] 7 Paige 281.

description, is vested for the benefit of another." (Hill on Trustees, 411.) In The People v. Runkle the congregation are said to be the constituents of the trustees. (9 John. 156.) In the case of the Dutch Church in Garden Street v. Mott, the chancellor speaks of the legislature having power to "transfer the legal title from the naked trustees to the *cestui que trust*, after the latter were incorporated." (7 Paige 82.) In Gable v. Miller, the chancellor decided that the property of the corporation was held in trust for the support of the worship of God by a church to be in a particular connection; and for teaching certain particular doctrines. (10 Paige 649.) Senator Porter, in the same cause, in deliving an opinion in the court for the correction of errors, in favor of sustaining the decree, considered those members of the church who had remained faithful to their allegiance to the government of the church as "the rightful members of the church, and the only *cestuis que trust* of the property held for the use of the church." (2 Denio 568.) In Bowden v. McLeod, Vice-Chancellor McCoun thought equity would exercise jurisdiction over the property of religious societies, as being trust property. In that case, by a special act, the minister, elders and deacons were constituted trustees for life. (1 Edw. Ch. Rep. 588. And see 16 Mass. 495, 505, 510.) By the fourth section of the statute under which religious societies are incorporated, the trustees, as we have seen, take possession of and hold all the estate, whether real or personal, and whether before held directly by the church, congregation or society, or by some other person to their use, and however acquired, or by whomsoever held; and they may purchase and demise, lease and improve the same for the use of the church, congregation or society, or other pious uses. * * *

The legal estate is clearly in the trustees, and they are to manage the same, and regulate and order all matters relating to the temporal concerns and revenues of the church, congregation or society. It is said they hold the property in trust, and this is so stated in the pleadings. But I think not in the ordinary sense of that expression. They too, individually, are usually *cestuis que trust*, only holding the legal estate while in office, but in the management of it, and in everything relating to their responsibility, they are upon the same footing with the officers of any incorporated company, and liable for fraud or negligence, or gross mismanagement. Mere trustees are liable for these, but in this case the trustees are, as to the management of the property, more properly officers or agents, and with a broader discretion in some respects than mere trustees. (Ang. & Ames on Corp., 306–7.) * * *

This brings us to the great question in this cause: are the defendants, or any of them, violating the trust reposed in them, or their duty, by adhering to and supporting Dr. Bullions? For, if that is so, although a court of chancery can not remove them and can not divest them of this property, it can compel them to do their duty in relation to it. * * *

Upon this examination of the subject, it seems to me that certain general rules are applicable to these institutions when incorporated

under the third section of the act—that chancery has no power to disfranchise one of the members, nor to remove the trustees or declare their election void; nor direct who shall vote; or in any way interfere with their election. This I have already very fully considered; that the trustees may be restrained from wasting the property, and from such management of it as the court can clearly see, unreasonable and unconscientiously deprives the society, or some part of it, of its enjoyment; and also from applying it to the promotion of tenets clearly opposed and adverse to the fundamental principles of the faith and doctrine professed by the church or society at the time the corporation purchased the property. But the exercise of this jurisdiction should generally be restrictive, and not mandatory; for the statute is their guide and authority for the future, and gives a very broad margin for the exercise of discretion and religious freedom. (Lord Cottenham in The Attorney-General v. Shore,[1] in the House of Lords; Lord Brougham in Milligan v. Mitchell;[2] Lane v. Newdigate, 10 Ves. 193;) that the support of particular doctrines, or systems of worship or government, or a connection with some particular judicatory, may be made a condition in a grant or donation, but if no such condition be expressed, none should be implied, except as to cardinal points. This last principle, I think, may be deduced from the cases already cited, particularly The Attorney-General v. Pearson,[3] The Attorney-General v. Shore,[1] The Attorney-General v. Drummond,[4] Craigdallie v. Aikman,[5] Milligan v. Mitchell,[2] Porter v. Clark,[6] Miller v. Gable,[7] Baptist Church v. Witherell,[8] Lawyer v. Cipperly,[9] The Presbyterian Church v. Johnston.[10] It is hardly necessary to remark that, in Deun v. Bolton,[11] the office bearers of the church were, by statute, *ex officio* trustees, and of course a deposition of the former would be an amotion of the latter. Another general rule is, that the church or spiritual body is authorized to call the minister, either by itself or by some other mode, according to usage. In order to reach the revenues of the corporation, that call must be ratified by the congregation or body entitled to elect trustees, by fixing the salary of the minister; and then the trustee may apply the revenues to his support. * * *

But whether the use of the house by a majority of the congregation under the ministry of the defendant, Dr. Bullions, is such an act as that the minority can complain in this court, and ask for restrictive measures, is a point of much difficulty. * * * It must be remembered that this associate church adheres to the presbyterial form of government. (Dec. and Tes., p. 3, art. 8, Ch. Gov. and Dis., p. 1, art. 4; p. 3, art. 12.) And after the cases of Diefendorf v. Reformed Calvinistic Church,[12] and The Dutch Church v. Bradford,[13] I

[1] 7 Sim. 309 *n*, 9 Cl. & F. R. 355.
[2] 1 Myl. & K. 446, 3 Myl. & C. 72, 433, 511.
[3] 7 Sim. 290.
[4] 1 Con. & L. 210.
[5] 1 Dow's P. C. 1.
[6] 2 Sim. 520.
[7] 2 Denio 492.
[8] 3 Paige 296.
[9] 7 Paige 281.
[10] 1 Watts & S. 9.
[11] 7 Halst. 206.
[12] 20 John. 12.
[13] 8 Cowen 457.

do not see how we can look beyond the decision of the synod. All the authorities agree that the civil courts can not, upon the merits, overhale the decisions of ecclesiastical judicatories in matters properly within their province. Dr. Bullions himself took the case to the synod, and the deposition of a minister is purely an ecclesiastical matter; though the effect of that deposition upon civil rights is quite another thing. The church judicatories had power to depose him, but they could not sequester the property of the corporation, nor compel the congregation, against the will of a majority, and the trustees, to receive a minister. The defendants, in their answer, admit that a minister who is under rightful sentence of excommunication can not be permitted to occupy the pulpit or administer divine ordinances. Our courts have, as we have seen, declared that such dissolution of the connection between pastor and flock discharges the civil contract, even the individual subscriptions for the support of the former. It is true, a majority of the church in those cases were probably opposed to the minister, but the decisions were not put upon that ground. Dr. Bullions must, for the purpose of this case, be deemed deposed from the office of the holy ministry; and, notwithstanding a large majority of this enlightened society still consider him in good standing, a minority of the corporators are of the opposite opinion, and, giving full effect to proceedings against him, insist that his employment is a grievance that deprives them of a reasonable enjoyment of the corporate property, which can be redressed in this court. And with much hesitation, I have come to the conclusion that, upon this point, the law is with them. * * *

There must be a decree restraining the defendants from using the temporalities of the corporation for the support of Dr. Bullions' ministry as long as he is under sentence of deprivation. All the other portions of the decree which have been appealed from must be reversed. Neither party can have costs against the other on this appeal. The complainants have asked too much, and neither side is free from blame. The rule is, where both parties have claimed what they are not entitled to, and each has succeeded as to part of the matters in litigation between them, to give costs to neither. (Crippen v. Hermance, 9 Paige 211.) Nor am I disposed to burden the corporate funds with the costs, except the costs of putting in the answer by the corporation. Each party must in all other respects bear their own.

It was stated on the argument that the complainants, under the vice-chancellor's decree, had taken possession of and occupied the church edifice. The defendants, who were trustees at the time of the commencement of the suit, and their successors, are entitled to the possession of the property of the corporation, but, under all the circumstances of this case, there should be no accounting for the mere use of the property.

If there has been waste or destruction of property, that should be made good.

PAIGE, P. J., concurred.

(Dissenting opinion of CADY, J., omitted.)

Note. See particularly 1819, Dartmouth College v. Woodward, 4 Wheat. 518, *infra*, p. 708; 1815, Phillips Academy v. King, 12 Mass. 546; 1823, Society for Propagating the Gospel v. New Haven, 8 Wheat. (U. S.) 464; 1864, Board of Education v. Greenbaum, 39 Ill. 610; 1893, Bakewell v. Board of Education, (Ill.), 33 N. E. Rep. 186; 1879, Magdalen Hospital v. Knotts, 4 App. Cas. 324; 1872, Gooch v. Association for Relief of Aged Females, 109 Mass. 558; 1895, Hibernian Benev. Soc. v. Kelly, 28 Ore. 173, 52 Am. St. Rep. 769; 1894, Philadelphia v. Masonic Home, 160 Pa. St. 572, 40 Am. St. Rep. 736; 1880, Hennepin Co. v. Brotherhood, etc., 27 Minn. 460, 38 Am. Rep. 298; 1874, Mitchell v. Treasurer of Franklin Co., 25 Ohio St. 143; 1890, Wagner Free Institute v. Philadelphia, 132 Pa. St. 612, 19 Am. St. Rep. 613; 1888, Fire Ins. Patrol v. Boyd, 120 Pa. St. 624, 6 Am. St. R. 745; 1822, American Asylum v. Phœnix Bank, 4 Conn. 172, 10 Am. D. 112; 1876, McDonald v. Massachusetts Gen'l. Hospital, 120 Mass. 432, 21 Am. Rep. 529; 1883, Coit v. Comstock, 51 Conn. 352, 50 Am. Rep. 29; 1893, Sears v. Chapman, 158 Mass. 400, 35 Am. St. Rep. 502; 1889, Coe v. Washington Mills, 149 Mass. 543; 1886, Howe v. Wilson, 91 Mo. 45, 60 Am. Rep. 226; 1880, Rhymer's Appeal, 93 Pa. St. 142, 39 Am. Rep. 736, n. 738; 1881, Manners v. Philadelphia Library Co., 93 Pa. St. 165, 39 Am. Rep. 741, note 748; 1882, Bangor v. Masonic Lodge, 73 Me. 428, 40 Am. Rep. 369.

Sec. 40. Same. Civil corporations are:

1. Quasi.
2. Pure or complete.

THE BOARD OF COMMISSIONERS OF HAMILTON COUNTY v. MIGHELS.[1]

1857. IN THE SUPREME COURT OF OHIO. 7 Ohio State Reports 109–125.

In error to the superior court of Cincinnati.

BRINKERHOFF, J. The defendant in error brought suit in the superior court of Cincinnati against the plaintiffs in error, and, on the 14th of May, 1855, filed therein the following petition, to wit: "The plaintiff, a citizen of the state of Ohio, and a resident of the county of Hamilton, says that the defendants, the board of county commissioners of the county of Hamilton, in the state of Ohio, being authorized by law, in the exercise of their discretion, to erect a good and convenient court-house, upon such plan as they might project, in the city of Cincinnati, the seat of justice of such county, were, on the eleventh and twelfth days of December, 1854, engaged in the erection of such court-house, in the city of Cincinnati, which building was designed and then used for the holding of the courts of the county of Hamilton, and for the offices of the sheriff, clerk of the courts and certain other county officers, under the direction and sanction of the defendants. On the eleventh and twelfth days of December, 1854, the rooms of the northwest corner of said building, on the first floor, were used, under the direction of the defendants, for the holding of the criminal court of Hamilton county, and a certain trial was then and there had, at which the plaintiff was required, by a writ of subpena, to appear and testify, and was detained under the order of the court, as such witness, till night. In the erection of such court-house, upon the

[1] Arguments and part of opinion omitted.

plan projected by the defendants, there was a certain stairway from the first to the second floor, opposite to the main entrance into the building, which persons in their egress from the said court-room by the usual passages into the street must necessarily pass, and under said stairway was a large opening into the cellar, which the defendants wrongfully and unjustly permitted to remain open, unprotected and uncovered, and wrongfully and negligently omitted in any manner to guard the same, so as to prevent persons passing along said passage from falling into such opening, and wholly omitted to light the same at night, by reason whereof, and for want of such light and protection over said opening, the plaintiff, being such witness required to be in such building, and necessarily detained there in obedience to the order of said criminal court of Hamilton county, till after nightfall on the twelfth day of December, 1854, in passing along said passages on his way from the court-room to the street, necessarily and unavoidably slipped and fell into said opening, and thereby the thigh and two ribs of the plaintiff were fractured and broken, and the plaintiff became sick, lame and disordered, and so remained for a long space of time, during all which time he suffered great pain, and was prevented from attending to and transacting his necessary and lawful business, and was obliged to expend and did expend a large sum of money in endeavoring to get healed of said wound, sickness or disorder. The plaintiff, therefore, demands judgment against the defendants for $10,000 damages."

To this petition the defendants below demurred on the ground that it did not state facts sufficient to constitute a cause of action. On hearing, the demurrer was overruled and leave was taken to answer. An answer was filed, admitting a part of the material facts alleged in the petition, and denying the remainder. The case was tried by a jury who found the issues in favor of the plaintiff below, and assessed his damages at $7,750. After motions for a new trial, and in arrest of judgment were made, heard and overruled, judgment was entered on the verdict. No bill of exceptions was taken to any ruling of the court below on the trial.

The case having been reviewed on error by the superior court at general term, and the judgment there affirmed, a petition in error is filed here to reverse that judgment of affirmance.

All the errors assigned or assignable on the record present but the single question which was originally made by the demurrer to the petition, *i. e.*, does the petition state facts sufficient to constitute a cause of action? If it does, there is no error apparent on this record; if it does not, the judgment is erroneous and must be reversed.

It will be noticed that this is an action brought by an individual plaintiff against the commissioners of a county in their official or *quasi* corporate capacity, to recover damages resulting from the negligence and misconduct of those officers. No claim is made against those officers as individuals, but the recovery is sought against the county, and if this judgment can be maintained, it must in some way be met and paid by the people of Hamilton county. And thus we

are presented with the question, is a county, or, in other words, the people of a county, liable in an action sounding in tort, for the personal misconduct or negligence of the county commissioners while in the performance of their official functions?

If a county be thus liable, that liability must be derived either expressly or by necessary implication from the provisions of some statute, or must rest on the principles of the common law.

[After holding there was no statutory liability proceeds:]

2. Is the action maintainable on the principles of the common law? In entering on this inquiry, it is but justice to ourselves to say, that, assisted by the researches of diligent counsel, we have given it an unusual share of labor and attention; and this not only because of the importance of the question itself, but for the reason that the conclusion to which our minds have been compelled is in conflict with a case (Commissioners of Brown County v. Butt, 2 Ohio Rep. 348) decided by judges for whose judgment we entertain that degree of respect which renders even involuntary and irresistible dissent from their conclusions reluctant and self-distrustful.

For the purpose of maintaining this action, an effort has been made in argument to assimilate counties to natural persons and municipal and other corporations proper. Now it is conceded, that if the negligence, and consequent injury to the plaintiff below had been the act of a natural person in the construction of a private building, to which the plaintiff below had been invited, the party guilty of the negligence would properly be liable in damages. So, also, it now seems to be well settled that, had the defendants below been the agents of a municipal or other corporation proper, and had the plaintiff below been injured through like negligence and under like circumstances, the corporation might be held to answer for the injury. And why? Because where there is a wrong there ought to be a remedy; persons, whether natural or artificial, are bound so to use their own property and conduct their own affairs as not to injure others; and where an act is done to the injury of another by a natural person in the pursuit of his own interests, or, through its agents, by an artificial person, a corporation proper, which is called into existence, either at the direct solicitation or by the free consent of the persons composing it, for the promotion of their own local and private advantage and convenience, and which can work only through agents, such natural or artificial person is, on every principle of justice and enlightened reason, bound to rectify the consequence of his own misfeasance. And it is freely admitted that if counties are in all material respects like municipal corporations proper, and may be fairly classed with them, then this action ought to be maintained. But how is the fact? This question is vital, and on its solution the case must depend.

As before remarked, municipal corporations proper are called into existence, either at the direct solicitation or by the free consent of the people who compose them.

Counties are local subdivisions of a state created by the sovereign power of the state, of its own sovereign will, without the particular

solicitation, consent or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to by the people it embraces; the latter is super-imposed by a sovereign and paramount authority.

A municipal corporation proper is created mainly for the interest, advantage and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for the purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy. Ward v. County of Hartford, 12 Conn. 406; Boalt v. Commissioners of Williams County, 18 Ohio Rep. 16; C. W. & Z. Railroad v. Commissioners of Clinton County, 1 Ohio St. Rep. 89.

The idea that the board of county commissioners is the agent of the county or of its people is prominently advanced and pressed on our attention. That board is, in some sort, the agent of the county, it is true; inasmuch as it alone is authorized to sue and be sued in respect to contracts growing out of the county organization. There is an administrative necessity that some name should be employed as the representative of the public interests involved in such suits; and that of the board of county commissioners has, by law, been designated for that purpose; but the name of the county auditor, or the name of the county itself, had the legislature chosen so to prescribe, would have answered the same purpose quite as well; and, in fact, we think, has no special weight or significance.

But, it is said, the members of the board of county commissioners are chosen by the electors of the county, and hence the board is to be regarded as the agents of the county, for whose torts in the performance of artificial duties the county ought to be responsible. True, the people of the county elect the board of county commissioners; but they also elect the sheriff and treasurer of the county. Are the people of the county, therefore, responsible for the malfeasance in office of the sheriff, or for the official defalcations of the county treasurer? This will not be pretended. And yet, if this case is to rest on the principles governing the relation of principal and agent, wherein is the distinction between the case at bar and the case supposed? We confess our inability to discover any such distinction. In the case of municipal corporations proper, the electors are, mediately or immediately, invested with very ample control over their agents, not only as to what shall be done, but how it shall be done, and by whom it shall be done; they may exact such guarantees as they deem proper for their own indemnity, and may prescribe by-laws for their government. As between the commissioners and the electors of a county all this is wanting. All his powers and duties are prescribed by the supreme legislature; and the electors can exercise no control over him whatso-

ever, except such as springs from the bare fact of election; and to this extent they can control a sheriff or treasurer as well as a commissioner.

Chancellor Kent (1 Com. 572–3) says, that "a great proportion of the rules and maxims which constitute the code of the common law, grew into use by the application of the dictates of natural justice and cultivated reason to particular cases;" and that "the best evidence" of what that law is, "is to be found in the decisions of courts of justice, contained in books of reports, and in the treatises and digests of learned men."

Now, on what principles of "natural justice," or of "cultivated reason," aside from positive statute, the people of a county should be held responsible for the personal or official misconduct of a county commissioner, we are wholly unable to perceive.

But how stands the case upon authority, "by the decision of courts of justice, and the treatises of learned men?"

The county organization, substantially similar in all its general features and functions, has existed in England from the earliest times, and in all the states of this Union, with perhaps one or two exceptions, more nominal than real, from the period of their settlement; yet the researches of diligent counsel have failed to furnish a single case where an action has been maintained against a county in a case like the one before us, except that of the Commissioners of Brown County v. Butt, before cited, and which was recognized as authoritative in Richardson v. Spencer, 6 Ohio Rep. 13, but, apparently without any particular examination of the principles on which it was based, or of the authorities bearing upon them.

It is said that the court below sustained the action in the case before us, on the authority of Commissioners of Brown County v. Butt; and we concur with the court below in the opinion that if that case was properly decided this action must be maintained. We have looked in vain for any substantial distinction between them. In that case, the debtor, having been surrendered by his appearance bail, and committed to the custody of Butt, who was sheriff of Brown county, escaped by reason of there being no jail in Brown county, and the sheriff not being by law at liberty to imprison the debtor elsewhere than in the jail of the county. The creditor having recovered against him, as sheriff, for the escape, Butt brought his action on the case against the board of commissioners of the county to recover the damages he had thus sustained by reason of its neglect of duty to provide a jail. The court, Burnet, J., dissenting, held the action to be well brought, on the ground that the commissioners were the agents and representatives of the county. In that opinion, for the reason before indicated, as well as on the authorities about to be noticed, we find ourselves unable to concur. We can not but think that county commissioners are not agents or representatives of the county in any such sense or manner as to render the people of the county justly answerable for their neglect. The reported opinion of the majority of the court in that case may furnish very abundant reason why the utter neglect of county commissioners to furnish a jail, and the sheriff himself being in no

fault, a plea of these facts ought to be held a good bar to an action for an escape, and the creditor turned over to an action against the commissioners personally, or why, if such plea be held bad, the sheriff might maintain his action against the county commissioners in their individual capacity, for the personal injury resulting to him from their neglect—and as to these alternatives, the question not being directly before us, we express no opinion—but it affords to our minds no satisfactory reason why the people of a county should be held pecuniarily responsible for the delinquencies of officers over whose acts that people have no supervision or control whatsoever. And the case itself, as before remarked, stands alone. At the time it was made it was unsupported by any reported case; and, so far as we can ascertain, it remains still unsupported by any case outside of Ohio, while the cases on the other side are uniform and so numerous as to render a particular notice of all of them too tedious to be attempted.

The leading case on this subject seems to be that of Russell v. The Men of Devon, 2 T. R. 667, which was an action on the case against the *men dwelling in the county of Devon*, to recover satisfaction for an injury done to a wagon of the plaintiff in consequence of a bridge being out of repair, which ought to have been repaired by the county; to which two of the inhabitants, for themselves and the rest of the men dwelling in that county, appeared and demurred generally. On hearing, the court of king's bench unanimously sustained the demurrer; and this, apparently, on three grounds: (1) That there was no precedent for such an action. (2) By reason of the inconvenience resulting from the multiplicity of actions for contribution to which a recovery and levying of the judgment upon the inhabitants of the county would give rise; and, (3) That the county of Devon had no fund out of which satisfaction could be made. And this last reason, it seems to us, applies with great weight to the case in hand. It is true, counties in Ohio have a treasury, and in it various funds. But those funds are all raised for specific purposes; to those purposes they must be devoted; the commissioners are authorized to levy no tax, except for such purposes as are authorized by statute; and we have no statute authorizing the levy of a tax to satisfy such a judgment as this. And in Boalt v. Commissioners of Williams County, before cited, it was decided that a bill in chancery would not lie against a county to subject equities, and, in the opinion of the court in that case, it is assumed, *arguendo*, as indisputable, that county bridges, court-house, public offices, jail or poor-house, can not be sold on execution at law.

In Riddle v. The Proprietors of the Locks and Canals on Merrimack River, 7 Mass. Rep. 169,[1] Parsons, C. J., delivering the opinion of the court, clearly lays down the principle on which we proceed. He says: "We distinguish between proper aggregate corporations, and the inhabitants of any district who are by statute invested with particular powers without their consent. These are in the books sometimes called *quasi* corporations. Of this description are counties and hundreds in

[1] *Supra*, p. 47.

England; and counties, towns, etc., in this state. Although *quasi* corporations are liable to information or indictment, for a neglect of public duty, imposed on them by law; yet it is settled in the case of Russell et al. v. Inhabitants of the County of Devon, that no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute. And the sound reason is that having no corporate fund and no legal means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation. This burden the common law will not impose, but in cases where the statute is an authority, to which every man must be considered as assenting. But in regular corporations, which have, or are supposed to have, a corporate fund, this reason does not apply."

The same doctrine is asserted by the same court in Mower v. Inhabitants of Leicester, 9 Mass. Rep. 247; and is recognized as settled law by Angell & Ames on Corporations, section 630, note. So in South Carolina, 2 Nott & McCord 537; Young v. Commissioners of the Roads; and White v. City Council, 2 Hill's Rep. 571. So in Connecticut, Ward v. The County of Hartford, 12 Conn. 404. The case of the Freeholders of Sussex County v. Strader, 3 Harr. N. J. Rep. 158, before alluded to, was an action brought by Strader against the county of Sussex, New Jersey, to recover damages for an injury to a team of the plaintiff, on account of a defect in a public bridge which the chosen freeholders of the county were bound to keep in repair. In that case the court not only sustain the doctrine and distinction laid down in the Men of Devon, and by Chief Justice Parsons in 7th Mass.; but Chief Justice Hornblower, in delivering his opinion, supposes, and remarks upon almost the very case before us. He says: "It is the duty, for instance, of the board of freeholders, to erect and keep in repair court-houses and jails; a neglect to do so may occasion great inconvenience, perhaps positive loss or injury, to some individual whose business or duty requires his attendance at court; the building, by being old and out of repair, may give way, and break a man's limbs, or occasion him an injury in some other way, but no one will pretend that in such a case an action would lie by the person injured against the county."

The same doctrine was recognized and applied in Illinois, in Hedges v. The County of Madison, 1 Gilman's Rep. 567, by the supreme court of the United States in Fowle v. Common Council of Alexandria, 3 Peters 409, and is also applied and strongly urged and approved by the supreme court of New York in the able opinion of Selden, J., in Morey v. The Town of Newfane, 8 Barb. S. C. Rep. 645.

It is undoubtedly competent for the legislature to make the people of a county liable for the official delinquencies of the county commissioners, and, if they think it wise and just, without any power in the people to control the acts of the commissioners, or to exact indemnity from them; but this has not yet been done, and we think that such liability can not be derived from the relation of the parties either on the principles or the precedents of the common law.

In conclusion, and at the risk of the penalties of tautology, I repeat,

that while, both upon principle and authority, we find ourselves compelled to overrule the case of The Commissioners of Brown County v. Butt, as having been erroneously decided, we do so with extreme reluctance, and with all respect for the judgment and veneration for the memory of the judges who decided it, but, with our convictions, we could not do otherwise, and, in overruling it, we are satisfied we are contributing to place the law of Ohio upon a footing of sound principle, as well as in harmony with that of other states whose jurisprudence, like our own, rests on the basis of common law.

Judgment reversed.

BARTLEY, C. J., and SWAN, BOWEN and SCOTT, JJ., concurred.

Note. 1816, Rumford School District v. Wood, 13 Mass. 193; 1823, Todd v. Birdsall, 1 Cowen (N. Y.) 260; 1834, Andrews v. Estes, 11 Maine 267, 26 Am. Dec. 521; 1835, McLoud v. Selby, 10 Conn. 390, 27 Am. Dec. 689; 1837, Chase v. Merrimac Bank, 19 Pick. (Mass.) 564, 31 Am. Dec. 163; 1841, Connell v. Woodward, 5 How. (Miss.) 665, 37 Am. Dec. 173; 1843, Gaskill v. Dudley, 6 Met. (Mass.) 546, 39 Am. Dec. 750; 1873, Whitney v. Stow, 111 Mass. 368; 1878, Talbot Co. v. Queen Anne Co., 50 Md. 245. Joint stock companies are sometimes called private *quasi* corporations, *i. e.*, they have some of the features of corporations, but not all. Morawetz Corp., § 6, and cases cited. See case cited *supra*, p. 110.

Sec. 41. (*c*) Corporations in their relation to the state are:

1. Purely public.
2. *Quasi*-Public.
3. Private.

THE BANK OF THE STATE OF SOUTH CAROLINA v. GIBBS, EXECUTOR.

1825. IN THE COURT OF APPEALS OF SOUTH CAROLINA. 3 McCord (S. Car.) Reports *377.

The question in this case was, whether a simple contract debt due to the Bank of the State of South Carolina was a debt due to the public, within the provisions of the executor's act (Pub. Laws, 494), and as such entitled to a preference, as a public debt.

NOTT, J.—The act of the legislature, upon the construction of which the decision of this case depends, directing the order in which the debts due by a testator or intestate shall be paid, provides, "that the funeral and other expenses of the last sickness, charges of probate of the will, or of letters of administration, shall be first paid; next, debts due to the public," etc.

The question now is, whether the debt in this case is in the sense of the act a debt due to the public. There is nothing on the face of the proceedings which will authorize us to view it in that light, for we must look beyond the case itself to see that the state has any interest in it. It is not then a debt due to the public; but it is due to the corporation, though the money, when received, may be for the use of the state. In the case of the United States Bank against the Planters' Bank of Georgia (9 Wheat. 907), Chief Justice Marshall, who de-

livered the opinion of the court, said: "The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation and not by that of the corporators. The state does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the state of Georgia, although the state holds an interest in it. It is," he says, "a sound principle, that when a government becomes a partner in a trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." I can not distinguish that case from the one now under consideration. It is true, the state of Georgia held but a part of the interest in that bank, and the state of South Carolina owns the whole in this. But, nevertheless, we may, with truth, say, in the language of that opinion, the Bank of the State of South Carolina is not the state of South Carolina; it is only a corporation created for particular purposes, possessing the same powers and privileges of other corporations, and no more. The state did not transfer any portion of its sovereignty to this corporation, nor communicate to it any of its privileges or prerogatives, but has placed it on the same level with other corporate bodies, with the same privilege of suing, and liability of being sued, as an incident to such corporations. I am of opinion, therefore, that the same principle by which the case referred to was governed is applicable to this case, and that the bank is not entitled to any such preference as is contended for—and that is the opinion of the court.

The motion is therefore refused.

Note. See cases cited to People v. Morris, *infra*, pp. 229, 234.

Sec. 42. Same.

McKIM v. ODOM.[1]

1831. IN THE HIGH COURT OF CHANCERY OF MARYLAND. 3 Bland Chancery (Md.) 407–433.

[This bill was filed on the 23d of June, 1827, by William S. Moore and John McKim, Jr., against John Odom, George Law, William G. Harrison, William F. Anderson and the president and directors of the Franklin Bank of Baltimore. The bill states that the plaintiff, Moore, and the defendant, Odom, being joint and equal owners of the schooner Beauty, sent her on a voyage from Baltimore to Montevideo, under Odom as master; that, for the better management of the concerns of their vessel, they employed the defendants, Law & Harrison, then partners in trade, as her ship's husband; that it was agreed by these owners, before their vessel sailed, that she might be sold, and she was sold accordingly, at Montevideo, for about $12,000; and there were remitted in specie, by the United States ship Cyane, as a part of the proceeds of sale, about $9,000, with a bill of lading for

[1] Statement of facts abridged. Arguments omitted; much of the opinion omitted.

the defendant Law; that on the 10th of April, 1826, the plaintiff Moore assigned all his interest in the schooner and her earnings to the plaintiff McKim, of which Law was duly notified; that afterward and immediately on the arrival of the ship Cyane, the defendant Law, by means of his bill of lading, obtained possession of the specie remitted, had it exchanged in Philadelphia, and thence transmitted to Baltimore, where he had the greater part of it deposited in the Franklin Bank, in the name of the defendant Anderson, in trust for his, Law's, use; that the object of the defendant Law in withholding, and thus secretly depositing the proceeds of sale, was fraudulently to compel the plaintiff McKim to submit to certain unjust and improper charges, which he, Law, as ship's husband, claimed a right to have allowed and deducted from those proceeds. Upon which the plaintiffs prayed relief and an injunction to stay the money so deposited in the hands of the bank. An injunction was granted accordingly.

On the 12th of December, 1828, the plaintiffs, by their petition, stated that the president and directors of the Franklin Bank of Baltimore had been regularly returned summoned, and had refused to answer the amended bill, whereupon the plaintiffs prayed that a *distringas* might be issued against that corporation.]

BLAND, Chancellor. * * * The mode of proceeding against contumacious *natural* persons, who neglect or refuse to answer, is well established and sufficiently energetic, but the course of proceeding for that purpose against artificial bodies or corporations is different, more feeble and much more tardy, there being no legislative provision for enforcing an appearance or answer from such defendants.

So far as I have been able to ascertain, this is the first instance of an application to this court for coercive process against a body politic. Corporations have latterly become very numerous, and new ones are created at almost every session of the legislature; the matter now submitted for determination, therefore, has an importance much above the interests of the case out of which it arises, and requires to be carefully considered with a view to the course of proceeding in future.

Under the provincial government corporations were framed and called into existence, as in England, either directly by or with the immediate sanction of the lord proprietary or the monarch. But, however they may have been originated formerly or elsewhere, it is certain that they can now only be established here by the authority of the legislature. The multitude of bodies politic that have been created either by the government of the province or of the republic, most of which still subsist, may be considered, in reference to their objects, as belonging to one or other of three distinct classes.

[Public.] The first kind are such as relate merely to the public police, which, by assuming upon themselves some of the duties of the state, in a partial or detailed form, and having neither power nor property for the purposes of personal aggrandizement, can be considered in no other light than as the auxiliaries of the government of the Republic; and consequently, as the secondary and deputy trustees and servants of the people. The right to establish, alter or abolish such corpora-

tions seems to be a principle evidently inherent in the very nature of the institutions themselves, since all mere municipal regulations must, from the nature of things, be subject to the absolute control of the government. These institutions, being, in their nature, the auxiliaries of the government in the great business of municipal rule, can not have the least pretention to sustain their privileges, or their existence, upon any thing like a contract between them and the government, because there can be no reciprocity of stipulation, and because their objects and duties are incompatible with everything of the nature of such a compact.

The power of acquiring and holding property, although almost always given, is by no means a necessary incident to corporations of this class; they may be established without any such capacity; as in the instance of the commissioners for emitting bills of credit.[1] The preservation of morals, and the administration of justice are the chief ends for which government has been instituted; and infancy, insanity, infirmity and helpless poverty have an undoubted claim upon the protecting care of the republic.[2] Bodies politic of this class, having these objects in view, are city corporations;[3] levy courts;[4] county schools for the provincial or state government;[5] public colleges;[6] hospitals;[7] trustees of the poor of several counties,[8] etc.

[Private.] The second class of corporations are such as have no concern whatever with the duties of the republic; nor in any manner bound to perform any acts for its benefit; but whose only object is the personal emolument of its members. The corporators in such institution may also, in some sense, be considered as trustees; but then, even in that character, they are the mere factors of individuals; and, therefore, their resignation or removal can not divest or alter any of the rights of the individuals they represented. Each member of such an aggregation either was a proprietor at the commencement, or became so during the existence of its incorporation; and consequently, unless he has aliened his right, must continue to be so after its dissolution. A corporation not being, like a natural person, one of the elements of society, of which government is formed, can only be considered as a creature of the law. It is the law alone which gives to it a personality distinct from that of each of its members, and confers on it the right to act by its president, directors, or agents, in a manner analogous to that in which the government itself acts by its regularly constituted functionaries. This individuality of character, and the right so to act is, then, nothing more than a portion of the power of the government with which it has been invested. It is this power which is given by the creation of a body politic, and which, by its extinguishment, is resumed, and nothing more; the rights of property vested in its

[1] 1769, ch. 14, § 6.
[2] Montesq. Sp. Laws, b. 23, ch. 29.
[3] 1708, ch. 7; 1796, ch. 68.
[4] 1804, ch. 73.
[5] 1696, ch. 17; 1723, ch. 19.
[6] April, 1782, ch. 8.
[7] 1797, ch. 102; 1816, ch. 156.
[8] 1768, ch. 29; 1785, ch. 15.

several members, in all other respects, remain unaffected by its dissolution.

It is remarkable that there is no instance of the creation of any body politic of this description under the provincial government; but since the establishment of the republic they have increased and multiplied to a very large and still rapidly growing family. The examples of this class of corporations are the insurance companies;[1] the Free Mason societies;[2] the banks;[3] the manufacturing companies;[4] the library companies,[5] etc.

[Quasi-public.] The third species of corporations partake, in many respects, of the nature of the first two classes; and are such as have a concern with some of the expensive duties of the state, the trouble and charge of which are undertaken and defrayed by them, in consideration of a certain emolument allowed and secured to their members. In cases of this kind there is certainly many of the material features of a contract between the government and the corporation; there is manifestly a *quid pro quo*. But this contract, if it be so, is, and of necessity must be, like all others to which a government or state is a party, one of imperfect obligation as regards the state;[6] and, as such, subject to be dealt with by the government of the state as the public good may require, on making a just compensation for any private property which may be taken for a public use. No bodies politic of this description were ever created under the provincial government; but since our independence, a great number of them have been called into existence; such as canal companies;[7] bridge companies;[8] turnpike road companies;[9] etc.

In regard to the irrepealable nature of an act of incorporation, it may be well not only to bear in mind the distinctions as explained above in the text, according to which it is quite obvious that at least two out of the three kinds of corporations, there described, may be modified or repealed at the pleasure of the legislature, without the slightest interference with the rights of private property of any kind, but that there must also be a variety of cases in which corporations of the third class, such as turnpike roads, may have their stock, even considering it as private property, indefinitely depreciated, or, in effect, totally annihilated, without, in the opinion of any one, giving rise to a claim for compensation, as in cases where mere private property is taken, by virtue of the government's power of *eminent domain*, for public use. Without going into an argument, it will be sufficient to state a case which has occurred. By the act of 1812, chapter 78, the legislature incorporated a company for making a turnpike road from Baltimore to Washington; under which the road was made, and the stock yielded a considerable dividend annually. After which the legislature, by the act of 1830, chapter 158, authorized the construction of a railroad between the same cities, and nearly parallel with the turnpike road, which was accordingly put in operation. In consequence of which the annual dividends on the stock of

[1] April, 1787, ch. 20.
[2] 1821, ch. 147.
[3] 1790, ch. 5.
[4] 1808, ch. 49.
[5] 1797, ch. 35.
[6] Vattel Law Nation, Prelim., § 17.
[7] November, 1783, ch. 23.
[8] 1795, ch. 62.
[9] 1797, ch. 65.

The right and capacity to sue and be sued is an incident to bodies politic of all descriptions;[1] even to those which have been incorporated by and are located in another state or in a foreign country.[2] It is held to be incumbent upon every body politic, not being incorporated by a public law of which the court is bound to take notice, which comes into a court of justice as a plaintiff, if required, even upon the general issue only being pleaded, to show the authority under which it has assumed to act as a corporation.[3] When called on as a defendant its corporate capacity is thus admitted, and it appears by attorney and responds under its seal, or in the manner specially prescribed to it.[4] But there is no legislative enactment which directs in what mode a corporation of any kind may be compelled to answer in case it should neglect or refuse to do so.

It is admitted on all hands that in a suit against a corporation none of its members can be taken or personally punished, except, perhaps, as a last resort, on account of any contumacy in their corporate capacity. The only mode of proceeding, either to enforce an answer or obedience to a decree, is by a *distringas* and sequestration of the property of the body politic.[5] The state itself is regarded in many respects as a mere body politic;[6] and in the various instances where it becomes necessary to have it made a party to the litigation, it is represented by its attorney-general; in which cases the course of the court merely allows that he should be attended with a copy of the bill; but he can not be forced to answer in any manner whatever;[7] and therefore, if the bill can not be taken *pro confesso* against the state,[8] the further progress of the case must await his good pleasure.

Every corporation is and must be composed of, and conducted by, natural persons; yet the distinction between the natural and artificial capacities and liabilities of its members has been drawn in such a manner as to create the most serious inconvenience. A body politic, it has been quaintly said, has no soul; and therefore can not be called on to answer under the obligation of an oath by which a natural person may be bound.[9] To avoid this difficulty the court of chancery has

the turnpike road have been very materially diminished. Currie v. The Mutual Assurance Society, 4 Hen. & Mun. 315.

[1] 1 Blac. Com. 475.

[2] 1 Blac. Com. 385; 4 Com. Dig. 487; Henriques v. Dutch West India Company, 2 Ld. Raym. 1532; The National Bank of St. Charles v. De Bernales, 11 Com. Law Rep. 475.

[3] 4 Com. Dig. 487; McMechen v. The Mayor of Baltimore, 2 H. & J. 41; Agnew v. The Bank of Gettysburg, 2 H. & G. 479.

[4] 1804, ch. 73, § 6.

[5] Bac. Abr. tit. Corporations, E. 2; Lynch v. The Mechanic's Bank, 13 Johns. 127.

[6] 1785, ch. 36.

[7] Willis Eq. Plea. 7.

[8] 2 Mad. Pr. Chan. 335; 1 Fowl. Exch. Prac. 401; Nabob of the Carnatic v. The East India Company, 1 Ves., Jun., 371; s. c. 1 Hoven. Supp. 149.

[9] The case of Sutton's Hospital, 10 Co. 33.

had recourse to a singular shift, which it is admitted rests on very questionable principles; it allows the secretary, bookkeeper or some one or more of the chief members of the body politic to be made co-defendants for the express purpose of obtaining an answer on oath, which answer, contrary to the general rule in other cases, is received as evidence against the corporation itself.[1] Thus allowing the plaintiff to select from among the corporators such one or more of them as he may think proper to make witnesses, and to extract from them only such proof as may be entirely responsive to his case.

It is said, in one of the very respectable treatises on equity pleading, that, in the case of a corporation aggregate, where the answer is under the common seal, the bill must pray that a writ called a writ of *distringas* may issue under the great seal, which is for the purpose of distraining them by their goods and chattels, rents and profits, until they obey the summons or direction of the court.[2] What is here said, however, as to the prayer of the bill, is certainly wrong, the authorities cited warrant no such assertion.[3] And it has also been said, that a *subpena* is not the proper original process against a corporation, because it has no conscience.[4] This is also an error, for, in all cases, where a corporation is made defendant, the first and proper process for calling it in to appear and answer is the same as that used for summoning a natural person, that is, a *subpena;* and accordingly the bill prays for a *subpena*, and no other process.[5] The bill, it is true, must always ask for that original process which is suited to the nature of the case; against natural and artificial persons a *subpena* is prayed for; against non-residents an order of publication made the substitute of a subpena, is asked, and against the attorney-general it is prayed that he may be attended with a copy of the bill;[6] which form of prayer, as against the attorney-general, appears to be recognized by several acts of assembly,[7] with only two exceptions, in which he is directed to be summoned, or served with a *subpena.*[8] These prayers are indispensably necessary, because it is an established rule, that no one is to be considered a party to the suit, against whom no process or publication is prayed and served with it, or the publication made.[9]

If the body politic neglects or refuses to appear as required by the *subpena* which has been served on the mayor, president or any director or manager, or other officer, then the next process is a *distringas*, the

[1] Fenton v. Hughes, 7 Ves. 289; Dummer v. Corporation of Chippenham, 14 Ves. 253.
[2] Coop. Pl. Eq. 16.
[3] Harvey v. East India Company, 2 Vern. 395; s. c. Prec. Cha. 128.
[4] Com. Dig. tit. Franchises, F. 19.
[5] Willis Eq. Plea. 8; Lowten v. The Mayor of Colchester, 2 Meriv. 395.
[6] Willis Eq. Plea. 7; 2 Mad. Pra. Chan. 202.
[7] 1785, ch. 72, s. 29, and ch. 78, s. 1; April, 1787, ch. 30, s. 4; 1799, ch. 79, s. 7.
[8] 1786, ch. 49, s. 8; 1794, ch. 60, s. 6.
[9] Windsor v. Windsor, 2 Dick. 707; Reilly v. Ward, 5 Bro. P. C. 495; Lingan v. Henderson, 1 Bland 245.

form of which writ is substantially the same at law as in equity.[1] By this writ the sheriff is commanded to make a distress upon the lands and tenements, goods and chattels of the corporation; and it is indorsed thus: "By the court at the suit of A. B. for want of an appearance (or answer, as the case may be)." But in England upon the first writ the sheriff generally levies forty shillings issues; upon the *alias distringas*, four pounds; on the *pluries distringas* he levies the whole property; and on the return of the *pluries* a sequestration is granted.[2] Thus far there appears to be not the slightest difference to be found in the books, either as to the form of the process, or in reference to the character of the corporation to be affected by it.

I can, therefore, feel myself at liberty to make no other alteration than to settle the amount in reference to the present value of money, and to declare, that upon the first *distringas* to compel an appearance or answer, the sheriff shall take issues or personal property of the corporation, to the amount of *twenty dollars;* and upon the *alias distringas* he shall levy *forty dollars;* and on the *pluries distringas* he shall distrain the whole of the personal estate, together with the rents and profits of the lands.[3]

If it shall be ascertained by the return of all these successive writs that the corporation has no property upon which a *distringas* may be levied, or which can be taken under a sequestration, then the bill may be taken *pro confesso*, and the plaintiff may obtain relief accordingly;[4] or if, having no property, or after all its property has been sequestered, it still stands out, and refuses to appear and answer, then, according to what seems to be the better and more reasonable opinion, the plaintiff may have an attachment against the members, or, at least, those of them who have been duly summoned, or served with the *subpena*, and thus notified of the institution of the suit.[5]

If, after a decree, the corporation neglects to comply therewith, upon being served with a copy of it according to the ancient practice,[6] as recognized by the act of assembly,[7] now dispensed with,[8] the plaintiff may obtain a *distringas* to enforce obedience to it, and after the return of the first writ of *distringas* he may have a sequestration,[9] and if the sheriff returns that the body politic has nothing upon which the *distringas* can be levied, then the members of the corporation may be attached, or such other proceedings had according to the nature of the case, and having proper re-

[1] 2 Harr. Ent. 674; 1 Harri. Pra. Chan. 264; 1832, ch. 306, s. 5.
[2] 1 Harr. Prac. Chan. 264.
[3] East India Company's case, 1 Salk. 191.
[4] Salmon v. The Hamborough Company, 1 Ca. Chan. 204; Curson v. African Company, 1 Vern. 121.
[5] Rex v. Gardner, Cowp. 85; London v. Lynn, 1 H. Blac. 206.
[6] 2 Mad. Pr. Chan. 466.
[7] 1785, ch. 72, s. 25.
[8] 1818, ch. 193, s. 4.
[9] Harvey v. East India Company, 2 Vern. 395; s. c. Prec. Chan. 129; Com. Dig. tit. Franchises, F. 19.

gard to the extent of the liability of the members of the body politic as may be deemed proper and lawful.[1]

Whereupon it is *ordered* that a writ of *distringas* be issued as prayed by the said petition of the plaintiffs, which writ is hereby directed to be indorsed and levied as above prescribed.

[Soon after the president and directors of the Franklin Bank of Baltimore put in their answer, and, after hearing, the bill of complaint was dismissed as to them.]

(See cases cited to People v. Morris, *infra*, p. 234.)

Sec. 43. Same.

THE PEOPLE v. MORRIS.[2]

1835. IN THE SUPREME COURT OF NEW YORK. 13 Wendell (N.Y.) 325–337.

[Error from the St. Lawrence oyer and terminer. The defendant was tried on an indictment for selling *spirituous liquors* and *permitting the same to be drank* in his grocery store, without having obtained a license as a *tavern keeper*.

The village charter of 1824 authorized the trustees to regulate and "license grocers, and keepers of victualing houses, where fruit victuals and liquor shall be sold to be eaten or drank in such houses or groceries." In 1830 the revised statutes went into effect and provided that only certain excise commissioners could grant licenses to sell liquors and wines to tavern and inn-keepers to be drank in their houses, and licenses to grocers should be granted to sell only in five-gallon quantities or over, *but not to be drank in their houses*. Defendant had obtained his license from the village authorities under the charter, and admitted the selling in his grocery to be drank there, after the revised statutes went into effect.]

By the court, NELSON, J. The defendant insists that the statute under which he has been convicted is inoperative, upon the grounds, (1) That the power or franchise of the corporation of the village of Ogdensburgh to grant licenses to *grocers* to sell spirituous liquors to be drank in their houses is a *vested right*, and can not be impaired or taken away; and (2) That if such power can be taken away, it can be done only by bill having the assent of *two-thirds* of the members elected to each branch of the legislature, in conformity to the ninth section of the seventh article of the constitution of the state.

As to the first objection urged by the defendant, the only limita-

[1] 2 Mad. Pr. Chan. 466; Salmon v. The Hamborough Company, 1 Cha. Cas. 204; Adley v. The Whitestable Company, 17 Ves. 324; s. c. 1 Meriv. 107.

[2] Statement of facts abridged. Much of the opinion omitted.

tion to the powers of the legislative department that can exist must be found either in the constitution of the United States or of this state, or in the natural and inherent rights of the citizens, which they can not part with or be deprived of by the society to which they belong. * *

Vested rights are indefinite terms, and of extensive signification, not unfrequently resorted to when no better argument exists, in cases neither within the reason nor spirit of the principle. Rights in one sense vested, that is, vested as it regards every other body or power except the government, are numerous, and the subject of common regulation and even abrogation. All general and local laws, restraining the free action of the citizen as to person or property, the imposition of burthens and of duties, partake more or less of this character, and may be referred to in illustration of the remark. Government was instituted for the purpose of modifying and regulating these rights with a view to the general good, and under the constitution the mode by which it was thought this great object might best be attained was left to the wisdom and direction of the people themselves, acting through the medium of their representatives. We may concede to the defendant that if any rights vested under the national or state constitutions, or others inherent and inalienable, and, therefore, also vested, have been violated by any provision of the revised statutes, such provision is inoperative and void. But if such rights have not been violated, we do not perceive how its penalties can be eluded. Now the defendant's rights are in no way improperly interfered with by the revised statutes, except so far as there may be an infraction of the corporate privileges of the village, because it will not be pretended that the right to sell spirituous liquors falls within the most extended class of vested rights. Nor can it be claimed that the right of any corporator, in his individual capacity, has been at all touched by this statute. It acts solely and exclusively upon the *powers* and *privileges* previously conferred upon the whole or aggregate body of citizens by the village charter. It is this power, thus previously granted to the corporation, which the revised statutes intended to modify, not the private rights of an individual member of it.

What was the power thus conferred by the village charter? We answer that it was wholly political. Instead of prescribing at their discretion every duty to be performed, and forbidding every act to be avoided, in a word, directing the whole system of government to be observed and executed, the legislature have merely defined the outlines and leading principles, and conferred upon the inhabitants, within the bounds of the corporation, the power at discretion to fill up and carry them into operation. Strictly speaking, individual rights or private interests are no more involved in the arrangement than they are in the general laws passed with reference to the government of a town, a county or the state. Their rights, as citizens of the government, subject to its control, and to be so regulated and directed as to harmonize with the general good, are those and those only, within the contemplation of the charter. * * *

[The constitution, article 7, section 9, provided: "The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill, etc., creating, continuing, altering, or renewing any body politic or corporate."]

We are of the opinion the constitutional provision does not apply to public corporations.[1] That the village of Ogdensburgh is "a body politic and corporate," is not denied. The charter falls within the definition of Lord Coke and of other approved authors. "A body politic," he says, "is a body to take in succession, framed as to its capacity by policy, and therefore is called by Littleton (section 413) a body politic; and it is called a corporation or body corporate because the persons are made into a body, and are of capacity to take, grant, etc., by a particular name." Viner's Abr. Corp. (*a2*). A public corporation is also defined to be, "an investing the people of the place with the local government thereof." This latter description is the most appropriate, and is justified by the history of these institutions, and the nature of the powers with which they were and are invested. * * *

The fact conceded that they are "bodies politic and corporate," is not, by fair reasoning, necessarily conclusive. So are towns and counties, for they come within one or other of the above or most approved definitions. They possess every requisite to constitute them corporations, besides being declared to be so by statute, as are also superintendents of the poor and trustees of school districts. 1 R. S. 337, 42 id. 364, 486, 617, 498. Each town, as a body corporate, has capacity to sue and be sued; to purchase and hold real estate; to make such contracts and hold such personal property as may be necessary to its corporate and administrative powers; and to make such order for the disposition, regulation and use of its public property as may be conducive to the interests of the inhabitants. Large powers are also conferred, as has already appeared, in respect to their municipal and domestic regulations. So in respect to superintendents of the poor. It is expressly declared (1 R. S. 617, § 16) "they shall be a corporation by the name of the superintendents of the poor of the county for which they shall be appointed, and shall possess the usual powers of a corporation for public purposes." Large powers are conferred upon them also to enable them to execute their trust, and especially for the "good order and government of the place and poor-houses belonging to the county, for the employment, relief, management and government of the persons placed under their care." The trustees elected in a town having lands belonging to it for the support of the gospel, or of schools, or both, "shall be a corporation for the purposes of their office, by the name of the 'Trustees of the Gospel and School Lot,'" in the town in which they are elected. They shall have power, "besides the ordinary powers of a corporation," to manage these lots, as particularly set forth in the statute. 1 R. S. 497, 8. Other cases might be referred to. That they come within the *letter* of the provision is not enough, unless the different bodies above

[1] The subsequent case of Purdy v. People, 4 Hill (N. Y.) 384, held that this constitutional provision applied to *public* as well as *private* corporations.

alluded to are also included, which probably will not be pretended; for, if so, most of the legislation of the state must be in conformity to this provision of the constitution.

Are they within the evil this provision was designed to remedy? No one, I think, acquainted with the history of the times, or with the introduction of this clause into the constitution, will venture upon this ground. It may be fortunate for truth, and what is deemed a sound exposition of this provision, that all who may desire to examine it can recur to his own recollection and challenge that of others upon this point. We think we hazard nothing in asserting that the multiplication of cities or villages by the legislature has at no time been a subject of complaint. Only *four* of the former existed in the state at the adoption of the constitution. The latter, which were somewhat numerous, have always been viewed by the people of the state as a matter in which the inhabitants of the village were exclusively interested, and to be left to their option. But *private incorporations* had multiplied to an extent that had attracted public attention, especially *banking institutions*. These had been sought for with zeal, and their enactment attended with circumstances that awakened public suspicion and alarm. So extreme had the evil become at one period of our history, that the chief magistrate of the state felt it his duty to exercise the power then existing in the constitution, of proroguing the legislature, and was triumphantly sustained by the people in the execution of this high and delicate trust. The fact affords strong evidence of the deep impression made upon the public mind as to these and *similar* private corporations, and of the scope and purpose of the clause on this subject. If we resort to the history of its introduction into the new constitution, the above view will be confirmed. Mr. King, chairman of the committee of the legislative department, reported the section; and when it came under consideration, said that the committee had looked upon the multiplication of corporations as an evil; they had been created for a great variety of purposes; they were exceptions to the common law; they could not be proceeded against in the ordinary way of prosecutions against individuals in courts of justice; they ought not to be increased, but should be diminished as far as could be done consistently with the preservation of vested rights. It is obvious, though the language used in the clause in question is general, that the honorable chairman had in his mind (and he spoke for the committee) the case of private corporations; that the great inducement to the adoption of the clause was a check upon them; and that the organization of communities, and the investing them with the privileges of mere municipal jurisdiction and authority, were not at all in contemplation.

The distinction between public and private corporations is strongly marked, and, as to all essential purposes, they correspond only in name. We speak of the erection of a town or a county, and the term would be just as appropriate when applied to cities or villages. They are severally political institutions, erected to be employed in the

internal government of the state. There is no contract between the government and governed, for but one party is concerned—the public; and the inhabitants upon whom the powers and privileges are conferred are mere trustees, who hold and exercise such powers for the public good. The only interest involved is the public interest, and no other is concerned in their creation, continuance, alteration or renewal. The nature and operation of these corporations repudiate the idea of vested rights, and, therefore, no evil arising out of them could have influenced the convention. *We know of no vested rights of political power, in any citizen or body of citizens, except those conferred by the constitution.* That is our bill of rights, and is analogous to those granted to kingdoms or minor communities, such as towns and cities, by princes and superior lords on the continent, or by the crown of England.

Private corporations are the private property of the corporators. They are designed to regulate private interests. Large investments are made in pursuance of their authority, and the tenure by which such corporate property is held is like that of an individual to his farm or personal estate; and an invasion of such corporate power is like a violation of private right. One of the strongest reasons why these private corporations should be cautiously granted arises from the inviolability of the rights acquired under them; for notwithstanding the reserved power in the charter to modify or repeal, an interference seriously affecting this species of property is calculated to shake public confidence in the security of these corporations generally, and might and probably would be immediately disastrous to the property invested under their faith, in the particular instance in which the legislature exercised its reserved power. This wide distinction was well known to the members of the convention, and shows that the clause in the constitution may be fully satisfied by confining its operation to the case of private corporations. Nor can it be admitted that it was intended to restrict the action of the legislature, in the municipal regulations of the state, as to one place more than another, or that less latitude was to be given to such regulations in the government of the citizens residing within the bounds of cities and villages than of those residing in towns and counties. The nature and object of the power exercised and the claims of those concerned, are alike, and it is difficult to discover any solid reason for the distinction. All our public laws, civil and criminal, however important or severe their operation, enacted for the good government of the people throughout the state, are passed by *majority votes*; and it would be inconceivably strange if laws passed with a view to a more perfect government of a particular place (laws better adapted to the organization of society and the business and conditions of the governed residing in small districts), should depend upon a different and greatly restricted rule of action on the part of the legislature.

Judgment affirmed.

Note. 1898, State v. Maryland Institute, etc., 87 Md. 643, 41 Atl. Rep. 126; 1897, United States v. Trans. Mo. Frt. Assn., 166 U. S. 290, on 320–2; 1894, Chicago, etc., R. Co. v. Wabash, St. L., etc., R., 61 Fed. Rep. 993; 1891, Downing v. Ind. St. Bd. of Ag., 129 Ind. 443, 35 Am. & Eng. C. C. 216; 1890, Wolfe v. Underwood, 91 Ala. 523, 8 So. Rep. 774; 1889, State v. District of Narragansett, 16 R. I. 424, 24 Am. & Eng. C. C. 131; 1889, Appeal of Pittsburgh, 123 Pa. St. 374, 25 Am. & Eng. C. C. 364; 1888, Turlock Irrigation Dist. v. Williams, 76 Cal. 360, 22 Am. & Eng. C. C. 198; 1888, Wambersie v. Orange Humane Soc., 84 Va. 446, 28 Am. & Eng. C. C. 83; 1885, Hockett v. State, 105 Ind. 250; 1883, Pierce v. Commonwealth, 104 Pa. St. 150; 1876, Munn v. Illinois, 94 U. S. 113; 1869, Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; 1868, Foster v. Fowler, 60 Pa. St. 27; 1866, Commonw. v. Lowell Gas Co., 12 Allen (Mass.) 75; 1862, State of Iowa v. Wapello Co., 13 Iowa 388, on 400–403; 1850, Mills v. Williams, 11 Ire. (N. C.) Law 558; 1842, Inhabitants of Worcester v. Western R. Co., 4 Met. (Mass.) 564; 1841, Ten Eyck v. Canal Co., 18 N. J. L. 200; 1819, Dartmouth College v. Woodward, 4 Wheat. 518, *infra*, p. 708; 1902, Mound City Land Co. v. Miller, — Mo. —, 60 L. R. A. 190.

Sec. 44. Same. (1) Private corporations, as to the method of acquiring or losing membership, are:

1. *Stock, or*
2. *Non-stock.*

THE STATE v. THE STANDARD LIFE ASSOCIATION.[1]

1882. In the Supreme Court of Ohio. 38 Ohio State Reports 281–299.

[Quo Warranto: The object of this action is, to oust the defendant, a corporation organized under section 3630 of the Revised Statutes, from its franchise to do business, as an insurance company, on the co-operative or assessment plan, as authorized by said section. The ground alleged is misuser of its corporate privileges, and the exercise of rights and privileges not conferred by law. Among other things it is specified as grounds for the judgment of ouster, that this company has issued certificates of membership for the payment of stipulated sums of money for the member's benefit, instead of the benefit of his family or heirs as the law authorizes; that it has issued such certificates to very aged and infirm persons without regard to their prospects of life; that it has issued them for the benefit of cousins, sons-in-law, and other relatives who are not of the family or heirs of such member; that it has delayed the approval of proofs of death, and making the proper assessments to pay in case of death; and that it has treated others than the family or heirs as beneficiaries, making assessments against them, and looking to them and not to the member for the payment.

[1] Statement of facts abridged, part of opinion omitted.

The answer puts in issue these allegations, and avers that the defendant is doing a business authorized by law.]

JOHNSON, J. This association was incorporated September 1, 1880. The record of the company shows that seven persons, to wit: D. R. Johnston, W. H. Carter, J. B. Netscher, Jerry Shank, George W. Cole, S. W. Anderson and John F. Wood, met on that day in Mansfield for the purpose, as is stated, of organizing an association "to furnish mutual protection and relief to its members," under section 3630 of the Revised Statutes; Mr. Anderson was made chairman of the meeting, and he thereupon presented a plan of operations, which was unanimously adopted. What that plan was does not appear from the record of the company, but is subsequently disclosed in the proceedings and acts of the association.

At the same meeting, those present drew up, and five of them executed, articles of incorporation, which were subsequently authenticated and filed with the secretary of state, under which they became a body corporate.

Before adjourning, and, of course, before they had become incorporated, these seven persons proceeded to elect themselves "officers and trustees" of the association for one year, giving to each an office, and also appointed an executive committee from among themselves. It appears that by-laws were also adopted, but the record of the trustees is silent as to their provisions. This record and the books of the association show they proceeded to transact business as a corporation soon after.

The certificate of corporation, after stating the name and place of business, states the purpose of the association to be "to receive money, either by voluntary donation or contribution, or to collect the same by assessment of its members, and to distribute and appropriate the same to the families or heirs of its deceased members, in such manner as may be prescribed by the rules and regulations of the association, not inconsistent with the laws of Ohio, and so as to carry out the objects and purposes of the association as above expressed." The section of the Revised Statutes authorizing such a corporation is as follows:

"Section 3630. A company or association may be organized for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of such company or association, and may receive money, either by voluntary donation or contribution, or collect the same by assessment on its members, and may distribute, invest and appropriate the same in such manner as it may deem proper; but the aggregate sum stipulated to be paid to the family or heirs of any member at his decease shall in no case exceed $7,000, nor shall any assessment on account of the death of any member be made against any surviving member exceeding one-fifth of one per centum stipulated to be paid to such survivor at his decease, and such association shall not be subject to the preceding sections of this chapter."

It will be noticed that this section authorizes such corporation for the mutual protection and relief of its members, and also for the payment of stipulated sums of money to the family or heirs of the deceased members. The certificate of incorporation is silent as to furnishing mutual protection and relief to members. It limits the scheme, so far as relief is concerned, to the distribution of its funds to the family or heirs of deceased members.

It does not purport, therefore, to afford any relief or protection to its members, but only to provide for their family or heirs after their decease. It is in no sense, therefore, according to the charter, a mutual aid association to members, but a mutual insurance company of members, for the benefit of the family or heirs of members.

It has issued what are termed certificates of membership, but the real nature of the contract is that of insurance.

The so-called member, for in fact he is not treated as a member of the corporate body, contracts to pay an admission fee, and annual dues of specified amounts, and a stated assessment for each death in the class to which he belongs, in consideration of which the company agrees to pay his beneficiary named the assessment collected (less the deductions stated hereafter), not exceeding the amount of insurance named in the certificate, which is either $2,000 or $3,000.

In Commonwealth v. Wetherbe, 105 Mass. 149, it was held, that such a contract was one of insurance, whatever be the terms of payment of the consideration by the assured, or the mode of payment of the sum to be paid in the event of loss, and although the object of the insurer, in making the contract, is benevolent and not speculative.

It was further held in that case that it was none the less a contract of mutual insurance because the amount to be paid is not a gross sum, but one graduated by the number of members, nor because a portion of the premiums are to be paid upon uncertain periods of the death of members, nor because in case of non-payment of assessments the contract provides no mode of enforcing payment thereof but merely declares the contract forfeited.

From the specific terms of the charter, as well as from the tenor of certificates of membership, the contract entered into is one of insurance on the lives of members, and not one for the mutual protection and relief of its members.

Whether it is competent to become a corporation for that single purpose when the statute authorizes such corporations for the double purpose of mutual protection and relief of its members, and also for life insurance for the benefit of the family or heirs of such members, is a question we need not now stop to answer, as the petition admits that the association was duly incorporated.

Section 3630 provides, however, that these corporations shall not be subject to the preceding sections of the chapter, relating to life insurance companies "on the mutual or stock plan." Chapter 10, sections 3587 to 3629, Revised Statutes.

This leads to the inquiry, to what extent they are regulated by law,

and to what extent such associations may adopt their own rules and regulations?

Though not subject to the provisions relating to life insurance in chapter 10, they are subject to the general provisions relating to corporations found in chapter 1 of title 11 of the Revised Statutes.

That chapter provides for two classes of corporations, (1) those for *profit*, which must have a capital stock, and (2) those *not for profit*, which need not have a capital stock.

If it is of the first kind, its name must begin with "The," and end with "Company," and in each kind the place of business and purpose for which it is formed must be stated in the certificate. R. S., section 3226. By section 3240 a majority of the subscribers to the articles of incorporation of a corporation, other than for profit, may elect not less than five trustees, who shall hold their offices until the next election, or until their successors are elected and qualified. In the case at bar, the incorporators elected seven trustees for one year.

By section 3246, unless the regulations otherwise provide, the annual election for trustees or directors shall be held (this section applies as well to corporations not for profit as those for profit) on the first Monday in January of each year. It further contemplates that the elective body consists of the "members" of the corporation in those not for profit, and the "stockholders," in those for profit.

Section 3249 provides that every corporation may adopt a code of *regulations* for its government, not inconsistent with the laws of the state.

Section 3250 authorizes the *trustees* or directors of a corporation to adopt a code of *by-laws* for *their* government not inconsistent with the *regulations* of the corporation, or the constitution and laws of the state, and may change them at pleasure, but section 3251 requires that regulations may be adopted or changed by the assent in writing of two-thirds of the stockholders, or, if there is no capital stock, of the members, or by a majority of the stockholders or members, at a meeting held for that purpose, of which due notice is given.

By section 3252, a corporation, by its regulations, when no other provision is especially made in this title, may provide, first, for the time, place, etc., of meetings; second, the number of stockholders or members to make a quorum; third, the time for the election of trustees or directors; fourth, the duties and compensation of officers; fifth, the mode of filling and tenure of all offices other than trustees or directors; and, sixth, the qualification of members when the corporation is not for profit.

By section 3261, the trustees of corporations, other than for profit, are made personally liable for all debts by them contracted.

These are the chief provisions of the statute relating to corporations other than for profit.

We are of opinion (1) That associations incorporated for the purposes named in section 3630 are corporations other than for profit,

and hence any plan or scheme which is intended to earn profits for its trustees, managers or agents, is in violation of law.

(2) That the *members* of such a corporation, and not the incorporators nor the first board of trustees, elected by them, are the elective body. These members, and not the trustees or incorporators, are authorized to elect trustees, and adopt regulations for the government of the corporation in the transaction of its business. Hence the trustees are the chosen agents of the members. They have no authority to adopt or alter regulations, nor to prescribe their terms of office, though they may make by-laws for their government and change them at pleasure.

The facts in this case show that this association has been organized and is doing business in direct violation of these provisions of law.

I. The members of the corporation have had no voice in the election of trustees or in the management of its affairs. The incorporators, at the first meeting to organize, elected themselves trustees for one year. At the end of that year these same trustees re-elected themselves; the meeting, as the record shows, was the annual meeting of the trustees, and all being present.

On January 25, 1882, they adopted a new code of "by-laws, rules and regulations," by which they provided that they should hold office *during life*, and in case of vacancy by death or resignation, or removal for good cause, which could be done by a majority vote, such vacancy should be filled by the remaining trustees. Thus they arrogated to themselves all authority. They made regulations, and conducted the whole businesss on the theory that the members had no voice. They were under no obligations to become members, and most of them were not.

They thus became a perpetual body, invested with all the franchises and powers which the statute vested in the members.

II. The plan upon which the business has been done, was to make money for these trustees and their agents.

These self-constituted trustees clothed themselves with supreme and perpetual power, and then proceeded to manage this self-imposed trust for their own interest, and at the expense of their over-confiding members, or their speculative beneficiaries. I am aware this is a serious charge, but it is not made without the most convincing evidence, taken from the books and papers of the company. * * *

This is not the case of exceptional excess of corporate power. The whole plan of operations, and their practical exemplification, manifest a carefully formed purpose to make money for the trustees. It is a speculative insurance company, in a most objectionable form. To prolong its existence and thus enable the trustees to continue in such business, would be a failure of duty on the part of the court.

Judgment of ouster.

OKEY, C. J., took no part in the decision of this case.

Note. 1858, Union Insurance Co. v. Hoge, 21 How. (62 U. S.) 35; 1871, Bryant v. Ohio Dental College, 1 Cin. Sup. Ct. Rep. (Ohio) 67, 307; 1887,

Ohio College of Dental Surgery v. Rosenthal, 45 Ohio St. 183; 1889, Crawford v. Gross (Pa. Com. Pl.), 7 Pa. Co. Ct. Rep. 419, 7 R. & Corp. L. J. 123. See below, The Corporate Funds, p. 760; Lindley's Partnership, vol. 1, p. 5, *et seq.*; "Stock, Its Nature and Transfer," by Henry Budd, Jr., 7 So. Law Rev. 430. It seems that originally the idea of a stock company was one in which each member traded on his individual stock, but in accordance with rules laid down by the company. The East India Company, incorporated in 1600, was of this character originally—each voyage to the East Indies was on a separate joint-stock, to which each member, if he wished, might contribute such sum as he chose; each took shares in each voyage, as had been the immemorial shipping customs of merchants. But in 1612 it was determined by the company that it would have one joint-stock—the aggregate of the subscriptions of the members—all to be managed by the governor and directors of the company. Most of the trading companies afterward were either organized upon or changed to this plan. See Cunningham's Growth of Eng. Indus., Modern Times, pp. 124, 162, 225. In 1731 the colony of Connecticut incorporated the New London Society for Trade and Commerce United, with a capital stock to be controlled by members voting in proportion to their shares.

Sec. 45. Same. (2) Private corporations, as to the perfection of their organization, are:

1. *De jure.*
2. *De facto.*
3. *By estoppel.*

CAPPS & McCREARY v. HASTINGS PROSPECTING COMPANY.[1]

1894. In the Supreme Court of Nebraska. 40 Nebraska Reports, 470–478.

Error from district court of Adams county.

Ragan, C. J. The Hastings Prospecting Company sued Lucius J. Capps and Willis P. McCreary, co-partners, doing business under the name, firm and style of Capps & McCreary, in the district court of Adams county, on a subscription or writing obligatory signed by them, in words and figures, as follows: "For the purpose of organizing a corporation, with a capital stock of $15,000, to bore for gas, oil or coal, at or near the city of Hastings, Adams county, Nebraska, and to buy or lease the land to experiment thereon for such purposes, and to buy, lease or hire the necessary machinery and labor for such purposes, we, the undersigned, agree to subscribe and pay for the amount of stock set opposite our names, said stock to be paid for in the manner following, to wit: Ten per cent. within thirty days from the organization of said corporation, and the balance at the call of the directors; provided, that said directors shall not have power to call for more than 10 per cent. of said stock at any one time; and, provided further, that payment shall not be called for oftener than once

[1] Arguments omitted.

a month. Names, Capps & McCreary; number of shares, ten shares; dollars, $100.00." The case was tried to the court, a jury being waived, resulting in a finding and judgment in favor of the prospecting company, and Capps & McCreary bring the case here for review.

The only errors assigned are that the finding and judgment of the court are contrary to the evidence and the law. The undisputed evidence in the case is that the plaintiffs in error and a number of other citizens signed the subscription paper quoted above; that after the $15,000 of stock had been subscribed the subscribers, or some of them, met and elected a board of directors, adopted articles of incorporation, and filed a copy of the same in the office of the secretary of state and the original in the office of the register of deeds of Adams county, the county in which the principal place of business was fixed by the articles of association. This incorporation, or attempted incorporation, occurred on the 15th day of April, 1889. The articles of incorporation were never filed in the office of the county clerk of Adams county. We have here then the questions: First, whether the prospecting company failed to become, as it attempted, a corporation *de jure* by neglecting to file in the office of the county clerk its articles of incorporation; second, and if it did, whether such default or failure on the part of the prospecting company is available as a defense to the plaintiffs in error? The first inquiry which presents itself is as to the nature of the agreement which the plaintiffs in error signed. What did they promise to do? We think a fair construction of the writing signed by them amounts to this: That they agreed to accept and pay for ten shares of the capital stock of the corporation the subscribers to the enterprise of boring for gas should organize, such payment to be made within thirty days after such corporation should be organized. The next inquiry is, what is meant by the expression, "when the corporation shall be organized"? It must be remembered that the plaintiffs in error agreed to become stockholders in the corporation that should be formed, and a fair construction of this promise is that they meant to become stockholders in a corporation *de jure* and not a corporation *de facto*. A *de jure* corporation is one whose right to exercise a corporate function would prove invulnerable if assailed by the state in *quo warranto* proceedings. The plaintiffs in error might have been willing to invest a part of their capital towards a public enterprise and take their chances of the investment being remunerative, if no further liability would attach to them than that of stockholders in a *de jure* corporation, when they would not have embarked the same money for the same purpose in a partnership or a *de facto* corporation, where they would assume liabilities greater than those of stockholders in a *de jure* corporation. We hold, then, that by the subscription signed by the plaintiffs in error they promised to take and pay for ten shares of the capital stock of such *de jure* corporation as might be formed for the purpose for which the subscription was made.

Is the Hastings Prospecting Company, or has it ever been, a *de jure*

corporation? It is admitted that it did not file in the office of the county clerk of Adams county, that being the county in which its articles of incorporation fixed its principal place of business, its articles of incorporation. Did this default prevent the Hastings Prospecting Company from becoming a corporation *de jure?* The authorities are not entirely in harmony on this question, but the weight of authority is, that where the statute requires the articles of incorporation to be filed with some public officer before the commencement by the proposed corporation of the business for which it is organized, such filing is a condition precedent to the right of such corporation to perform any corporate function; consequently, until a compliance with the statute, the corporation has no valid existence as a *de jure* corporation. Morawetz, Private Corporations, section 27, says, "A substantial compliance with all the terms of a general incorporation law is a prerequisite of the right of forming a corporation under it. Thus where it is provided that a certificate or articles of association, setting forth the purposes of the corporation about to be formed, the amount of the capital, and other details, shall be filed with some public officer, a performance of this requirement is essential; and until it has been performed, the association will have no right whatever to assume corporate franchises." Cook on Stock and Stockholders, section 231, speaking to this same subject, says: "Occasionally, however, it happens that this certificate is not fully made out, as required by the statute, or is not filed, or some other step prescribed by law is not complied with. The corporation is then not duly incorporated; and the state, by *quo warranto*, may oust it from its user of corporate franchises." In Doyle v. Mizner, 42 Mich. 332, it was ruled: "All private corporations must be organized under general laws, and can be valid only when strictly conforming to all the conditions imposed on their completion." The court says: "The incorporation was sought to be shown by asking Doyle, on cross-examination, concerning the signing of a paper purporting to be articles of incorporation which had been filed in the Detroit city clerk's office April 6, 1875. This paper was not acknowledged, and was not filed in the county clerk's office. * * * The statute concerning manufacturing corporations expressly requires that the articles shall be 'acknowledged before some person authorized by the laws of this state to take acknowledgment of deeds.' * * * That before any such corporation shall commence business, the articles should be filed with the secretary of state and county clerk;" and the court held that by reason of the failure to acknowledge and file in the office of the county clerk the articles of incorporation, the association did not become a corporation *de jure*. To the same effect are Stowe v. Flagg, 72 Ill. 397; Bigelow v. Gregory, 73 Ill. 197; Utley v. Union Tool Co., 11 Gray (Mass.) 139; Unity Ins. Co. v. Cram, 43 N. H. 636; Childs v. Smith, 46 N. Y. 34; Harris v. McGregor, 29 Cal. 125.

Section 126, chapter 16, Compiled Statutes, 1893, provides:

"Every corporation, previous to the commencement of any business except its own organization, when the same is not formed by legislative enactment, must adopt articles of incorporation and have them recorded in the office of the county clerk of the county * * * in which the business is to be transacted." * * * Section 132 of said chapter provided: "Any corporation formed without legislative enactment may commence business as soon as its articles of incorporation are filed by the county clerks of the counties as required by this subdivision, and shall be valid if a copy of its articles be filed in the office of the secretary of state, and the notice required be published within four months from the time of filing such articles in the clerk's office." These two sections of the statute, read together, leave little room for doubt that the filing of the articles of incorporation in the office of the county clerk is one of the things required to make the corporation one *de jure*. To organize a corporation there must be subscribers to the stock; a meeting of said subscribers, or some of them; the adoption of articles of association for the government of the proposed corporation, and such articles must be filed in the office of the county clerk of the county in which is fixed the corporation's principal place of business. These sections of the statute quoted above were construed by this court in Abbott v. Omaha Smelting and Refining Co., 4 Neb. 416, and it was there said: "In this state the filing of articles of incorporation with the county clerk is a condition precedent to the existence of any corporate franchise. The law and the articles so filed, taken together, are considered in the nature of a grant from the state and constitute the charter of the company." A corporate franchise is a privilege, a power, a right. It is a very different thing from the performance of any step necessary to the organization. In Indianapolis Furnace and Mining Co. v. Herkimer, 46 Ind. 142, the question we are considering arose and was decided by the supreme court of Indiana, under a statute substantially like the one we have quoted above, and the court said: "The signing of articles of association by parties proposing to form a manufacturing corporation does not create such corporation. The subscribers must also make, sign, and acknowledge the certificate of incorporation prescribed (by the statute) and must file the same in the recorder's office of the proper county." We think, therefore, that the Hastings Prospecting Company, the name of the corporation attempted to be organized by the subscribers who signed the subscription on which the plaintiffs in error are sued, is not, and has never been, a corporation *de jure*.

Is that fact available to the plaintiffs in error as a defense to this suit? It is to be borne in mind that the plaintiffs in error did not subscribe for the stock of any corporation, either *de facto* or *de jure*, then in existence; and there is a distinction as to the liability of parties for subscriptions to a corporation, or an association which assumes to be and is acting as a corporation, and the liability for subscriptions made by the parties for the purpose of organizing a corporation from among

the subscribers. If the subscription made by Capps & McCreary had been made to the Hastings Prospecting Company when it was acting as a corporation, when it was exercising the functions of a corporation, when it was claiming to be a corporation, and had their agreement been to pay such corporation certain sums of money for certain shares of its stock, it seems that they would then be estopped from setting up as a defense that the prospecting company was not a corporation *de jure*. (Cook Stock and Stockholders, § 186, and cases cited.) Morawetz on Private Corporations, section 67, thus lays down the rule in such cases: "Every subscription (to the stock of a corporation to be organized) by implication refers to and incorporates the terms of the charter or general law under which the corporation is to be formed; and every subscriber agrees to become associated with the others only upon condition that the formalities prescribed by the charter shall be observed in making the mutual contract. Thus, if certain preliminaries, such as the filing of a certificate, are required to be performed after the articles of association have been subscribed, but before the corporation shall be in existence, the contract of membership does not go into effect until these formalities are complied with, and a subscriber to the articles can not until then be made to contribute the amount of his subscription." In Rikhoff v. Brown's Rotary Shuttle Sewing Machine Co., 68 Ind. 388, it was held: "A subscription of stock to preliminary articles of association, not purporting to be a contract with an existing corporation, does not estop the subscriber to afterward deny the existence of the corporation in a suit upon the subscription." See, also, Indianapolis Furnace and Mining Co. v. Herkimer, 46 Ind. 142, where it is said: "Until the statutory requirements to organize a corporation have been complied with, a subscriber to the articles of association is not estopped to deny the existence of the corporation." (See, also, Dorris v. Sweeney, 60 N. Y. 463.) We think these authorities are decisive of the case under consideration. The rule they lay down is sound law, good sense and exact justice.

If the plaintiffs in error are to pay for the stock subscribed, it, of course, follows that they become entitled to the stock. This would make them stockholders in a *de facto* corporation and liable as copartners, whereas their contract was to become liable as stockholders. The plaintiffs in error have not broken their promise. The judgment of the district court is reversed.

Note. See *infra*, Conditions precedent to *de jure* existence, p. 585.

Sec. 46. Same.

GIBBS' ESTATE. HALLSTEAD'S APPEAL.

1893. IN THE SUPREME COURT OF PENNSYLVANIA. 157 Pennsylvania State Reports 59–74; 22 L. R. A. 276.

Appeal by Hallstead, guardian of Mary E. Clapp et al., from decree of orphan's court dismissing exceptions to auditor's report in estate of Henry Gibbs, deceased.

Exceptions to report of auditor on exceptions to administrator's account. Before METZGER, P. J., twenty-ninth judicial district, specially presiding.

The case was referred to Stanley W. Little, Esq., as auditor. Before the auditor, W. F. Hallstead, guardian of Mary E. Clapp et al., claimed to recover from the estate of decedent, Henry Gibbs, the sum of $2,900.46, the amount of a deposit in the Home Savings Bank, of which decedent was a stockholder. The claim was made on the ground that the bank was a general partnership, and that its stockholders were liable as partners for its debts.

The auditor reported in part as follows:

"The exceptants to the account of the administrator ask to take out of the funds for distribution the sum of $36,167.53 and interest. This request is based on the position that the 'Home Savings Bank' was not a corporation, or a limited partnership, or a joint stock association, and therefore was a common partnership. That, being a common partnership, and Henry Gibbs having been a stockholder therein, his individual estate is liable for the entire amount of money deposited in said bank during the time said Gibbs was a member thereof, and unpaid, with what interest may be due thereon.

"This statement of the case at once discloses its importance to the parties concerned. The industry of counsel and the research of the auditor have failed to find much authority in this state to aid in the solution of the question which distinguishes this case. All fair minds must agree that a party seeking to divert so large a fund from its ordinary channel into the pockets of strangers, should present a case strong in the fact and clear in the law.

"As a starting point in this investigation the auditor can find nothing better than the opinion of Mr. Justice Williams, in the case of Hallstead v. Coleman, 143 Pa., at page 364, in these words: 'Now the important question in this case, which lay at the threshold of plaintiff's cause of action, was whether this bank was a partnership. The plaintiff alleged it and claimed to recover against the defendants as members of the banking firm. The burden of proving the partnership was on him, and until this proof was given the defendants were not called upon to enter upon their defense.' Applying this law to this case, which involves questions very similar to those in the case just mentioned, the first question is, have the exceptants proved this was

a partnership, of which Henry Gibbs was a member at the time they deposited their money in this bank, and for all the debts and defalcations of which his estate is liable?

"The evidence offered by them shows that in September, 1873, a bank was opened at South Waverly, in this state; that it had over its door the name 'The Home Savings Bank;' that it organized by electing a board of directors and a president and cashier; that its capital stock was divided into shares of $100; that to each holder of stock it issued certificates of stock, saying upon their face that the bank was organized under act of the legislature of Pennsylvania; that its authorized capital was $100,000; that these certificates had on their back blank powers of attorney for transfer, and in all respects were in the form and style usually adopted by banks; (that these certificates when issued were signed by the president and cashier, and to some of them the seal was affixed;) (17) (that it had a seal, which was affixed to all cashier's checks;) (18) that said bank registered in the office of the auditor-general under section 1 of act of June 7, 1879; that it filed these separate reports in said office of its net earnings or income under the tenth section of said act; (that it also filed in said office at least six reports for publication, covering the four quarters of the year, in accordance with the requirements of the acts of April 16, 1850, and April 17, 1861;) (19) that it paid dividends to its stockholders; that it failed and passed into the hands of a receiver; that none of the certificates of stock, certificates of deposit, books of account with customers, bills, letters, checks or drafts bore upon their face the names of any member other than the president and cashier, and the person to whom addressed or issued; that the transfer of any stockholder's interest was at his own option, and neither such transfer, nor the death of any stockholder worked any change in the name or conduct of the business; that so slight was the effect upon the business of the death of Mr. Gibbs that a large amount of claims have been presented before the auditor for allowance for money deposited after his death, or deposited before and re-deposited and new certificates therefor issued after his death. (What is there in all this evidence from beginning of the business to the failure tending to prove a partnership? What in it all inconsistent with a corporate existence? Only one thing has been urged upon the auditor, and that is to be found in the form of the reports made by the bank to the auditor-general of its net earnings or income under section 10 of act of 1879; (20) and the position was taken that the provisions of this section only apply to unincorporated banks. While it is true that in the printed portion of these reports the word 'firm' is used instead of 'corporation,' yet, remembering that these printed forms were not made by the bank, but were sent to it from the auditor-general's office, and that they were made and returned under an act which is not applicable solely to unincorporated banks, but applies to those which are incorporated as well (and as at most was only the declaration of one member in the absence of and without the knowledge of any others, the auditor does not deem this single fact sufficient to overcome the preceding

evidence of incorporation, or, more accurately, to prove the partnership) (21).

"This comprises the affirmative evidence of the exceptants. It is supplemented by some of a negative character, showing that searches in the office of the recorder of deeds in this county have failed to find any record of this bank as a limited partnership; and that searches in the auditor-general's office have proved equally futile in finding any record of its incorporation. From these two negatives the auditor is urged to find an affirmative. In other words, as no record can be found showing this bank to have been a limited partnership or a corporation, it must have been a simple partnership.

"Upon the certificates issued to Mr. Gibbs each time he acquired stock in this bank, it declared it was organized under 'act of the legislature of Pennsylvania.' If this was true, a search among those local acts of the legislature which filled our pamphlet laws prior to 1874 might have been better rewarded.

"(But is it true that if this was not a corporation or a limited partnership, it follows necessarily that it was a common partnership? This has been urged with much force, and the auditor admits that he entertained that belief at the outset of this case; but from authority consulted, and reflection, he has come to a different conclusion. A partnership *inter se* can not result from any aggregation of negatives. The formation of such a partnership is a positive action and can not exist without an agreement of some kind among all its members.) (22) Parsons in his work on Partnership, in discussing who are liable as partners, says: 'The first thing to be remembered is that persons may be charged as partners of a firm, on either one or two perfectly distinct grounds; one of them is that the person actually is a partner, the other is that he has, with his own knowledge and consent, held forth as a partner to the person having a claim, or to the public generally.' (Upon which of these two distinct grounds can Mr. Gibbs be charged as a partner in this case? Certainly not upon the first, for no articles of partnership and no agreement to be partners, and no agreement of any kind existed between Mr. Gibbs and the other stockholders, and no person can be a partner in fact in a partnership having no existence. If, then, this estate is to be charged it must be upon the second ground above mentioned. But the evidence fails to show any holding forth of him as a partner by the bank or by himself. His name nowhere appears in any business transaction of the bank with others; he took no part in its management or control; he never held any official position therein; no one of these claimants knew that he was a stockholder therein at the time of depositing their money; the bank never represented to any one of them that it was a partnership, and none of them dealt with it as such, and the evidence does not show that Mr. Gibbs had any knowledge of the transactions between the bank and these claimants, or had a personal acquaintance with them. But, on the contrary, the weight of the evidence tends to show that this bank held itself out to the world and to Mr. Gibbs as a corporation and nothing else.) (23.)

"But it is said Mr. Gibbs took dividends on his stock, and hence his estate is liable in this case. (As tending to discharge the burden resting upon the claimants, to prove that this bank was a partnership instead of a corporation, the fact of the receipt of dividends does not go far;) (24) because the taking of dividends is as consistent with the corporate, as with the partnership relation.

"(Nor does this fact, standing alone and disconnected with any agreement between the stockholders, or any holding forth of Mr. Gibbs as a partner by the bank or by himself, or with any credit given to the bank by the claimants knowing Mr. Gibbs to be in any way connected therewith, make his estate liable) (25) in the opinion of the auditor. The old doctrine enunciated in Waugh v. Carver, 2 H. Bl. 235, that one taking a share of profits shall, by operation of law, be made liable to losses, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts, is not the accepted law to-day in England, and, as the auditor thinks, is not in accordance with the weight of authority in this country: Edwards v. Tracy, 62 Pa. 380. (Profits can only exist after payment of all liabilities; and how any one who shares only in what may remain after all creditors are secured takes from them any security is not quite plain.) (26) This is especially true of the banking business. (Every man buying stock in a bank that is conducted upon usual and sound banking principles, as he has a right to expect it will be, knows that he will get no dividends, only such as may remain after all liabilities are deducted.) (27) When a person induces others to credit a firm upon the assurance or belief that he is a member thereof, his property should make good any loss thereby sustained by such creditor, whether such person receives any dividend or not; (but to hold one who puts money into a business and draws out no part of the principal, and but a small part of the interest, liable for all debts, should rest on better reason than that he has reduced the creditor's security. Mr. Gibbs' purchase of this stock and the receipt of dividends thereon, did nothing to lessen the amount these exceptants may, or have realized on their claims. He put in $6,000, and drew out $1,820, thereby making the fund for creditors $4,180 larger.) (28) That this fund was diverted or misappropriated, does not make him liable; it not having been done by him or by any agent of his, in fact or in law.

"It has been said in support of these claims that there must be a liability somewhere, that persons doing business in this state must do it subject to the liability either of incorporators, partners or individuals. Suppose this is admitted. Is there a want of all liability here? If this bank were solvent to-day, and these claimants brought suit against it as a corporation, what would prevent their recovery? (Having declared to the world for nearly eighteen years that it was a corporation, and having induced these parties to trust it as such, what court would now permit it to defend on the ground that it was not incorporated, and thereby allow it to benefit by its own fraud?

Clearly it would be estopped.) (29) Spahr v. Farmers' Bank, Carlisle, 94 Pa. 429, and authorities there cited. The inability of claimants to get their pay seems to result more from a want of ability than liability on the part of the bank; a want from which this estate has suffered in common with these parties.

"(The auditor is therefore of the opinion that the demand of the claimant is not sustained;) (30) and dismisses the exceptions, feeling satisfaction in the knowledge that his decision, if erroneous, can be corrected in a higher court. In coming to this conclusion the auditor has been influenced to some extent (he hopes not too far) by the opinion of Judge Martin of the supreme court of New York, and the many authorities cited by him in the case of the Merchants' National Bank of Binghamton, New York, v. Charles E. Pendleton et al.,[1] which is attached to this report; which opinion has been recently affirmed by the court of appeals of the same state."

Exceptions among others to above findings in brackets were dismissed. Whereupon exceptant appealed.

Errors assigned were (18–30) dismissal of exceptions, quoting them.

Opinion by Mr. JUSTICE WILLIAMS, October 2, 1893.

This case involves substantially the same question that was heard and determined in Hallstead v. Coleman, 143 Pa. 354. The appellant seeks to charge the estate of Henry Gibbs with money deposited by him, as guardian, in the Home Savings Bank, located at South Waverly, on the theory that the bank was a general partnership and that the decedent was one of the partners. The appellees deny that the Home Savings Bank was a partnership, and assert that the decedent purchased shares of the stock in the bank, as and for the shares of the stock in an incorporated bank, and not otherwise. At this point it seems desirable to define the words over which this contest extends.

First. *What is a corporation?* The several answers given by text writers may be reduced to the following formula: A corporation is an artificial person created by the law as the representative of those persons, natural or artificial, who contribute to, or become holders of shares in, the property entrusted to it for a common purpose. As it is the creature of positive law, its rights, powers and duties are prescribed by the law. Beyond the legitimate purposes which it was created to serve, and the lines of limitation the law has drawn around it, it is without power to act or capacity to take. Thus a banking corporation, while fully competent to do what is usual and necessary in its own business, may not own and operate a railroad or engage permanently in any other business than that for which it was created. It has neither the legal capacity, nor the right, to do so; and if it undertakes to go in any direction beyond its corporate powers its acts are *ultra vires*. The creation of a corporation is not within the power of the individuals who subscribe to its stock. It is exclusively the work of the law; and the best evidence to the existence of a corporation is the grant of corporate powers by the commonwealth.

Second. *What is a corporation de facto? It is an apparent cor-*

[1] 20 St. Rep. 891.

porate organization, asserted to be a corporation by its members and actually acting as such, but lacking the creative fiat of the law. In Taylor on Private Corporations, 145, it is said that a *de facto* corporation may exist "when a body of men are acting as a corporation under color of apparent organization, in pursuance of some charter or enabling act." Their organization may be imperfect, so that upon a *quo warranto* they could not show a sufficient compliance with the law to justify the exercise of corporate powers, but, as to parties dealing with them, and as to each other, they are estopped to deny that they are what they hold themselves out to be. In a recent case in Minnesota, Finnegan v. The Knights of Labor Building Association,[1] it was held that a *de facto* corporation exists when these three things concur, viz.: A law under which the alleged corporation might be created; an attempt to organize under the law; an assumption and exercise of corporate powers under such attempted organization. In Church v. Pickett, 19 N. Y. 482, only two things were held necessary, viz: "The existence of a charter or law under which a corporation with the powers assumed might be lawfully created; and the user by the party to the suit of the rights claimed to be conferred by such a charter or law." Where there has been a substantial compliance with the law the corporation is, of course, *de jure.* Where there has been no substantial compliance, but there has been, nevertheless, an assumption and exercise of corporate powers in pursuance of an attempted organization, the alleged corporation is such *de facto* only. The Minnesota courts hold the correct rule, *and three things are necessary to create the liability, a law or charter under which an organization de jure might be effected, an attempt to organize which falls so far short of the requirements of the law or charter as to be ineffectual, an assumption and exercise of corporate powers notwithstanding the failure to comply with the law or charter.*

Third. *What is a partnership? Perhaps the best definition is that given by Story: a relation created by a "contract between two or more persons to place their money, effects, labor, or skill, or some or all of them, in lawful commerce and divide the profits between them." Its foundation is a contract express or implied. It results from the act of the parties, not from the act of the law.* Hedge's App., 63 Pa. 273, 17 Am. & Eng. Ency. of Law 829. See, also, 8 W. & S. 63; 16 Ohio 166; 14 Johns. 318; 49 Ill. 437. But as to third parties one may be held liable as a partner by implication of law arising upon his own acts, contrary even to his own intention. Thus the officers and acting members of a corporation *de facto* may be liable as partners if their conduct has led others to trust the concern upon that basis. 47 Conn. 443. But without a contract of partnership, or such acts and declarations as lead others to infer its existence and to extend credit on that basis, there is no foundation on which liability as a partner can rest. The best evidence of the existence of a partnership is the contract creating it. If proof of the contract is not within reach, its existence may be inferred from proof

[1] *Infra*, p. 614.

of contribution to the partnership stock. If direct proof of contribution can not be had, it may be inferred from participation in profits. In the absence of all this, the acts and declarations of the parties sought to be charged may be resorted to. Participation in profits is not conclusive proof of the existence of the partnership relation. Edwards v. Tracy, 62 Pa. 374. But both in England and in this country it is cogent evidence upon the question, It puts the defendant upon his proofs explanatory of the fact. If he is able to show that such participation was referable to some other reason, such as compensation for services rendered by an agent, broker, salesman or otherwise, the *prima facies* is overcome. So, if the participation in the profits is referable to some other relation other than that of partnership between the participants, such as membership in a joint-stock association or a corporation, the effect of proof of participation will be overcome.

In the light of these well settled rules, let us consider briefly the position of the parties and the important findings of fact made by the learned auditor in this case. The claimant's right to share in the fund in court rested on the theory that the Home Savings Bank, in which the money of his wards had been deposited, was a partnership, and that the decedent was a partner. The burden of proving the fact that the bank was a partnership was on him; and as was said in Hallstead v. Coleman, 143 Pa. 364, "until that proof was given, the defendants were not called upon to enter upon their defense." The proof made upon this subject showed the organization of a bank under the name of the Home Savings Bank, with a president, cashier, and a board of directors. This is the mode of organization usually adopted by corporations, and did not tend to prove a partnership. It was then shown that the decedent bought and held certificates of stock in the bank, after its organization, which recited not the formation of a partnership, but the organization of a bank under the laws of the state, and the division of its capital into shares of one hundred dollars each. This is not the usual way in which partnerships are created and partners admitted. It is the usual way in which stocks are issued and transferred in corporations. Proof was then made of the receipt by the decedent of several dividends upon his stock. These did not purport to be shares in the profits of firm business, but dividends, declared in the manner usual among corporations, upon the stock of the bank; and were paid by dividend checks drawn under the authority of the board of directors. The only other evidence was the returns made by the officers of the bank under the tax law of 1879, which threw very little light upon the character of the organization of the bank. Upon this proof the questions for the auditor were whether the bank was shown to be a partnership, and the decedent a partner. The bank did business for a number of years and then failed. Its books and papers were in the hands, or subject to the control, of the receiver. The manner of its organization was not shown; the partnership agreement, if any such existed, was not produced.

No proof was given that the officers or stockholders claimed or held

out to the public that the stockholders were partners or the bank a partnership enterprise. It is not alleged that the decedent participated in any manner in the business, or exercised any control over it. The whole case against him rested on the fact that he had purchased shares in a bank, then organized and doing business, and received dividends declared by the directors and paid to him in a cashier's check. We are not surprised that the auditor was led to ask, "What is there in all this evidence from the beginning of the business to the failure tending to prove a partnership?" Nor that he answered his own question by holding that this proof was insufficient to establish, *prima facie*, the existence of the partnership relation. On the other hand, there was much tending to show that Henry Gibbs understood that he was the holder of stock in an incorporated bank, and that the bank assumed and exercised corporate powers; and was dealt with by the public as a corporation. The form of its certificates, the manner of their transfer, the election of directors by the stockholders, the management of the business of the bank by the directors and the officers elected by them, the mode of declaring and paying dividends, were all suggestive of a corporation. They were not suggestive of a partnership. We are unable, therefore, to say that the auditor erred in finding that the bank was not shown to be a partnership. The learned judge who heard the exceptions to this report seems to have concurred with the auditor, and we require under such circumstances to be satisfied that a mistake was made before interfering with the findings. We are not so satisfied; but are of opinion that the state of the evidence justified the auditor's conclusion. This disposes of the whole case.

It is said with earnestness and energy that this is a case in which the depositors deserve protection. We assent to this proposition. We can extend protection to them, however, in accordance with the established rules of law, and in no other manner. What the Home Savings Bank was in its organization, in what capacity those who held its stock were liable to its depositors are questions not now before us. It may have been a corporation *de jure*, a corporation *de facto*, a joint-stock association or a general partnership so far as we are able to declare. What we say is that the evidence in this case is not sufficient to make a case, prima facie, against Henry Gibbs as a partner, or the bank as a general partnership. It does not appear that the bank was organized as a partnership, conducted business as a partnership, or held itself out to the public as such. It does not appear that Gibbs understood the bank to be other than what his certificates of stock indicated; or that he treated the business of the bank as that of a firm, or exercised the slightest control over, or influence upon it, or mislead the appellant or any other depositor by act or word as to his relation to it. What does appear is that he purchased shares of stock in the usual manner, and received some dividends thereon. These circumstances are naturally referable to the relation of a stockholder to a corporation; and standing alone, are not proof, *prima facie*, of the appellant's proposition that the bank was organized as a partnership, and that the purchase of shares of stock made Gibbs a partner. If he

had received profits from the business apparently conducted by a partnership, he would have been put upon his explanation, and, failing to make one, would have been held to be a partner. The burden in that case would have been on him. Having received dividends declared by a board of directors upon the stock into which the capital of the bank was divided, he could rest securely upon the apparent character of the transaction and the inferences naturally to be drawn from it. The burden of explanation necessary to give another character to the dividend declared, and to the stock on which it was paid, was on him who asserted that such other was the true character of these circumstances.

It was also said in the argument that the recitals in the stock certificates are not evidence of actual incorporation as against a stranger. This must be granted. They do not prove incorporation. But the appellees are not bound, upon the evidence in this case, to prove incorporation. The significant question is, where is the proof that this bank was organized or conducted as a partnership concern? The certificates do not prove that, but the inferences naturally drawn from them tend the other way. It will not do for the appellants to say: "We have shown that the decedent was a stockholder in this bank and received dividends upon his stock, now you must show that the bank was incorporated or be liable to us as a general partner." This is attempting to change the burden of proof. Again the learned counsel says: "This is the sole fact (the form of the certificate) that is before the court, and if it is sufficient to authorize a court to find an incorporation in this case, why is it not in any other?" The court below did not find that the bank was a corporation. That question was not before it. It was alleged by the appellant to be a partnership, but the auditor and the judge of the court below regarded the evidence in support of that allegation insufficient to justify a finding that the bank was not "organized by act of the legislature of Pennsylvania," as its certificates alleged, but by the parties as copartners. The appellant failed, not because the bank was held to be a corporation, but because it was not shown to be a partnership. Until evidence in support of the appellant's position is given sufficient to lead fairly to the conclusion that the bank was organized as a partnership, or that Henry Gibbs contracted to become a partner when he bought his stock, or that he led the public by his acts and declarations to deal with him or the bank on the basis of his being a partner, there is nothing that makes it the duty of his representatives to enter upon a defense, or that makes it possible for the court to decide upon the character of the bank. In such a state of the evidence the court can only say, as the court below said in this case, "It is not shown that the bank is a partnership," and for that reason the claimant fails.

The assignments of error are not sustained, and the decree is affirmed.

Note. See *infra*, Conditions precedent to *de facto* existence, p. 614.

Sec. 47. Same.

McCARTHY v. LAVASCHE.

1878. In the Supreme Court of Illinois. 89 Ill. Rep. 270–277, 31 Am. R. 83.

Appeal from the superior court of Cook county, the Hon. Joseph E. Gary, Judge, presiding.

Mr. Justice Walker delivered the opinion of the court.

The National Loan and Trust Company was organized under an act of the general assembly, approved on the 9th of March, 1867. Under the provisions of an act adopted and approved the 26th of March, 1872, the corporation changed its name to the "Bank of Chicago," and appellee, being a creditor of the bank, brought an action of debt against appellant for its recovery.

The declaration avers that the corporation was, among other things, authorized to borrow money, to receive money on deposit, to loan money and make discounts, etc.; that on the 26th of August, 1873, the bank owed, and was and still is indebted to appellee in the sum of $100 for money received of appellee on deposit; that appellant then was, and still is, a stockholder and the owner of one share of $100 in the bank; that the bank had become, and still is, utterly insolvent, and that appellant had not assigned or transferred his stock in the bank.

The declaration further avers that the charter of the corporation contains this provision: "And each stockholder shall be liable to double the amount of the stock held or owned by him, and for three months after giving notice of transfer, as hereinafter mentioned," and that, by virtue of this provision of the act of incorporation, appellant as such stockholder, was individually liable to the creditor or creditors of the bank in double the amount of the stock held by him, whereby he became liable to pay appellee.

A demurrer was filed to the declaration, which the court overruled, and appellant abided by his demurrer; and the court thereupon rendered judgment in favor of plaintiff, and assessed the damages and rendered judgment for $110.50, and defendant appeals, and assigns errors.

It is urged that the corporation was never legally organized, as the act under which the stockholders incorporated was unconstitutional and void; that if not, then the clause in the charter rendering stockholders liable is too vague to render them liable to the individual creditors of the company; or if it shall be held that they are so liable then the remedy is in equity, against all the stockholders.

On the other hand, it is contended that the law does not contravene the constitution; but if it should be so held, the stockholders having organized the corporation, and held themselves out to the world as

such, and thereby obtained credit and incurred indebtedness, they are estopped to deny the validity of the act of their organization under it, and that a reasonable and fair construction of the clause of the act quoted renders the shareholders individually liable to each and every creditor, and that the remedy for a recovery on the liability is complete at law. These are the questions raised and discussed on this record.

Even if the law is unconstitutional, can the promoters and those engaged in its operation be heard to say that they may relieve themselves from liability, and from all their engagements, because the law under which they have acted is prohibited by the organic law? May shrewd, intelligent persons go to the general assembly and procure an act that they should know is prohibited by the fundamental law, avail themselves of its benefits, obtain the money of the uninformed and the confiding, and then be heard to say, we are not incorporated, our charter and organization are void, and we will hold your money? Or, may those who promoted the enterprise by becoming shareholders, to enable the company to organize, and to procure other people's money, be heard to interpose such a defense? The presumption is, that each subscriber for stock knew at the time of the subscription that the charter contained the provision rendering him liable for double the sum he subscribed, and such persons could not but have known that this provision would contribute largely to give credit to the concern and greatly augment its business.

The subscribers for shares of the stock, no doubt, expected to reap large profits, and expected those profits to be greatly enhanced by this provision. It enabled them to point to it and assure individuals and the public that the institution was safe, as, if the business was not lucrative, all the stockholders were severally liable for double the amount of their subscriptions. They thus, no doubt, did increase their business, and thus obtained money and credit, which now, when the institution has proved a failure, they endeavor to avoid paying by urging that their organization, and, consequently, their subscriptions to its stock, were void. Fair dealing would say that they should be estopped from interposing such a defense.

The question is by no means new in the jurisprudence of this country. The question has been frequently considered in the courts, in the form here presented or in analogous cases. See Baker v. Brannan, 6 Hill 47; Embry v. Conner, 3 N. Y. 511; Eaton v. Aspinwall, 19 N. Y. 119; Mead v. Keeler, 24 Barb. 25; Ferguson v. Landran, 5 Bush (Ky.) 230. These were all cases where the parties were held to be estopped from insisting that the organization was illegal, or a law unconstitutional, because of the acts or consent of the parties urging the objections.

In our own court analogous questions have been presented and determined. In the case of Tarbell v. Page, 24 Ill. 46, it was held that in a suit by a creditor against a stockholder, the former could not show that the corporation had failed to file a certificate of organiza-

tion with the secretary of state; that in a collateral proceeding the regularity of the corporate organization could not be questioned. And this is a rule of uniform application. If, then, the plaintiff, by contracting with a body exercising the franchises of a corporation, is estopped from denying the legality of its organization, the same reason must apply with increased force to prevent a stockholder in such an organization from questioning the legality of the corporation.

That the legality of an incorporation can not be attacked collaterally, see Rice v. Rock Island and Alton Railroad Co., 21 Ill. 93. Goodrich v. Reynolds et al., 31 Ill. 490, and numerous subsequent cases. In fact, the books abound in adjudged cases which hold that a person doing an act or making a statement which misleads another to his injury shall not be permitted to question the act or the truth of the statement. So, on the same principle, appellant should be estopped, as his acts contributed to the organization of this company, and he held himself out to the world as a stockholder therein, and liable to the extent of double the amount of his subscription. Had the company not been organized, appellee would not have lost his money, and appellant thus contributed to that loss.

In Ferguson v. Landran, *supra*, appellants denied the validity of a tax levied under a local law, but the court held they were estopped to deny the validity of the law, because they had approved it and availed of its benefits and aided in procuring its passage. The court held the law unconsitutional, but enforced the tax. The court says, "parties are estopped from denying the constitutionality of a local statute by participating in the procurement of its passage, and by ratifying, acquiescing in, or approving it after its passage, and by becoming recipients of benefits under it; and all such persons are held to be liable to the tax authorized by such enactment, although it is unconstitutional and invalid to all other persons."

Here, appellant approved of the act, and availed himself of its benefits by subscribing for stock and becoming entitled to exercise all the rights and privileges of a stockholder in the corporation. Justice, morality, public policy and precedent all demand that appellant should be estopped from denying the constitutionality of the law. If stockholders might show the law unconstitutional, and their organization void, and all their acts unauthorized, then all persons engaged in the organization of the corporation should be held liable for the consequences of their illegal and unauthorized acts, independent of the clause in their charter. So they should, in no event, escape liability for obtaining money without authority.

Suppose these stockholders had formed a partnership, with articles of partnership containing precisely the same provisions that are contained in their charter, and had put in capital stock to the same extent, and the same amounts they each subscribed in shares, would any one question the legality of the organization, or the legal liability of each of the members of the firm? We apprehend these propositions would be conceded. And if so, in principle, what distinction can be

taken between the supposed case and the one at bar? Had the shareholders written under the charter a statement that it was unconstitutional and void as a law, but that they adopted it as articles of partnership, and that each would be bound by its terms and conditions, and would pay in, for capital stock, the sums set opposite their several names, and they had signed it, and specified the sum to be paid in, could it be doubted that each member would have been liable, under the articles thus executed? And if so, when stripped of mere form, and substance is alone considered, this organization is in effect the same. We can perceive no well-grounded distinction. We are therefore of opinion that, independent of all constitutional questions, each shareholder became liable under the charter as articles of partnership, as it operated as an agreement by each subscriber to be liable to creditors to double the amount each subscribed.

It is urged that under the language of the third section of the charter, although a liability may be created to double the amount of the stock, still it is to the corporation and not to the creditors. The obvious purpose of the general assembly was to secure the creditors of the institution. And if so, why make a provision which the creditor could not, and the directors would not, in all probability enforce? On their refusal the creditor, if that construction is to be given, would be compelled to proceed by *mandamus*, had the law been valid, to compel suits to be brought by the corporation against shareholders, and then in all probability, after years of delay in litigation, to get the money into their hands, a further delay would be liable to ensue until a recovery could be had against the bank and the money realized at the end of a long, obstinate and expensive litigation. Such a course could not, we think, have been intended. Such a requirement would greatly impair if it did not render the security worthless. We must therefore conclude, that as the provision was intended to secure the creditor, it was intended that his remedy should be direct and effective, and that he might sue in his own name and at law.

If this association only amounted to a partnership, as we have seen it was, then the firm could not sue one of its members to compel the payment. Nor do we perceive how the firm could maintain a bill for the purpose. Hence we must conclude that it was intended that the liability should be direct to the creditor and not to the firm.

It is next urged that a remedy is in equity and not at law. Actions at law were maintained in the cases of Culver v. Third National Bank, 64 Ill. 528, and Corwith v. Culver, 69 Ill. 502, under a statute creating a liability of the stockholders. It was then urged that the remedy was in equity, but we held that it was a legal liability and could be enforced by an action at law. That statute did not determine, in terms, in which forum the remedy should be sought. But it being a legal right, the remedy was held to be at law.

It is urged that the liability should be construed to be joint against all the stockholders. To do so would, we think, do violence to the language of the statute; the language is, "each stockholder shall be

liable to double the amount of stock held or owned by him, for three months after giving notice of transfers, as hereinafter mentioned." This language renders the stockholders severally and individually liable.

The judgment of the court below must be affirmed.

Judgment affirmed.

Note. See *infra*, Conditions precedent to existence by estoppel, p. 630.

PART II.

THE BODY CORPORATE, ITS PARENTAGE, CONCEPTION, BIRTH, ANATOMY, LIFE AND DEATH.

TITLE I. PARENTAGE—THE STATE AND PROMOTERS.

SUBDIVISION I. THE STATE, ITS POWER TO CREATE.

CHAPTER 2.

NATURE OF THE POWER AND METHODS OF EXERCISE.

ARTICLE I. NATURE OF THE POWER.

Sec. 48. "The state creates the corporation upon the application of individuals, who are called incorporators. The incorporators then organize the corporation. The functions of the incorporators thereupon cease, and the stockholders proceed to contribute the capital and elect directors. The directors then start and continue to keep in operation the powers of the corporation." 1 Cook on Stock and Stockholders, § 2, 3d ed., p. 4.

(*a*) The power to create is an incident of sovereignty, and the sovereign's consent is essential. A corporation is the creature of the sovereignty that creates it, and to that alone is it amenable for violation or usurpation of its purely corporate authority.

STATE OF CONNECTICUT, EX REL. WILCOX, v. CURTIS.[1]

1868. IN THE SUPREME COURT OF ERRORS OF CONNECTICUT. 35 Conn. 374–384, 95 Am. Dec. 263.

[Information in the nature of a *quo warranto* upon the relation of Wilcox, who claimed to have been duly elected a director of the First National Bank of Meriden, Conn., but who claimed to have been deprived of exercising the franchises thereof by Curtis, who, without warrant, exercised the same and wrongfully excluded the relator. The suit was brought in the superior court for the county of New Haven.

[1] Statement of facts abridged. Arguments omitted.

Defendant demurred, and the case was reserved for the advice of the supreme court.]

BUTLER, J. *The power to create a corporation is an attribute of sovereignty; and the government of the United States created the corporation in question, in the exercise of that independent and supreme sovereign power which the people delegated to it by the constitution. It is, therefore, the creature of that sovereignty, and amenable to, and controllable by it, and by none other.*

An information in the nature of a *quo warranto* against a corporation lies only at the instance and in the name of the sovereign power which created it. (5 Wheaton 291.) The original writ so lay against any person who usurped any franchise or liberty against the king, or for misuser or non-user of franchises or privileges granted by him. The information in the nature of a *quo warranto*, authorized by the statute of the 9th Anne, at the relation of any person against any other person usurping, intruding into, or unlawfully holding any franchise or office in any corporation, is but an extension and simplification of the ancient writ, and is grantable only where that would lie. In England it lies in the name of the sovereign against those who usurp such franchises, because such usurpation is in derogation of the rights of the crown. In this country it lies in the name of the government, against those who usurp such franchises, because grantable or granted by the commonwealth.

"*The state, or commonwealth*," *says Mr. Angell in his work on corporations*, "*stands in the place of the king, and has succeeded to all the prerogatives and franchises proper to a republican government. With us therefore to assume a power which can not be exercised without a grant from the sovereign authority, or to intrude into the office of a private corporation, contrary to the provisions of the statute which creates it, is, in a large sense, to invade the sovereign prerogative and to assume or violate a sovereign franchise.*" And the cases cited fully sustain his positions. Upon the same principles the information can lie only in the name of the United States and in the federal courts, against those who invade a franchise grantable or granted by the national government.

As then the corporation in question is the creature of federal sovereignty, and in respect to its internal organization, operation and continual existence is amenable to and controllable by that sovereignty alone; and as the writ in question is properly grantable by that sovereignty alone whose franchise has been invaded and violated, it would seem upon principle too clear for argument (if there be nothing more in the case) that the relator has erred in invoking the interference of another uninvaded and unviolated sovereignty, and the court below have erred in assuming jurisdiction and granting the writ.

Such is the obvious *prima facie* character of the case before us. But the plaintiff insists that there is no error and makes several claims, founded upon the complex character of sovereignty as it exists in this country, divided between the national and state governments.

1. He insists in the first place that this institution is amenable to state sovereignty, because it is located and its officers discharge their duties and perform their functions within this state. This claim is groundless.

It is indeed true, in the language of the supreme court of the United States (2 Howard 555), that a "corporation created by a state to perform its functions under the authority of that state, and only suable there, though it may have members out of the state, is a person, though an artificial one, inhabiting and belonging to that state, and, therefore, entitled—for the purpose of suing and being sued—to be deemed a citizen of the state." But this is not such a corporation. It was not *created* by us; it does not perform its functions under *our authority*, and it *is* the creature of and controllable by another and superior sovereignty. That other sovereignty is exercised over the whole country irrespective of state lines or state authority. It places its officers, agents and instruments wherever its necessities or its interests require, and necessarily within the limits of the states. With those officers, and agents, and instruments, in the exercise of their functions, state authority can in no way interfere. The national banks are its *instruments*, by which it performs its functions in establishing a national currency; *on that fact their constitutionality is placed*, and in the exercise of the powers conferred upon them they are as independent of state control as the army, or navy, or the officers of the subtreasury and custom-house, or any other *instrumentality* by which the functions of the federal government are performed. No other view is compatible with the principles of our own jurisprudence, or those recognized and declared by the supreme court of the United States in numerous cases, and particularly in the exhaustive opinion of Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316.

2. The relator insists, in the second place, that the superior court has jurisdiction of the defense set forth in the information, because the judicial power of the federal and state governments is exercised concurrently by the courts of either, unless congress has conferred exclusive jurisdiction, in respect to the subject-matter, on the federal courts, and no such exclusive jurisdiction has been conferred in relation to this. This claim is equally unfounded.

It is undoubtedly true that the state courts retain jurisdiction over some matters, to which, by the constitution and laws of the United States, jurisdiction is given to the federal government and courts, and in respect to which jurisdiction appertained to and was exercised by the state courts prior to the adoption of that constitution. On that subject the rule seems to be, that the state courts retain the jurisdiction which they had before that event except where it was taken away by an exclusive constitutional grant of jurisdiction to the federal government, or congress have made the jurisdiction exclusive in the federal courts, or the exercise of the jurisdiction is repugnant to, and incompatible with such exercise by those courts.

But the cases where such concurrent jurisdiction can be entertained

by the courts of the states are few. Most of those where such jurisdiction has been sustained by the supreme court of the United States, and all to which we have been particularly referred, were cases of a criminal character where the act was an offense against both sovereignties, and punished by the law of the state. Here there could be no jurisdiction anterior to the adoption of the constitution. Nor has there been any invasion of the sovereignty of this state or violation of its laws, or any *offense* which the state is called upon to redress in its own behalf. It is a clear principle that where there has been no offense there can be no judicial jurisdiction; and equally clear that a state has no authority to enforce a national law in behalf of the national government.

And this is one of that class of cases where jurisdiction in the state court is utterly incompatible with the necessary jurisdiction of the national government. The corporation in question being the creature and instrument of that government must necessarily be subject to that alone. By the common law, and by our statute, an information of this character lies as well to deprive a corporation of its charter as to determine the rights of its competing officers; and if the relator is right in this claim, its charter can be taken away and its franchises seized by the courts of the state. Nothing could be more repugnant in character than such an unauthorized interference, for such a purpose, or for any purpose.

3. The plaintiff claims in the third place, that concurrent jurisdiction of the subject-matter is conferred upon the state courts by the amended currency act of 1864, section 57, which provides, "that suits, action and proceedings against any association, under this act, may be had in any circuit, district, or territorial court of the United States, held within the district in which such association may be established; or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. Provided, however, that all proceedings to enjoin the comptroller under this act shall be had in a circuit, district or territorial court of the United States held in the district in which association is located." To this claim also we find it impossible to assent.

The information in the nature of a *quo warranto*, although grantable to determine a private right to an office in a corporation, between party and party, as well as to determine the right of the corporation to the franchise assumed, and a civil proceeding must be filed and issued in the name of the sovereignty which created the corporation, and is still so far forth a prerogative writ. Congress, in the exercise of its authority to apportion the judicial power among the inferior federal courts, has been very cautious in conferring the power to grant prerogative writs. That power is nowhere conferred, in express terms, upon the circuit or any other federal court located in the states. They did attempt to confer the power to grant a mandamus upon the supreme court, as a matter of original jurisdiction, but that court, in Marbury v. Madison, held the act unconstitutional, on the ground

that it was not competent for congress to increase the original jurisdiction of the supreme court. By the eleventh section of the judiciary act of 1789 jurisdiction was given to the circuit courts of all suits of a civil nature at common law and in equity to the amount of $500 or more between certain parties. This writ, though in its nature grantable at the discretion of the court, is one of right, and constitutes a suit within the meaning of that term as used in the act, but it is not of the character, or between the parties contemplated by it.

The 14th section also authorizes the circuit and other federal courts "to issue writs of habeas corpus and all other writs not specially provided for by statute, which may be *necessary for the exercise of their respective jurisdictions*, and agreeable to the principles and usages of law." But the supreme court, in McIntire v. Wood (7 Cranch 504), and M'Lung v. Silliman (6 Wheaton 598), and Kendall v. The United States (12 Peters 524), held that the circuit courts, within the states, had not power under those sections to grant a *mandamus*, which is one of those writs, unless necessary for the exercise of their jurisdiction within the limits prescribed, although the power was sustained in the latter case, as having been given to the circuit court of the District of Columbia. The granting of those writs undoubtedly appertains to the judicial power of the government, but that part of the power seems not to have been conferred by congress upon any of the courts but that of the District of Columbia, in prescribing their jurisdiction, except as incident to and *necessary for* the exercise of the other special powers with which they are clothed. The circuit court of the United States for this district has not the power, therefore, to issue a *quo warranto* in a case like this, by virtue of any general jurisdiction. And is it to be assumed that congress, having been thus cautious of entrusting the federal courts with that power, intended nevertheless to confer it by the language quoted, and not only on the federal, but upon the state courts; to delegate to the state courts a part of their sovereignty; to submit a corporation—a creature of their creation, and an instrument by which they perform one of their functions—to the absolute and unrestrained supervision and control of the courts of another sovereignty, especially when by the act which created it they reserved to their own officers unusual supervisory power and control? I think not. And if the case turned upon that question alone, I should be strongly inclined to the opinion that congress intended by the clause quoted to provide a more *convenient forum* for determining the *ordinary* questions which must naturally arise between the corporations and others in the course of their business, and intended no more.

But there is another and conclusive objection to this claim of the plaintiff. The section in question authorizes *suits against the corporation only*. This is not a suit against the corporation, but a proceeding by one individual against another *individual* competing for the office of director of it, and it is not within the letter or spirit of the act.

For these reasons we advise that the information is insufficient and the demurrer should be sustained.

In this opinion the other judges concurred.

1809, Commonwealth v. Union Ins. Co., 5 Mass. 230, 4 Am. Dec. 50; 1824, Commonwealth v. Murray, 11 Serg. & R. (Pa.) 73, 14 Am. Dec. 614; 1836, People v. Rensselaer, etc., R. Co., 15 Wend. 113, 30 Am. Dec. 33, note 44; 1841, State v. Harris, 3 Ark. 570, 36 Am. Dec. 460; 1841, State v. Evans, 3 Ark. 585, 36 Am. Dec. 468; 1864, People v. River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64; 1867, Commonwealth v. Cluley, 56 Pa. St. 270, 94 Am. Dec. 75; 1888, Moore v. Brooklyn, etc., R., 108 N. Y. 98; 1892, Pickett v. Abney, 84 Texas 645; 1893, Republican Mountain Silver Mines v. Brown, 58 Fed. Rep. 644, 24 L. R. A. 776; 1897, Madden v. Penn. Elec. L. Co., 181 Pa. St. 617, 38 L. R. A. 638; 1898, Coquard v. National L. O. Co., 171 Ill. 480, 49 N. E. Rep. 563; 1899, Clark v. Mutual Res. F. L. Ass'n, 14 App. Cas. (D. C.) 154, 43 L. R. A. 390.

Sec. 49. (*b*) None but the sovereign can create.

THE MEDICAL INSTITUTION OF GENEVA COLLEGE v. PATTERSON.[1]

1845. In the Supreme Court of New York. 1 Denio (N. Y.) 61–69.

[Suit by the medical institution upon a note given by defendant payable to the Medical Institution of Geneva College. Special verdict raising the question as to the plaintiff's corporate existence.]

By the Court: Bronson, C. J. If "The Medical Institution of Geneva College" is not a corporation it has no capacity to sue, and the defendant is entitled to judgment. This is the only question made by the special verdict. The principal argument for the plaintiffs depends upon maintaining the following propositions: 1. Each of the English Universities of Oxford and Cambridge has the power of creating subordinate corporations, such as colleges for giving instruction in the liberal arts and sciences. 2. Columbia College, in the city of New York, has the same power in this respect as the English universities. 3. Geneva College has the same powers as Columbia College, and, 4. Geneva College, thus having the power, has created a corporation by the name of "The Medical Institution of Geneva College." If any one link in this chain is broken, the whole argument falls to the ground.

[By the charter Geneva College was given all the corporate rights and privileges of Columbia College, the governors of which were empowered by their charter from the king to appoint a president, professors and other officers, who could exercise their office, as freely and fully as any of the like officers in the English universities; the governors also had the power to make laws and ordinances for the government of the college and students, and to grant degrees the same as English universities.]

[1] Statement of facts abridged. Arguments and part of opinion omitted.

These are all the provisions of the charter to which we have been referred in support of the plaintiff's case; and, whatever may be the powers of the English universities, I think it entirely clear that Columbia College has no power to create corporations of any kind, or for any purpose. It can not be necessary to discuss the question. It is enough to say that there is nothing in the charter which looks like a license or authority to erect corporations. The *chancellor* of the university of Oxford has power by charter to erect corporations. (1 Kyd on Corp. 50; 1 Black. Comm. 474.) But Columbia College has no chancellor. Its principal officer is a president, who has no greater powers than are usually conferred on the presidents of other colleges. They can not make corporations.

Although it is now settled that the king may delegate his authority to create corporations; or, in other words, may exercise the power by another as his instrument, on the principle *qui facit per alium, facit per se*, I find no authority for the position that a general power to erect corporations has ever been delegated to either of the English universities. But, however that may be, I think there is no color for saying that such a power has been conferred upon any of our colleges.

* * *

Judgment for defendant.

Note. 1830, People v. Trustees of Geneva College, 5 Wend. (N. Y.) 211; 1894, State v. International Ins. Co., 88 Wis. 512, 43 Am. St. Rep. 920; 1697, Robinson v. Groscot, Comberbach 372; 1704, Cuddon v. Eastwick, 1 Salk. 192; 1829, McKim v. Odom, 3 Bland Ch. (Md.) 407, *supra*, p. 222; 1852, Pennsylvania R. v. Comm'rs, 21 Pa. St. 9; 1853, Franklin Bridge Co. v. Wood, 14 Ga. 80, *infra*, p. 279; 1859, State v. Bradford, 32 Vt. 50; 1870, Hoadley v. Essex Co., 105 Mass. 519; 1874, Stowe v. Flagg, 72 Ill. 397. Also cases *infra*, on conditions precedent to corporate existence, *de jure, de facto* and by estoppel.

ARTICLE II. METHODS OF EXERCISE—EVIDENCE OF SOVEREIGN'S CONSENT.

Sec. 50. (*a*) In general.

THE CASE OF SUTTON'S HOSPITAL.

1613. 10 Coke, 23*a*, 30*a*, 30*b*, 31*a*.

(*Extracts from the Report.*)

"* * * And it is to be known, that every corporation or incorporation, or body politic or incorporate, which are all one, either stands upon one *sole person*, as the king, bishop, parson, etc., or aggregate of many, as mayor, commonalty, dean and chapter, etc., and these are in the civil law called *universitas sive collegium*. Now it is to be seen what things *are of the essence of a corporation*. 1. *Lawful authority of incorporation;* and that may be by *four* means, sc. *by the common law*, as the king himself, etc.; by authority of *parliament;* by the *king's charter* (as in this case); and by *prescription*. The 2d, which is of the essence of the incorporation, *are persons to*

be incorporated, and that in two manners, sc. persons natural, or bodies incorporate and political. 3. *A name by which they are incorporated*, as in this case governors of the lands, etc. 4. *Of a place*, for without a place no incorporation can be made; here the place is the charter-house in the county of Middlesex. Vide 3 Hen. VI 'Det.,' 20; 17 Edw. III 59*b*, and 45 Edw. III 17. 5. *By words sufficient in law*, but not restrained to any certain legal and prescript form of words. And for as much as good pleading is *lapis lydius*, the touch-stone of the true sense and knowledge of the common law, the form of pleading of a corporation by prescription is to be observed, for in such case he ought to prescribe in everything which is of the essence of the incorporation. * * * It appears that *incorporo*, or any derivative thereof, is not in law requisite to create an incorporation, but other equivalent words are sufficient, as *nominati* and *cogniti*; and therewith agree 44 Assizes, p. 9. In Prior of Plimpton's Case and 4 Edw. IV 7*b*, in the case of Abbot of Glastenbury, and in none of these books or records was any mention made of these words, *fundo*, *erigo*, etc., or any other like words, for, as it hath been said, they are only declaratory words, and the effect of them may be done by the owner of the land without any grant. And it was well observed that in old time the inhabitants or burgesses of a town or borough were incorporated when the king granted to them to have *gildam mercatoriam*. * * * *Vide* for this word guild or fraternity in the Book of Entries, 68; 37 Edw. III, c. 5; 15 Rich. II, c. 5; the statute of 1 Edw. VI of Chantries. In which three things were observed. 1. How *prudens antiquitas* did always comprehend much matter in a narrow room. 2. That to the creation of an incorporation the law had not restrained itself to any prescript and incompatible words. 3. That when a corporation is duly created, all other incidents are tacite annexed. And for direct authority in this point, in 22 Edw. IV Grants, 30, it is held by Brian, chief justice, and Choke, that corporation is sufficient without the words to implead and to be impleaded, etc., and therefore divers clauses subsequent in the charters are not of necessity, but only declaratory, and might well have been left out. As 1. By the same to have authority, ability and capacity to purchase, but no clause is added that they may alien, etc., and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, etc.; that is also declaratory, for when they are incorporated, they may make or use what seal they will. 4. To restrain them from aliening or demising but in certain form; that is an ordinance testifying the king's desire, but it is but a precept, and doth not bind in law. 5. That the survivors shall be the corporation; that is a good clause to oust doubts and questions which might arise, the number being certain. 6. If the revenues increase, that they shall be employed to increase the number of poor, etc.; that is but explanatory, as appears in the Case of Thetford School, in the eighth part of my Reports (f. 31*a*). 7. To be visited by the governors, etc.; that is also explanatory, * * * for if no visitor had been appointed by the charter, the governors should visit; and the books in 8 Edw. III 28, and 8 Assizes,

29, do not gainsay it, where it is held, that if the hospital be lay, the patron shall visit, and if spiritual the bishop shall visit, so that every hospital is visitable; it is true, but in the case at the bar the poor of the hospital are not incorporated, and so no legal hospital. 8. To make ordinances; that is requisite for the good order and government of the poor, etc., but not to the essence of the incorporation. 9. The exemption from the ordinary is but declaratory, for being a lay incorporation he neither can nor ought to visit. 10. The license to purchase in *mortmain* is necessary for the maintenance and support of the poor, etc., for without revenues they can not live, and without a license in *mortmain* they can not lawfully purchase revenues, and yet that is not of the essence of the corporation, for the corporation is perfect without it, so that by what has been said, it appears what things in *genere* are requisite to a complete body incorporate, and which are *verba operativa* in this case (which are necessary to be known in every case), in the resolution whereof it appears how necessary it is that the law and experience should join with their hands together. * * *"

Note. See cases following, pp. 266, 270, 275, 279.

Sec. 51. Same. (*b*) King's or Queen's Charter.

RUTTER v. CHAPMAN.[1]

1841. IN THE ENGLISH EXCHEQUER CHAMBER. 8 Mees. & W. (Exchequer) 1–117.

[This was a controversy between two coroners. The plaintiff had been one of the coroners of the county palatine of Lancaster, and had been entitled to hold inquests, and receive the fees therefrom. Upon the sudden death of Bridget Garratty, within the territory formerly within the jurisdiction of the plaintiff, he claimed the right to hold the inquest, but was prevented from doing so by the defendant who claimed to be a properly selected coroner by the council of Manchester, which he claimed was a borough duly incorporated, by the queen's charter, with jurisdiction over the territory where the death occurred. By act of parliament it had been provided that the queen, upon petition from the inhabitant householders of any town or borough, by advice of the privy council, might extend to such inhabitants "within the district to be set forth in such charter, all the powers and privileges" given to municipal corporations, by the 5 and 6 William IV, c. 76, which included several powers that were beyond the prerogative of the queen to grant without parliamentary authority. A petition agreed upon at a meeting of the rate-payers of the parliamentary borough of Manchester, convened by advertisement, and

[1] Statement of facts abridged. Only part of opinion of BOSANQUET, J., is given, all others omitted.

attended by 1,000 persons, which petition was signed by 4,000 householders of the borough, was presented to the queen asking for a charter incorporating such borough with the powers and privileges of the act of 5 and 6 William IV. Afterwards and before the petition was acted upon a counter petition was presented, signed by 6,000 householders, praying the queen not to grant the charter. The whole number of householders was 48,000. The queen nevertheless granted the charter and the corporation was organized by election of mayor, council, etc., and Chapman as coroner for the territory where the death occurred. The plaintiff claimed the queen could not create the corporation, except in strict compliance with the act of parliament, and that required a majority of householders to petition to be incorporated. The lower court found for defendant, holding that the queen by her prerogative could create a corporation without authority of parliament.]

BOSANQUET, J.— * * * The next head of objection is, that, in granting the charter, the various provisions of the municipal corporation act with respect to times and modes of proceeding have not been pursued. But there is no provision in the act which requires that this should be done. All the matters contained in that act related to corporations then in existence, whose constitutions were to be altered by authority of parliament, in carrying which object into effect it was necessary that all the provisions prescribed should be strictly adhered to.

But when a new corporation is to be erected by the authority of the crown, the constitution of such new corporation originates in the will of the sovereign; subject, however, to the assent or dissent of the new corporations by their acceptance or non-acceptance thereof. And such a grant, made by the known prerogative of the crown, requires no petition from any particular description of persons, as a condition precedent to its validity.

It has been contended, however, that the queen has exceeded the powers which she derived from her common law prerogative, as well as those conferred on her by the act of parliament, in delegating her authority to others, in matters respecting the selection of persons who are to constitute the burgesses of the corporation, particularly David Price, who is empowered to make out the burgess list, and Edward Rushton to revise it. Now I take it to have been long settled by law, that the queen, in erecting a corporation, may name, of her own authority, all the officers and all the corporators, or may empower a subject to do so in her stead. And although no one but the queen can make a corporation, yet when it is made under her authority, it is deemed in law to have been made by herself.

"When the king," says Lord COKE, in the case of Sutton's Hospital, 10 Rep. 33, "reserves as well the nomination of the persons as the name of incorporation to a person who shall be the founder, then he ought to name the parties and declare by what name they shall be incorporated, and when he has done so in writing, according to his authority, they are incorporated by the king's letters patent and not

by the common person, for he is but an instrument, and the king makes the corporation, in such case, in the same manner as if all had been comprehended in the letters patent themselves. It is true," he adds, "that none but the king can make a corporation, as it is held, 49 Ed. 3, 4, 29 Ass. 8; but *qui per alium facit, per se ipsum facere videtur.*" So it is said in Bro. Abr. Prerogative, 53: "*Nota*, the king, by his charter, may by express words grant to a corporation or commonalty to make another corporation or commonalty." Again, in Jenkins' Centuries 88, p. 270, it is said: "Only the king can make a corporation;" but, presently after, "the king may give power to name a corporation, and where it is named it is the king's corporation."

In Com. Dig., Franchise (F. 5), citing 1 Roll. Abr. 512, it is said that a subject may choose the person, invent the name, etc., for the king, also, the king by charter to the East India Company may enable them to constitute such persons as shall be incorporated. Ib. In Bacon's Abr. Corporations (B), it is said: "The king, by virtue of his prerogative, is the only person that can erect either an ecclesiastical or lay corporation; yet the king may grant power to a common person to name the corporation, and the persons of whom it is to consist, but when he has done so, the corporation does not take its essence from the common person, but from the king."

I am not aware that the proposition laid down in these authorities has ever been disputed since the second Hen. 7. Blackstone, vol. 1, p. 474, says, "The king, it is said, may grant to a subject the power of making corporations (Bro. Abr., tit. Prerog. 53; Vin. Abr. Prerog. 88, pl. 16), although the contrary was formerly held (Year Book, 2 H. 7, 13), that is, he may permit the subject to name the persons and powers of the corporation at his pleasure; but it is really the king that erects, and the subject is but the instrument; for though none but the king can make a corporation, yet *qui facit alium facit per se.* In this manner the chancellor of the University of Oxford has power by charter to erect corporations, and has actually often exerted it, in the erection of several matriculated companies, now subsisting, of tradesmen subservient to the students." The same doctrine will be found in Kyd on Corporations, 50. No distinction is made in these authorities between ecclesiastical and lay, eleemosynary and municipal corporations. I refer to these authorities for the purpose of showing in what broad terms the authority of the crown to delegate the nomination of corporations and corporate officers has been recognized. But it is not necessary to rely upon them to their full extent in this case; for no discretionary power of choice or appointment is given either to Mr. Price or to Mr. Rushton. The constitution of the corporation and the qualification of the burgesses are fixed by the charter; and these persons are only required to make a list of those who have such qualifications.

It is to be observed, that no method of proceeding is pointed out by the 5 and 6 Will. 4, c. 4, or 1 Vict., c. 78, for setting the corporation in motion: these acts simply provide, that it shall be lawful for her

majesty, under the advice of her privy council, to extend to the inhabitants of any town or borough, within the district to be set forth in such charter, the powers and provisions in the act contained; and I know no mode by which the crown can confer them except by charter. If the crown be authorized to grant the powers in question (which without the authority of the act could not have been done), must it not by necessary inference be authorized to prescribe the means by which they are to be made effective; provided at least that the means adopted are not at variance with those which might be resorted to in a common-law charter of incorporation. Many of the regulations of the municipal corporation act are inapplicable to a new corporation. David Price is appointed to make out the burgess list instead of the overseers, who, under the municipal corporation act, are required and compelled to make out such a list, but these officers would not be compellable to make out a burgess list for a new corporation. For the purpose, therefore, of securing the attainment of the end contemplated by the act, the crown has nominated a person, of whose willingness to undertake the duty it may be assured; Edward Rushton is appointed to revise the burgess list instead of a revising barrister appointed by the senior judge of assize; no power to any judge to appoint such a barrister being given by the act, after the year which had elapsed at the grant of this charter. And to have given authority to any other person to appoint a revising barrister would be at least as objectionable as a direct appointment by the queen herself.

It has been contended, indeed, that if the act of parliament be defective in prescribing the proper means of carrying its object into effect, the object can not be effected; but the more reasonable interpretation of the act in such cases appears to be, that where no particular means are prescribed, the crown may proceed to accomplish the object by the same means which it is authorized by the common law to employ in conferring the usual powers upon a new corporation, namely, by letters patent under the great seal. * * *

Judgment affirmed.

Viner's Abr. Corp. B. 1, 5; Y. B. 2 Henry VII, 13; 1613, Sutton's Hospital Case, 10 Coke 27, *supra*, p. 264; 1819, Dartmouth College v. Woodward, 4 Wheat. 518, *infra*, p. 708; 1815, Terrett v. Taylor, 9 Cranch (U. S.) 43; 1815, Town of Pawlet v. Clark, 9 Cranch (U. S.) 292; 1817, Denton v. Jackson, 2 Johns. Ch. (N. Y.) 320; 1828, N. Hempstead v. Hempstead, 2 Wend. (N. Y.) 109; 1830, Society for Propagation of Gospel v. Town of Pawlet, 4 Pet. (U. S.) 480; 1831, McKim v. Odom, 3 Bland Ch. (Md.) 407, note, p. 416; 1889, Baeder v. Jennings, 40 Fed. R. 199.

1. **The king's power formerly.** It is said that both before and for some time after the Norman conquest, many nobles claimed and exercised the right of creating corporations within their own territories. So also the Pope exercised the privilege of creating university corporations on the continent, and claimed a like right in England, which, though exercised, was not recognized as conferring legitimate corporate existence. (Greystock College Case, Dyer, 81, pl. 64, 1553.) Bracton (c. 1263) says: "Those things called privileges, although they pertain to the crown, may nevertheless be separated from the crown and be transferred to private persons, *but only* with the special grace of the king; whose grace and special grant if it have not intervened, time does not exclude the king from such a claim, for no time runs against a dona-

tion of the king's or contrary to it. * * * But this kind of liberties, when they have been granted by the king, are as it were possessed, and he to whom they are granted * * * will be in possession * * * until he has lost it from *abuse* or *non-user*." 1 Bract. Twiss's Trans., p. 55. By the time of Edward III, the absolute necessity of the king's consent to the erection of a corporation seems to be fully established, 49 Edward III, 4; 49 Ass. 8; Viner Corp. B.; 1 Kyd Corp. 42, 44; Bro. Corp. 15; Angell & Ames, § 67. By the *civil law* the sovereign's consent was necessary also, either by statute, *senatus consultum*, or constitution of the emperor. Digest 47, Lib. 22, 23; also 3, 4, 1; Hunter's Roman Law, 314; 1 Brown Civil Law, 101, 102; 1 Domat, Civ. Law, Title II, § 2, No. 15.

2. **At the present time.**—In England, the king or queen alone, when a corporation is intended with privileges, which, by the principles of the English law, may be granted by the king, is qualified to create a corporation by his or her sole charter. Thus the city of Annapolis, in Maryland, was incorporated by a charter from Queen Anne, when she held the government of the province. When, on the other hand, it is intended to establish a corporation vested with powers which the king can not himself grant, recourse must be had to an act of parliament; as if it be intended, for example, to grant the power of imprisonment, as in the case of the College of Physicians; or to confer a monopoly, as in the case of the East India Company; or when a court is erected, with a power to proceed in a manner contrary to the rules of the common law. Angell & Ames Corp., § 68.

There seems now to be the following methods of creating corporations in England:

1. **By royal charter,** now usually exercised by the king, by virtue of his prerogative in foreign affairs, for creating companies for governing and trading with the colonial possessions in Africa and the East Indies. Recent creations of this sort are the North Borneo Company, 1881 (State Papers, vol. lxxiii, p. 932); The Royal Niger Company, 1886 (Hertslet, Treaties, vol. xvii, p. 118); Imperial British East Africa Company, 1889 (State Papers, vol. lxxix, p. 641); and the British South Africa Company, 1889 (Hertslet, Treaties, vol. xviii, p. 134). These are quite similar to, though differing in some respects from, the Virginia (1609), Massachusetts Bay (1629), and Hudson's Bay, Companies (1670), for colonizing and trading in North America, and the East India Company (1600), for a like purpose in India.

2. **By parliament,—public companies,**—such as railways, canals, waterworks, etc.,—those engaged in a public undertaking that requires the exercise of the power of eminent domain. These are incorporated by special act of parliament in each case after investigation and report upon the necessity, but are regulated (unless expressly excepted) by the general provisions of the Companies Clauses Acts of 1845.

3. **By registration.**—All private business, social, or benevolent companies having more than twenty members (or if banking, more than ten members), under the general incorporation law of 1862, called the Companies Act. See Ency. of Laws of Eng., Companies, Chartered, vol. iii, p. 148; Company, p. 162, and Public Company, vol. x, p. 545; also, Railways, vol. xi, p. 1.

Sec. 52. Same. (*c*) Common law.

THE GOVERNOR v. ALLEN AND McMURDIE.[1]

1847. IN THE SUPREME COURT OF TENNESSEE. 8 Humphrey (27 Tennessee) 176–184.

TURLEY, J., delivered the opinion of the court.

On the 18th day of August, 1843, G. A. Davie, who had been elected trustee for the county of Montgomery, executed his bond,

[1] Arguments omitted.

with G. P. Allen and Robert McMurdie his sureties, to the governor in and over the state of Tennessee, in the penal sum of $3,000, to be void upon condition that he received and securely kept and paid over the school-funds of said county, as the law directs. This bond was acknowledged in open court at the August term, 1843, of the county court of Montgomery. The condition of this bond being broken, a suit thereon was commenced at the July term, 1846, of the circuit court of Montgomery, in the name of Aaron V. Brown, governor, in and over the state of Tennessee, against G. P. Allen and Robert McMurdie, two of the obligors. To the declaration the defendants filed a general demurrer, which was sustained by the circuit judge, and judgment given accordingly, from which an appeal in error is prosecuted to this court.

The question presented for consideration upon this demurrer is whether a suit at law can be maintained upon this bond, in the name of the governor of the state. By the 43d section of the act of 1838, ch. 148, and the 41st section of the act 1840, ch. 38, the trustees of the different counties of this state, before the reception of the portion of common school fund belonging to their counties under the general law for distributing it to them, are required to enter into bond, with two or more securities, for the proper performance of their duties in relation thereto, to the superintendent of public instruction and his successors in office. The bond sued on then, in this action, is not a good statutory bond, according to all the decisions of the state courts upon such subjects and the question necessarily is whether it can be held to be a good common law bond to be sued upon in the name of the governor of the state.

Before entering into a general investigation of this subject we deem it proper to premise that the bringing this suit in the name of Aaron V. Brown, governor and successor of James C. Jones, gives no additional strength to the action which it would not have had, provided the suit had been brought merely in the name of the governor of the state, and that the question must be examined as if it had been so brought, for if the bond be not a good common law bond when made payable to the office of the governor as such, the making it payable to a particular governor described *eo nomine* and his successors could not sustain the action, for in such case, the suit would not enure to his successors, but must be brought in his name if alive, and if not, in the name of his personal representative. The bond in this case, in point of fact, was not executed to any particular governor, *eo nomine*, but to the governor in and over the state of Tennessee, then can an action at law be maintained upon it? The solution of this question depends upon the fact whether a bond can upon common law principles be executed to the governor of the state. In the case of Polk v. Plummer and others, 2 Humph. 506, Judge Reese, who delivered the opinion of the court, says, "that when a statute directs a bond for the public benefit to be made payable to the governor or other functionary having legal succession, the office is the payee, and the successor, whether described *eo nomine*, either in the statute or

bond, or not, may yet maintain the action, such officer being made by form of the statute and for the public benefit, *quod hoc*, a corporation sole." There is no reason whatever, for questioning the general truth of this proposition; it is sustained by the judgment of the supreme court of North Carolina in the case of the Justices of Cumberland v. John Armstrong and others, 3 Dev. 284, where it is held that the acts of assembly which direct the justices of the county courts to take bonds to themselves in their official capacity confer on them, as to such bonds, a corporate character.

But it must be admitted in both these cases that, if they be only *quoad* corporations, and the bonds be not within the statute authorizing them, they will not enure by succession. But is a governor of a state only *quoad* a corporation sole? We think not. It is true it is held in the case of Polk v. Plummer and others to be *quoad* that particular transaction a corporation sole, but that was all that it was necessary to hold him in that case; but it is not determined that he is not a corporation sole for other purposes besides those in which bonds are directed by statute to be made payable to him. Blackstone, in the first volume of his Commentaries, page 469, says: "*A corporation sole consists of one person only, and his successors in some particular station, who are incorporated by law, in order to give them sole legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had.*" *In this view the king is a sole corporation; so is a bishop, and so is every parson and vicar.*

Now the governor constitutes the executive department of the state; he is vested by the constitution of the state with great and important powers to be executed for the benefit of the state, and it is absolutely necessary that there should be no *interregnum* in his office, to avoid many and great inconveniences; this can not be unless we apply to him the maxim of the common law, applicable to the king, that he never dies; this maxim of the common law (like most, if not all, of them) is based upon wise conceptions, and not upon any foolish reverence for kings or belief in their sanctity or immunity from the common lot of mankind, but upon the necessary assumption that the state, which protects and cares for all, never ceases to exist, but that it is always alive and active in the performance of its duties to the citizen. The state, being an ideality, can only be conceived of through the public functionaries who constitute the different departments by which it exists; therefore, to hold that it never dies is necessarily to hold that those who constitute its necessary departments never die. The departments by which the government of Great Britain exists are the king and houses of parliament; the king is the executive of the nation, and he and the two houses of parliament are the legislature; there is never in contemplation of law an *interregnum* in either of these departments, for the law-making and the law-executing power being absolutely necessary to the existence of the state, if they cease to be, the state *pro tempore* ceases to exist, which would be a solecism in a gov-

emment not destroyed by invasion or rebellion, and thrown back upon the primitive principles of society.

The governor of this state is the executive of it; it is one of his duties, among many others, to see that the laws of the state are executed and obeyed; this is a great and fundamental duty, without the proper observance of which society might and would necessarily be greatly distracted, and the proper security of life, liberty and property seriously endangered for the purpose of enforcing the execution of the laws, and the protection of the state from rebellion and invasion; he is the commander of the forces of the state; *to hold that there can be an interregnum in this office would be to hold to the temporary anarchy of the state*, and in order to hold that there is no such *interregnum* we must hold that the governor, as such, never dies; to do this he must be a corporation sole, with succession in office. Such we think he is, constituted so by the organization of our state government, and not by any particular statute or statutes; and therefore when bonds are directed to be made payable to him in his official capacity, they are payable to him in his capacity as a corporation sole *quoad* that particular transaction.

If the governor of the state be a corporation sole, then he may be a trustee, and that, too, in things not connected with his office; for it is well settled that corporations, both aggregate and sole, may be trustees for others. A bond, then, executed to a governor of a state voluntarily, which violates no public policy or private morality, but on the contrary is made to secure a public right, may be sued upon at law in the name of the governor, for the benefit and use of those interested in it, and that, too, though there be no express statute authorizing it. There is no case to be found contradicting this position.

In the case of The United States v. Thos. Tingley, 5 Pet. 114, it was held "that a bond voluntarily given to the United States, and not prescribed by law, is a valid instrument, upon the parties to it, in point of law, because the United States have in their political capacity a right to enter into a contract, or take a bond not previously provided by law, and the United States, being a body politic, may within the sphere of the constitutional power granted to it enter into contracts not prohibited by law and appropriate to the just exercise of those powers."

In the case of Hibbits v. Canada et al., 10 Yerg. 465, it was held by this court that when an administration bond was made payable to James Hibbits, chairman of Smith county, and his successors in office, instead of the governor, as is directed by law, "that no action at law could be maintained on the bond in the name of a successor, but that the bond was valid at common law as a voluntary bond, and that a suit at law might be maintained upon it in the name of the personal representative of Hibbits." The chairman of the county court is not a corporation sole, and, therefore, upon his death he has no successor, and a bond executed to him without authority by statute necessarily descends to his personal representative, and must be sued upon in his name.

The case of Polk, Governor, v. Plummer et al., in 2 Humph. 500, holds, as we have seen, in a too restricted sense, that the governor is a corporation sole when a bond has been executed to him by statutory provision. In the case of Jones, Governor, v. Wiley et al., 4 Humph. 146, a bond was taken from the clerk of Roane county court, payable to Newton Cannon and his successors in office, but taken before the wrong tribunal, it was held that the bond was not a good statutory bond, but that it was a good common law bond, and might be sued upon in the name of Cannon's personal representative, but not in the name of his successor. But Newton Cannon was not a corporation sole, and, therefore, could have no successors, and even if the bond had been made payable to him calling him governor, it is probable it would have been held to be a description personal only.

In the case of The Justices of Carroll County Court v. Buchanan, 2 Murph. 40, it is held by the supreme court of North Carolina that a guardian bond made payable to the justices of Carroll county is void at common law, because it was held that the justices of the county court are not a corporation, and their individual names were not used in the bond or suit; but it may be doubted whether, if the bond was executed in pursuance of the statute, the justices would not, under the authority of the case of The Justices of Cumberland v. Armstrong, 3 Dev., be considered a corporation *quoad* that transaction.

In the case of the governor for use of the State Bank v. Twitty et al., 1 Dev. 153, it was held by the supreme court of North Carolina that a sheriff's bond in a sum different from that directed by law, made payable to John Branch, governor, and his successors was not a good statutory bond, and could not be sued upon in the name of Gabriel Holmes, governor, and his successors. This case is the same with that of Jones, Governor, v. Wiley et al., 4 Humph. 46, and was decided as that was, for the same reason, to wit, that the bond is payable to the governor as an individual *eo nomine*, and not to his office, and, therefore, descends to his personal representative. These are all the cases to which we have been referred as conflicting with the view we have taken of this case. We think, as we have endeavored to show, that they are not in conflict with it.

Upon the whole, then, we are of opinion that the execution of this bond being voluntary, and for the purpose of securing a fund belonging to the county of Montgomery, donated to it by the state, and for which the trustee of the county was bound to enter into bond and security before he received it, the mistake of the county court in not taking this bond, payable to the superintendent of public instruction, but to the governor of the state, though it vitiates it as a statutory bond, does not avoid it at common law, but that the governor of the state being a corporation sole, a suit may be maintained upon it in his name for the benefit of the county of Montgomery.

We therefore reverse the judgment of the circuit court, overrule the demurrer and remand the case for further proceeding.

Note. It is frequently said that corporations do not exist by common law with us. That, perhaps, is true in regard to private corporations; but so far

as public officers, or the state itself, or the National Government are corporations they are so by common law.

1. As to officers, see *supra*, p. 200.

2. The United States is a corporation.—1878, Dickson v. United States, 125 Mass. 311, 28 Am. Rep. 230; United States v. Maurice, 2 Brock (U. S.) 96, 109; Cotton v. United States, 11 How. (U. S.) 229, 231; United States v. Tingey, 5 Pet. (U. S.) 115, 128.

3. The states are corporations also.—1843, State of Indiana v. Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378; People v. Utica Insurance Company, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; People v. Assessors of Watertown, 1 Hill (N. Y.) 620. But see 1901, State of Arkansas v. Kans. & T. C. Co., 183 U. S. 185.

Sec. 53. Same. (*d*) Prescription.

GREENE ET AL. v. DENNIS.[1]

1826. IN THE SUPREME COURT OF ERRORS OF CONNECTICUT. 6 Conn. 292–305, 16 Am. Dec. 58.

[This was an action of ejectment, for a tract of land in Pomfret, tried at Brooklyn, September term, 1825, before BRISTOL, J.

The plaintiffs claimed title to the demanded premises, as the heirs at law of Sylvester Wickes; and the defendant, as the lessee of the Yearly Meeting of the people called Quakers, who claimed to be devisees of Wickes and the lessee of Rowland Greene, who claimed as a residuary devisee. To prove his title, the defendant exhibited in evidence the last will and testament of Wickes, dated the 17th of January, 1822. The clause of the will comprising the demanded premises was in these words: "I give the Yearly Meeting of the people called Quakers, of New England, my farm in Pomfret, that I bought of Clark and Nightingale, the net income of which is to be appropriated in aid of the charitable fund of the boarding school established by Friends in Providence, to them the said people called Quakers, and their successors in the same faith forever." After making numerous other devises and bequests, the testator disposed of the residue in the following terms: "Also, I give to my said nephew, Rowland Greene, all the rest and residue of my estate, of what kind or nature it may be, or wherever found not herein or otherwise disposed of on condition that he, the said Rowland, pay or cause to be paid, all my just debts, the foregoing legacies, funeral charges and expense of settling my estate." The testator died soon afterward, and his will was duly proved and approved. The defendant also proved who the members of the Yearly Meeting were, viz., Benjamin Freeborn and thirty-two others, whose names were specified. To prove that the Yearly Meeting was a corporation, capable of taking and holding lands by devise, the defendant adduced in evidence certain votes and proceedings from the records of that body, beginning in 1683 and extending to the commencement of this suit. * * *

[1] Arguments omitted. Statement of facts abridged. Parts of opinion on other points omitted.

The judge instructed the jury that the members of the Yearly Meeting could not take and hold the farm, as individuals, for the purposes mentioned in the will; that the votes and acts done by the society, however long their continuance, would not authorize the presumption of a charter of incorporation, with power to purchase and hold real estate, unless they were such acts of the society as they could not perform without being incorporated; that if such devise to the Yearly Meeting was void for uncertainty, or because the society was not incorporated, the farm would descend to the heirs at law of the testator, would not pass by the residuary clause in the will to Rowland Greene. The jury returned a verdict for the plaintiffs, and the defendant moved for a new trial on the ground of misdirection.]

HOSMER, Ch. J. * * * 2. The next question that arises in the case is, whether the Yearly Meeting was a corporation, capable of holding land in trust.

By a corporation it is understood, in contradistinction from a voluntary association of individuals, a society created by the sovereign power.

At the trial of this cause no charter of incorporation was exhibited. It, however, was contended, from a long and continued exercise of certain acts, that an incorporation ought to be presumed.

That a grant of charter is presumable from the long continued exercise of authority is indisputable, and has not been disputed, and all the cases cited by the defendant's counsel tend only to prove this unquestionable principle. The inquiry in this case involves no question of law, and turns entirely on a point of fact. Admitting all the acts done by the Yearly Meeting for more than a century to have been lawful, do they warrant the presumption that they were incorporated? This is the precise inquiry, and in his charge to the jury, the judge, recognizing the law of presumptions, instructed them that the acts done must have been such as an unincorporated Yearly Meeting could not have performed. When fairly construed, the following was virtually the opinion expressed: If the acts done by the Yearly Meeting bear on the face of them the impress of corporate acts, such as individuals can not, and a corporation alone is competent to perform, you may presume the Yearly Meeting to be a corporation. But if their acts were within the competency of individuals to perform, they furnish no ground to presume that they were other than the acts of individuals. The inference to be drawn by the jury was a fact inquired after from facts established, and their reasoning was to be from the effect to the cause. The law made no inference on the subject, nor gave to the testimony a technical efficacy beyond the simple and natural operation. The principle had before been recognized in Hart v. Chalker, 5 Conn. Rep. 311. "A usage," said the court," supposed to be founded on a grant or agreement, determines the extent of the supposed grant or agreement. The right granted is supposed to be commensurate with the right enjoyed. They are different *media*, proving precisely the same fact; and it is because of this indentity of proof that the usage is supposed to evince the grant. In short, like

a seal with its correspondent impression, the grant and the usage are in a point of proof, precisely and identically the same."

The principle declared by the judge was unquestionably correct; and the verdict of the jury necessarily implies that the Yearly Meetings was not a corporation.

From the evidence exhibited, and spread on the motion before us, my mind is led to the same results. Every act of the Yearly Meeting is entirely reconcilable with the belief that it was done by persons, not by virtue of corporate authority, but as a voluntary association of individuals. Let it be supposed that the members of the Yearly Meetings were a delegation, to whom was confided the supervision of the spiritual concerns of the people called Quakers; that by voluntary contributions of their constituents and others, they were invested with funds to this end; and that they directed the general concerns and the application of their funds, by joint agreement, and with no more of compulsion than is implied in the voluntary and cheerful acquiescence of those whose interests they are pursuing. Superadd to this, that they kept records of their proceedings; that they appointed a clerk and treasurer; that they held lands, as individuals, for the general advantage, that they advised the payment of money and sent to the respective quarterly meetings for their proportion; that, *in fact*, they celebrated marriages, had burying places and admitted members of their Meeting or discarded them. Every one of these acts might be done by them as individuals without corporate authority and without coercion except over their own funds. Their organization for the transaction of business and disposing of their property, with a president at their head (which I believe did not exist), with their clerk and treasurer, and minutes of their proceedings, were nothing more than is usually done by an unincorporated library company or bible society or other voluntary assemblies. It does not appear that land or property of any kind was held by the Yearly Meeting, unless as tenants in common, or that a tax was laid by them other than an appointment for a voluntary contribution; nor is there exhibited in their constitution, organization or proceedings, one mark or *indicium* of a corporation. Nothing was done by them beyond the competency of individuals.

So far as the testimony adduced may be relied on, the members of the Yearly Meeting have never exercised one of those incidents which necessarilly and inseparably are annexed to every corporation. They have no perpetual succession, the primary object of corporate authority; there has been no suing or being sued, no granting and receiving, no holding of lands or estate for their own use, or that of others, as a corporation; no common seal, by which the intention of a corporate body is manifested, and no by-laws for the better government of themselves. They appear to have had the capacity of agreeing, of advising, and of disposing of their own, as individuals; and beyond this, no capacity of theirs is discerned.

The inference from such premises, that the Yearly Meeting was incorporated, would be as groundless as the supposition that an

individual, by virtue of his personal acts, gives proof of his being a corporation.

It is not sufficient for the defendant to show that the Yearly Meeting was a corporation, but he must proceed further, and prove that it is authorized, by virtue of its corporate powers, to hold property in trust for others. Such confidence is not incidental to every corporation, but in general, it is foreign to the end of its institution. Hence a corporation can not be seized of land to the use of another (Bro. Abr. tit. Feoffment. D. Cruise on Uses 22) unless it has explicit authority for this purpose. Now what act was ever exercised by the Yearly Meeting from which this power may be presumed? No such act appears; and hence the presumption of the corporate power in question can not be made.

I conclude, then, that the Yearly Meeting never was a corporation; and if it were, that it never had the capacity of becoming a trustee for others. * * *

The other judges were of the same opinion.

New trial not to be granted.

Note. See 1774, Kingston upon Hull v. Horner, 1 Cowper 102; 1807, Dillingham v. Snow, 3 Mass. 276; 1809, Dillingham v. Snow, 5 Mass. 547; 1815, Stockbridge v. West Stockbridge, 12 Mass. 400; 1820, Hagerstown Turnpike Co. v. Creeger, 5 Har. & J. (Md.) 122, 9 Am. Dec. 495; 1823, Craft of Mercers, etc., v. Hart, 12 Eng. C. L. 76, 1 Car & P. *113; 1829, River Tone v. Ash, 21 Eng. C. L. 152, 10 Bar. & C. *349; 1841, State v. Miami Exporting Co., 11 Ohio 126; 1844, New Boston v. Dunbarton, 15 N. H. 201; 1844, People v. Oakland County Bank, 1 Doug. (Mich.) 282; 1857, Bow v. Allenstown, 34 N. H. 351, 69 Am. Dec. 489; 1861, Robie v. Sedgwick, 35 Barb. (N. Y.) 319; 1862, State ex rel., etc., v. Bailey, 19 Ind. 452; 1868, Calkins v. State, 18 Ohio St. 366; 1876, Douthitt v. Stinson, 63 Mo. 268; 1882, State, ex rel. Sleeth, v. Gorden, 87 Ind. 171; 1885, Society Perun v. Cleveland, 43 Ohio St. 481. See cases below on estoppel to deny corporate existence, p. 630, *et seq.*

COLLIER, C. J., in Selma and Tennessee Railroad Co. v. Tipton, 5 Alabama Reports 787 (1843), on page 804, s. c. 39 American Decisions 344, on page 353, says:

"It is said that presumptions are applicable as well to corporations as individuals; that persons acting publicly as officers of the corporation are presumed rightfully in office, and all necessary steps presumed, in order to make a corporate act legally operative. So a charter, from the long exercise of corporative rights, or acceptance of a new charter from the acts of the corporate officers, as well as many other things, may be presumed from circumstances. (Bank of the United States v. Dandridge, 12 Wheat. Rep. 70, *et post;* The State v. Carr, 5 New Hamp. Rep. 367; Hagerstown T. P. Comp. v. Creeger, 5 Har. & J. R. 125. See also, 1 Pick. Rep. 279; 1 Pick. 372; 17 Mass. Rep. 1 and 479.) The court say: 'Where a corporation has gone into operation, and rights have been acquired under it, every presumption should be made in favor of the legality of its existence.' (See also, Trott v. Warren, 2 Fairf. (11 Me.) Rep. 227.) So, in All Saint's Church v. Lovett, 1 Hall's Rep. (N. Y. Superior Ct.) 191, it is held that where there had been a corporate body *de facto*, for a considerable time claiming to be a corporation and holding and enjoying property as such, it will be presumed that all merely formal requisites to the due creation of a corporation have been complied with. (See also, U. S. v. Amedy, 11 Wheat. Rep. 392.)"

Sec. 54. Same. (*e*) Legislative acts, which are, as to the power: (1) Inherent.

MONTGOMERY BELL v. THE BANK OF NASHVILLE.

1823. IN THE SUPREME COURT OF ERRORS AND APPEALS OF TENNESSEE. Peck's (7 Tenn.) Rep. 269.

HAYWOOD, J., delivered the opinion of himself, Judges White and Brown, Judge Peck being absent.

The declaration states that on the 7th day of August, 1819, a bill single was made and signed by Whitesides, his agent, duly authorized, by which he undertook in sixty days to pay at the bank of Nashville to Whitesides, who indorsed to Alfred Balch, who indorsed to the bank, that on the last day of grace it was presented for payment and was not paid, whereby an action accrued, etc. To this there was a demurrer for several causes, all which were overruled but two, and these two are now to be decided by this court. The first of these two questions is this: Could the legislature of Tennessee create a banking corporation? To which the answer is, *that the legislature of Tennessee, like the legislatures of all other sovereign states, can do all things not prohibited by the constitution of this state or of the United States, and, amongst other things, may establish a banking corporation with a capacity to sue and be sued, and, of course, to institute and maintain this action.*

A second question made is, whether the bank had power to discount this bill single, and sue upon it. By the act of 1807, ch. 103, § 1, art. 14, the bank is not to trade in any sort of stock except bank bills, etc., but by section 19, bonds, notes and bills shall not be received at the bank unless made payable there, which implies that bills made so payable may be received there. This bill single is of that description; the bank may receive, discount and sue upon it.

Judgment of the circuit court affirmed.

Sec. 55. Same. (2) Exclusive.

THE FRANKLIN BRIDGE COMPANY, PLAINTIFFS IN ERROR, v. YOUNG WOOD, DEFENDANT.

1853. IN THE SUPREME COURT OF GEORGIA. 14 Ga. 80–86.

Assumpsit in Heard superior court. Tried before Judge Hill, May term, 1853.

The Franklin Bridge Company was incorporated under the act of the legislature of 1843, to prescribe the mode of incorporating companies for certain purposes, by an order of the inferior court of Heard county.

The company sued the defendant, Wood, for his subscription to their stock.

The defendant pleaded that the company was not legally incorpo-

rated; contending that the act of the legislature, referred to, was unconstitutional and void.

Upon argument, the court held that the act aforesaid was unconstitutional, and non-suited the plaintiffs.

To this decision plaintiff excepted.

By the court.—LUMPKIN, J., delivering the opinion.

Is the act of 1843, and that of 1845, amendatory thereof, pointing out the manner of creating certain corporations and defining their rights, privileges and liabilities, unconstitutional?

By the first section of the act of 1843, it is provided: "That when the persons interested shall desire to have any church, camp-ground, manufacturing company, trading company, ice company, fire company, theater company, or hotel company, bridge company and ferry company, incorporated, they shall petition in writing the superior or inferior court of the county where such association may have been formed, or may desire to transact business for that purpose, setting forth the object of their association, and the privilege they desire to exercise, together with the name and style by which they desire to be incorporated; and said court *shall pass a rule or order*, directing said petition to be entered of record on the minutes of said court."

Section 2 enacts "That when such rule or order is passed, and said petition is entered of record, the said companies or associations shall have power respectively, under and by the name designated in their petition, to have and use a common seal; to contract and to be contracted with; to sue and be sued; to answer and to be answered unto in any court of law or equity; to appoint such officers as they may deem necessary, and to make such rules and regulations as they may think proper for their own government, not contrary to the laws of this state, but shall make no contracts or purchase, or hold any property of any kind except such as may be absolutely necessary to carry into effect the object of their incorporation. Nothing herein contained shall be so construed as to confer banking or insurance privileges on any company or association herein enumerated; and the individual members of such manufacturing, trading, theater, ice and hotel companies shall be bound for the punctual payment of all the contracts of said companies, as in case of partnership."

The third section declares that "No company or association shall be incorporated under this act for a longer period than fourteen years; but the same may be renewed whenever necessary, according to the provisions of the first section of this act."

The fourth section confers upon the superior and inferior courts, respectively, the power to change the names of the individuals.

Section 5. "For entering any of said petitions and orders, and furnishing a certified copy thereof, the clerk shall be entitled to a fee of five dollars; except in cases of applications by individuals for the change of names—in which case, the clerk of said court shall be entitled to the fee of one dollar—and that such certified copy shall be evidence of the matters therein stated in any court of law and equity in this state. (Cobb's Digest, 542–3.)

By the act of 1845, the provisions of the act of 1843 are extended to all associations and companies whatever, except banks and insurance companies; and the individual members of all such incorporations are made personally liable for all the contracts of said associations or companies. (Cobb's Digest, 542–3.)

The argument against the validity of the charter of the Franklin Bridge Company, created under these statutes, is this:

(1) That in England corporations are created and exist by prescription, by royal charter and by act of parliament. With us, they are created by authority of the legislature *and not otherwise*. That to establish a corporation is to enact a law, and that no power but the legislative body can do this.

(2) That legislative power is vested under our constitution, in the general assembly, to consist of a senate and house of representatives, to be elected at stated periods by the citizens of the respective counties.

(3) And that the general assembly is bound to exercise the power of making laws, thus conferred upon them, by the people, in the primordial compact, in the mode therein prescribed, and in none other, and that a law made in any other mode is unconstitutional and void. That the legislature is but the agent of their constituents, and that they can not transfer authority delegated to them to any other body, corporate or otherwise—not even to the judiciary, a co-ordinate department of the government, unless expressly empowered by the constitution to do so. That to do this would be to violate one of the fundamental maxims of jurisprudence, as well as of political science, namely: *delegata potestas, non potest delegari*. That to do this would not only be to disregard the constitutional inhibition, which is binding upon the representative, but by shifting responsibility, introduce innovations upon our system, which would result in the overthrow and ultimate destruction of our political fabric.

The constitutional inquiry thus presented is an exceedingly grave one. It reaches far beyond the case made in the bill of exceptions, and extends to the whole range of topics which fall under legislative cognizance. In the view we take, however, of the statutes before us, no such proposition as that which has been discussed is presented for our adjudication. And we rejoice that it is so, not only on account of the delicacy of the task in pronouncing an act of the legislature unconstitutional and void, one which is never justifiable, unless the case is clear and free from doubt; and even then one might almost be forgiven for shrinking from the performance of the duty, which would be productive of such incalculable mischief and confusion. Bridges have been built at a heavy expense, manufacturing and innumerable other associations have been formed in Georgia, and are in full operation, under charters incorporated under this law. And in view of the consequences any court might hesitate, unless the repugnance between the statute and the constitution was so palpable as to admit of no doubt, and produce a settled conviction of their incompatibility with each other.

(4) It was formerly asserted that in England the act of incorporation must be the *immediate* act of the king himself, and that he could not grant a license to another to create a corporation. (10 Rep. 27.) But Messrs. Angell & Ames, in their Treaties on Corporations, state that the law has since been settled to the contrary, and that the king may not only grant a license to a subject to erect a particular corporation, but give a general power, by charter, to erect corporations indefinitely, on the principle that *qui facit per alium, facit per se;* that the persons to whom the power is delegated, of establishing corporations, are only an instrument in the hands of the government. (1 Kyd 50, 1 Black. Comm. Ang. & Am. 63.)

Before the revolution, charters of incorporations were granted by the proprietaries of Pennsylvania, under a derivative authority from the crown, and those charters have since been recognized as valid. (3 Wilson's Lectures 409.) A similar power has been delegated by the legislature of Pennsylvania with regard to churches. (7 S. & R. 517.) The acts of the instrument in these cases become the acts of the mover under the familiar maxim above mentioned. (See, also, 1 Mo. Rep. 5.)

(5) Our opinion is, that no legislative power is delegated to the courts by the acts under consideration. There is simply a ministerial act to be performed—no discretion is given to the courts. The duty of passing the rule or order, directing the petition of the corporators to be entered of record on the minutes of the court, setting forth to the public the object of the association, and the privilege they desire to exercise, together with the name and style by which they are to be called and known, is made *obligatory* upon the courts; and should they refuse to discharge it, a mandamus would lie to coerce them. It is true, the legislature has seen fit to use the courts for the purpose of giving legal form to these companies. But it might have been done in any other way. Under the free banking law of 1838, instead of petitioning the court, and having the order passed and entered upon its minutes, the certificate, specifying the name of the association, its place of doing business, the amount of its capital stock, the names and residence of the shareholders, and the time for which the company was organized, is required merely to be proven, and acknowledged, and recorded in the office of the clerk of the superior court, where any office of the association is established, and a copy filed with the comptroller general. (Cobb's Digest, 107–8.)

And so under the act of 1847, authorizing the citizens of this state, and such others as they may associate with them, to prosecute the business of manufacturing with corporate powers and privileges. The persons who propose to embark in that branch of business are required to draw up a declaration, specifying the objects of their association, and the particular branch of business they intend carrying on, together with the name by which they will be known as a corporation, and the amount of capital to be employed by them; which declaration is required to be first recorded in the clerk's office of the superior court of the county where such corporation is located and

published once a week for two months in the two nearest gazettes, which being done, it is declared that said association shall become a body corporate and politic, and known as such, without being specially pleaded in all courts of law and equity in this state, to be governed by the provisions, and be subject to the liabilities therein specified. (Cobb's Digest, 439, 440.)

In these two instances, and in others which might be cited, the legislature have dispensed with the action of the courts, or of any other agency, to carry out their enactments, with regard to these various associations, which have become the usual and favorite mode of conducting the industrial pursuits of the civilized world in modern times.

All these statutes were complete as laws when they came from the hands of the legislature; and did not depend for their force and efficacy upon the action or will of any other power. It is true that they could only take effect upon the happening of some event, such as the filing the petition or declaration, and giving publicity to the purpose of the association, and the mode prescribed by the act. But if this were a good reason for regarding these statutes as invalid, then how few corporations could abide the test. For it requires the *acceptance* of the charter to create a corporate body, for the government can not compel persons to become an incorporated body without their consent. And this consent, either express or implied, is generally subsequent, in point of time, to the creation of the charter. And yet, no charter that we are aware of has been adjudged invalid, because the law creating it and previously defining its powers, rights, capacities and liabilities, did not take effect until the acceptance of the corporate body, or at least a majority of them, was signified.

The result, therefore, of our deliberation upon this case is, that the acts of 1843 and 1845, vesting in all associations, except for banking and insurance, the power of self-incorporation, do not impugn the constitution; and that the charter of the Franklin Bridge Company and all others, created under them, and in conformity to their provisions, are legal and valid. With the policy of these statutes, we have nothing to do. The province of this, and all other courts, is *jus dicere*, not *jus dare*.

Judgment reversed.

Sec. 56. Same. (3) Plenary.

PENOBSCOT BOOM CORPORATION v. WILLIAM P. LAMSON ET AL.[1]

1839. IN THE SUPREME JUDICIAL COURT OF MAINE. 16 Maine (4 Shepley) 224–233, 33 Am. Dec. 656.

Exceptions from the court of common pleas, PERHAM, J., presiding.

Assumpsit for boomage of logs, asserted to belong to the defendants. The writ was dated December 21, 1835, the action was entered at January term, 1836, and continued to October term follow-

[1] Arguments omitted. Part of opinion omitted.

ing, when the defendants called for the right of the attorneys acting for the corporation to appear and act therefor. The judge ruled that it was unnecessary. The action came on for trial at January term, 1837, when the general issue was pleaded, and a brief statement was filed, denying the existence of the corporation then or at any time; alleging that the charter *by and under which the plaintiffs claimed a corporate existence* had been forfeited by *non-user;* that there had been no organization under the same; that it was dissolved by a total loss of all its members; and that it had never complied with the provisions of the act of its incorporation by a total neglect to choose any officers under said act. To support the action, the act incorporating the Penobscot Boom Corporation, February 13, 1832, Spec. Laws, c. 236; a bill of sale from Rufus Dwinal, named in the act, to Samuel Veazie, dated February 17, 1832, conveying one-half of the charter, booms, and property; and another bill of sale from Dwinal to Veazie, dated April 1, 1833, conveying the other half; were introduced. Also, a book called and offered as the records of the corporation, but not verified by the oath of any one; "to the sufficiency of which, to prove the organization, as well as to the introduction of all the testimony offered by plaintiff, the defendants' counsel objected. The objection was overruled, and a part of the book was read to the jury. The defendants' counsel having called for the records." The charter and the bills of sale were copied into this book, and the following vote appeared therein: "Bangor, April 2, 1833, I, Samuel Veazie, being the only owner of the Penobscot Boom Corporation, have this day had a meeting of said corporation at my house, and appointed myself to the office of president of said corporation, and clerk of said meeting, with full powers to make all records and to transact all business that may be necessary for carrying said corporation into full effect and to receive and collect all tolls that may be due from time to time, and pay all bills against the said corporation, and to continue until some person is chosen or appointed in my stead. A true record. Attest, Samuel Veazie, clerk." The plaintiff then proved that the logs were surveyed in the boom by Davis & Young scalers, appointed by the surveyor-general of the county of Penobscot, under the statute of March 2, 1833, Spec. Laws, c. 373. Young also testified that he took charge of the boom in the spring of 1833, and had retained it since; that a large amount had been expended on the boom by Veazie, and that the witness is the general agent of Veazie at Oldtown, and drew on him for money and paid him money received for boomage, and knew nothing of the corporation of his own knowledge. It was proved that the boom was erected in the spring of 1832, under the direction of Dwinal, and has been in operation ever since. The defendants requested the court to order a non-suit, but the judge refused. The defendants then proved that the boom, when full, prevented the free passage of rafts and logs. The counsel for the defendants requested the judge to instruct the jury that there was no such corporation as alleged; that there was no vote or direction of the Penobscot Boom Corporation, at any regular meeting of the corporation, author-

izing the erection of the boom, and that the action was not maintainable. The judge did not thus instruct them, but directed them to inquire, if the evidence submitted to them proved the existence of such a corporation as is named in the writ; and if not, they would return a verdict for the defendants. But if such corporation had been proved, it not being denied that the sum claimed in this action was due, if the contents of the logs had been legally ascertained, they would find for the plaintiff. They were also directed to inquire if the boom had been erected and continued by authority of the Penobscot Boom Corporation. The jury returned a verdict for the plaintiff, and being inquired of at the request of the counsel for the defendants, stated that they found the boom to have been erected and continued by the authority of the Penobscot Boom Corporation. The defendants excepted.

SHEPLEY, J. * * * The existence of such a corporate body is denied, and it is said that it does not come within the legal description of a corporation, either sole or aggregate, as defined by any code of laws. Corporations originating according to the rules of the common law must be governed by it in their mode of organization, in the manner of exercising their powers, and in the use of the capacities conferred. And when one claims its origin from such a course, its rules must be regarded in deciding upon its legal existence. *The legislature may, however, create a corporation, not only without conforming to such rules, but in disregard of them, and when a corporation is thus created, its existence, powers, and capacities, the mode of exercising them, must depend upon the law of its creation. It was the pleasure of the legislature in this case to create a corporate body, without requiring a conformity to the usual mode of organization known to the law.* The grant is to one person who was at liberty to associate others, or to have a succession without it. No provision is made for a division of the property allowed to be held into shares, or for the call of any meeting, or the choice of a clerk, or any other officer, or the keeping of any records, or any mode of organization. And yet many important powers and privileges are granted with an evident design to permit their exercise. The grant being to one person and without any such provisions, the inference necessarily is that it was the intention of the legislature to permit that one person or his successor to exercise all the corporate powers, and to make his acts when acting upon the subject-matter of the corporation and within its sphere of action and grant of power the acts of the corporation.

There does not appear to be any other mode of carrying into effect the intention of the legislature. And if there are doubts whether the person controlling the corporation has acted in behalf of the corporation, they are necessarily to be solved by proof. And if any evils have arisen or shall arise from any proceedings under the act, the legislature may provide a remedy. The answer to the arguments against its existence arising from a want of organization and choice of officers is, that the act requires them. In the case of Day v. Stetson, 8 Greenl. 365, where a charter was granted to one, and provision was

made for taking associates and calling a meeting of them, it was decided that it was a condition subsequent, and that the neglect would not prevent the act taking effect, or the exercise of the powers granted by it. The case finds that, "it was proved that the boom was erected under the direction of *R. Dwinal*, and went into operation in the spring of 1832, and continued so ever since," and this sufficiently proves that the acceptance of the act of incorporation, for it could not be lawfully done but by virtue of the act, and the presumption of the law is that one acts lawfully when he may do so by a special grant of authority for that purpose. There is not the same finding in all the other cases, but there is sufficient testimony to prove that the boom was erected, and that it has been maintained by the one professing to own the franchise and to act under it. And the acceptance may be presumed from the exercise of the corporate powers. Bank of the United States v. Dandridge, 12 Wheat. 71; Trott v. Warren, 2 Fairf. 227. And the act of incorporation, with proof of the exercise of the corporate powers since 1832, was sufficient evidence of the existence of the corporation. Utica Ins. Co. v. Caldwell, 3 Wend. 296; Day v. Stetson, 8 Greenl. 365. There being no provision for the call of any meeting, or for the choice of any officer, when a sale of part of the franchise to Veazie required some evidence of the assent of two minds to perform a corporate act, there might be more difficulty in proving the acts of the corporation, but it is not perceived that the mode of proof would be changed.

It is contended, also, that if the corporation has existed, it has been dissolved. In what manner corporations may be dissolved, and what will not operate as a dissolution, has been determined in many decided cases. A corporation will not be dissolved by a sale of the franchise, or of all the corporate property and a settlement of all its concerns and a division of the surplus, or by a cessation of all corporate acts, or by any neglect of corporate duty, or any abuse of corporate powers, or by doing acts which cause a forfeiture of the charter, without a judgment declaring such forfeiture. Such dissolution can take place only: 1. By an act of the legislature, where, as in this state, power is reserved for that purpose. 2. By a surrender, which is accepted, of the charter. 3. by a loss of all its members, or of an integral part, so that the exercise of the corporate functions can not be restored. 4. By forfeiture, which must be declared by judgment of court. Slee v. Bloom, 5 Johns. Ch. Rep. 367; Trustees of Vernon Society v. Hills, 6 Cowen 23; Bank of Niagara v. Johnson, 8 Wend. 645; Wilde v. Jenkins, 4 Paige 481; Canal Company v. Railroad Company, 4 Gill. & Johns. 121; Russell v. McLellan, 14 Pick. 63; Revere v. Boston Copper Company, 15 Pick. 351; Porter v. Kendall, 6 B. & C. 703; 2 Kent 312. * * *

Exceptions overruled.

Note. 1 Hamilton's Works iii; 1819, McCulloch v. Maryland, 4 Wheat. (U. S.) 316; Osborn v. Bank of U. S., 9 Wheat. 738; 1840, Falconer v. Campbell, 2 McLean 195, *infra*, p. 287; 1844, Green v. Graves, 1 Doug. (Mich.) 351, *infra*, p. 292; 1844, People v. Marshall, 6 Ill. 672; 1851, Myers v. Manhattan

Bank, 20 Ohio 283; 1873, Robinson v. Jones, 14 Fla. 256; 1874, Stowe v. Flagg, 72 Ill. 397; 1874, Hadley v. Freedman's Sav. & T. Co., 2 Tenn. Ch. 122, 126; 1874, United States v. Ins. Co., 22 Wall. (U. S.) 99; 1875, Mayor of Mobile v. Moog, 53 Ala. 561; 1876, Cotton v. Mississippi Boom Co., 22 Minn. 372; 1876, Gordon v. Association, etc., 12 Bush (Ky.) 110; 1876, Williams v. Creswell, 51 Miss. 817, 822; 1878, Nelson v. McArthur, 38 Mich. 204.

Sec. 57. Same. As to form of exercising such authority:
(1) Special or general law.
(*a*) Policy of general laws.

FALCONER AND HIGGINS v. HENRY M. CAMPBELL ET AL.[1]

1840. IN THE CIRCUIT COURT OF THE UNITED STATES, 7TH CIRCUIT.
2 McLean's Reports (U. S. Circuit Ct.) 195–213.

Action against the directors of the Detroit bank to recover the amount of bill of exchange, drawn by the bank in favor or the plaintiffs on a New York bank, and protested for non-payment. The declaration set forth the organization of the bank under the general banking law of 1838. The defendants filed a general demurrer raising the questions (among others) stated below.

Opinion by MCLEAN, J. * * *

First: Are the associations authorized by the general law corporations?

Second: Had the legislature power to pass such a law?

The act in question is entitled "an act to organize and regulate banking associations." The first, second, third, fourth, fifth, sixth and seventh sections provide in what mode the associations shall be formed. Application is to be made, in writing, to the treasurer and clerk of the county, where the business is to be transacted, stating the amount of capital proposed. Of this application public notice is required to be given. Bond, in the sum of thirty thousand dollars, to be approved of by the treasurer and clerk, must be entered into. The capital stock is limited, and the subscriptions are to be received and apportioned, etc. Ten per cent. on shares subscribed are required to be paid.

And when the capital stock of the proposed association shall be subscribed and ten per cent. paid, on notice being given to the stockholders, they are authorized to meet and elect nine directors, a majority of whom are authorized to manage the affairs of the association. They are required to elect one of their number president; and in the ninth section it is provided, that "all such persons as shall become stockholders of any such association shall, on compliance with the provisions of the act, constitute a body corporate and politic in fact and in name, and by such name as they shall designate and assume to themselves, etc., and by such name they and their successors shall and may have continued succession, and shall, in their corporate capacity, be capable

[1] Arguments and part of opinion omitted.

of suing and being sued, pleading and being impleaded, etc., in all courts whatsoever; and that they and their successors may have a common seal, and by such name as they shall designate, adopt and assume as aforesaid, shall be in law capable of purchasing, holding and conveying any estate, real or personal," etc. By the 15th section the directors, for the time being, or a majority of them, have power to make by-laws.

The ordinary powers of a corporation are—1. Perpetual succession. 2. To sue and to be sued, and to receive and grant by their corporate name. 3. To purchase and hold lands and chattels. 4. To have a common seal; and 5. To make by-laws.

Some of these powers are incidents to a corporation, but they are all generally expressly given by a statute in this country, and these powers are all given in the act under consideration. It expressly provides that the association authorized by the act, when formed, shall "constitute a body corporate and politic in fact and in name."

The act not only gives in terms all the requisites to constitute a corporation, but the body, when formed, is technically designated by it as such. Where then is the ground for argument or doubt on the subject? Did not the legislature comprehend the force of the language they used? They have created an artificial being, giving to it in well defined terms its just proportions and powers, and have called it by its appropriate and technical name. Could the legislature in language more clear and forcible have created a corporation? Not a *quasi* corporation, not a joint stock company, or a limited partnership, but substantially and technically a corporation.

In illustration of this act of the legislature, it is unnecessary to refer to the mode of creating corporations in England by grant from the crown, or point out the distinction which may exist between a body thus created and one created by a statutory grant, or between an ancient and modern being of this sort. It is enough to know that it is not essential to the character of a corporation, that its powers should be equal to any similar association, either ancient or modern. It is sufficient if in its corporate name it exercises the powers and rights of a natural person, in the management of its concerns.

We can entertain no doubt that the associations authorized under the above act were intended to be, and are, in fact, corporations.

Had the legislature power to pass this law? This is the great question in the case, and it is fully and fairly presented by the demurrer.

The second section of the twelfth article of the constitution of Michigan declares that "the legislature shall pass no act of incorporation, unless with the assent of at least two-thirds of each house." And it is earnestly, ingeniously and ably contended that this is an inhibition of the creation of corporations by a general law. That corporate powers, under it, can only be conferred by express enactment in each case. * * *

We are told that the people of Michigan were jealous of monopolies, and especially of bank monopolies, and that by the introduction of the above section into their constitution they intended to restrict the

powers of the legislature in making such grants. That such was their intention is clear from the language of the section. A law which confers corporate powers can only be passed by a vote of two-thirds of the members of each house. But must each corporation be created by a separate act? This is the ground taken in support of the demurrer. No act of incorporation shall be passed by the legislature, unless with the assent of at least two-thirds of each house, are the words of the section. The word *act* is used in the singular, but does it necessarily import that not more than one corporation can be created in the same act?

Suppose ten distinct applications were made to the legislature for bank incorporations at the same session, and the legislature were disposed to grant each application, must they pass ten acts of incorporation, or may not the ten corporations be granted in the same act? Would not such a law be within the letter and spirit of the constitution? Of this there would seem to be little doubt.

As distinctive a character may be given to each corporation in such an act as if it were established by a special law. In 1834 an act was passed by the legislative council of the territory of Michigan, entitled "An act to establish branches of the Bank of Michigan, Farmers' and Mechanics' Bank of Michigan, and Bank of the River Raisin." Such acts are common, and it is believed never to have been supposed that the legislative power might not be exercised in this mode. The restriction in the constitution does not prohibit it.

And if this may be done under the constitution, then the construction, that each corporation must be created by a special law, can not be sustained. * * *

At the time the constitution of Michigan was adopted, in many of the states and in this territory, it was the ordinary course of legislation to create corporations by a general law. This was the case in Ohio, and in many of the other states. And it can be of no importance whether banking or other associations were thus incorporated. The power was exercised. Does the constitution prohibit the exercise of this power?

It has already been shown that an act which shall establish several banking corporations is not repugnant to the constitution. And this reduces the objections to the law under consideration to two points:

First. That a corporation being a grant must be made to a person or persons in *esse*.

Second. The indefinite number of banking corporations which, under the law, may be established.

The first objection on examination will be found to have but little force.

The creation of a corporate existence can never take effect until the association be formed and the organization completed. Commissioners are generally designated in the act, who are to superintend the opening of the books and receive the subscriptions of stock. And when the amount shall be subscribed and the necessary payments

made, the stockholders elect directors who appoint a president and cashier. The organization being completed, existence is given to the artificial being, and its agency commences. It is now in esse, but before this it was not. Vitality is given to it by the voluntary association and organization of its members. Had they remained passive the law could have had no effect.

In this case then, the grant of the franchise is not made to a person or persons *in esse*. The commissioners did not constitute the corporation, nor was the franchise in any form or degree vested in them.

This is the general mode in which corporations are created, and it has stood the test of time, and of legal scrutiny. No valid objection is perceived to it.

In regard to this objection the act under consideration rests upon the same ground as other and more special acts on the same subject. The franchise is not vested in either until the organization be completed, and this depends upon the voluntary association of individuals.

In a special act commissioners are named to open the books and receive subscriptions of stock; in the act under consideration the clerk and treasurer of each county are required to perform this duty. They are commissioners for this purpose; and, so far as the grant is concerned, if it be valid under one law it must be so under the other.

We come now to consider the objection, that an indefinite number of banking corporations are authorized by the general law, and this, it is supposed, is not only repugnant to the policy, but the express provision of the constitution.

It can not be said that this law violates any express provision of the constitution. The extent of the provision referred to is that no act of incorporation shall be passed, except by at least a majority of two-thirds of each branch of the legislature.

Now, this does not limit the number of corporations which shall be established, nor the number which may be created in one act. The act must be passed by a majority of two-thirds, and this is the only express restriction on the subject. If the range of legislative power be restricted beyond this, it must be done by construction.

There may be a wide distinction between the policy of a general and a special banking law, but this is not the question for judicial cognizance. Is there such a difference in principle, as to make the one constitutional and the other unconstitutional? This is the inquiry now to be made.

As it regards the power of the legislature, it is unquestionable, whether they establish one or fifty banking institutions. The same power which may establish one bank, under the constitution, may establish fifty.

In the general law, as above observed, commissioners are appointed, the county clerk and treasurer, to receive subscriptions of the stock the same as in a special act. And the mode of organization, under both acts, is substantially the same.

The only difference seems to be that in the special act the number

of corporations is limited, whilst under the general act they are indefinite.

And here it is contended that the legislature have, in substance, conferred the power to form corporations by voluntary associations, without exercising that special scrutiny, in each case, as is required by the constitution.

But is this a sound and practical view of the case?

It may be admitted that it derives great force from the disastrous results which have been realized under this law; but these have nothing to do with the question of power under consideration. Suppose the results had been as beneficial as they have been injurious, how changed would have been the argument. But the question remains unaffected by the good or evil which resulted from the law.

The legislature, in the exercise of their discretion, seem to have concluded that, by requiring securities on real estate, and subjecting the directors to certain liabilities, it would be good policy to multiply the banking institutions of the state. And in order to avoid the charge of monopoly, which had been so liberally applied to banking incorporations by a general law, they held out to the community at large equal privileges in forming such associations. The act which thus sanctions an indefinite number of banks, depending upon voluntary associations, is passed by the requisite majority of two-thirds of both houses of the legislature.

Now, what is the practical operation of this law? It, in effect, declares that the clerk and treasurer of each county in the state shall be authorized to open books and receive subscriptions of stock, and when the associations, thus formed, shall become organized, they shall be in fact and in name bodies corporate and politic. *The law acts as directly upon associations thus formed as if it had been passed expressly to incorporate each association. It is special to each. And the difference between a general and a special law of this character, in this respect, seems to be that the one is passed on the special application of a few individuals, whilst the other is enacted under the influence of a general policy. But the question of power is the same.*

May not the legislature determine the number of banks that shall be established? This will not be controverted. And if they may do this, may they not, under the constitution, pass an act, by a majority of two-thirds of each house, to establish voluntary associations without limiting their number?

Suppose the general law had limited the number of banks to be established under it to ten, could their power to pass the law have been doubted? They throw around the institutions, thus to be organized, all the guards and checks which they deem necessary for the public interest. The law acts as directly and distinctly upon each association as if it had been the only one established under it. And, in passing the law, the legislature exercise the same scrutiny as if they were about to incorporate only one bank. Such a law would be within the letter and spirit of the constitution. And if the legislature

may do this, may they not fix on a greater number of banks than ten, or may they not, in the exercise of their discretion, authorize the establishment of an indefinite number? Whether the number shall be large or small is a question of policy and not of constitutional power. If a large or indefinite number of corporations may be created in the same act, under as salutary restrictions as the creation of one, is the policy of the constitution disregarded?

It is contended that the general law throws off the restraints imposed by the constitution. But is this so? There is not a restriction in the exercise of corporate powers, which can be imposed by a special law, that may not be imposed under a general law. And the power of the legislature acts as directly in the one case as in the other. In the general law, then, there is no disregard of the restraints of the constitution. Having the power to establish more than one corporation in the same act, the legislature may establish many, or an indefinite number.

The number, whether indefinite or limited, does not render the law repugnant to the constitution. If it has been passed by the constitutional majority, it is within the restriction.

By the thirty-sixth section of this law the legislature reserve "the power to alter or amend the act, and to dissolve any association to be incorporated under its provisions, by a vote of two-thirds of each house."

Here is a power not usually reserved in granting franchises. And it would seem that, so far as the policy of the law may be considered, this reservation of power gives to the legislature as salutary a control over these grants, for the public good, as would have been exercised in acting on special applications for charters. And the presumption is, that if the general law had not passed, the number of banks, under special laws, would have been as great, and the consequences not less disastrous.

The evil is not to be found in the constitution, or in the construction of the constitution, but in the elements of which the government is composed. The true remedy is found in the sober reflection, experience and intelligence of the community. * * *

Demurrers withdrawn, and leave to plead, etc.

Sec. 57a. Same.

WHIPPLE, J., IN GREEN v. GRAVES,

1844, 1 Douglass (Mich.) Reports, p. 351 (on pp. 363–367), says upon substantially the same facts as in Falconer v. Campbell, *supra*, p. 287, in regard to the policy of the general banking law of Michigan:

Let me now advert to some of those "circumstances extrinsic of the act," for the purpose of discovering the reason or "cause of the act." The constitution of Michigan was formed in 1835. All who are

familiar with the history of that period will bear testimony to the fact that a strong public feeling existed against corporations, and especially in respect to those possessing banking powers. It may be said to have been the absorbing question of the day. The community were alarmed at the vast increase of corporations. They feared the power which such institutions were capable of wielding. The belief was entertained that this power had actually been wielded for bad purposes. It was argued that all corporations were, in a greater or less degree, monopolies, and hence the prejudices of the community were arrayed against them. It was alleged that, notwithstanding the gross corruptions and fraudulent conduct of banking corporations, they could not be reached, or be made amenable to justice and the violated laws of the country. It was boldly charged that bribery and corruption had been resorted to for the purpose of procuring or perpetuating charters. Regarded as contracts between the state and the company, they could not ordinarily be affected by legislative interference. Immunity was offered to the persons and property of the corporators, not invested in the corporate stock. Such were some of the circumstances under which the provision was incorporated into our constitution, circumstances well calculated to challenge the attention of the convention, and induce that body to devise new guards by which the community might be protected against the evils growing out of legislation in respect to corporations. But the object they had in view could not be achieved, unless some statutory check was imposed, by which to prevent the multiplication of corporations. This was the crying evil; for, in proportion as they increased, in just that proportion would the evils to which I have adverted increase also.

Chancellor Kent, who was a member of the convention that revised the constitution of New York in 1821, says that the convention "endeavored to check the improvident increase of corporations, by requiring the assent of two-thirds of the members elected to each branch of the legislature, to every bill for creating, continuing, altering or renewing any body politic or corporate." 2 Kent's Com. 271. Mr. King, who was also a member of the convention, and chairman of the committee on the legislative department, in reporting the section embodied in the constitution referred to by Chancellor Kent, remarked that "the committee looked upon the multiplication of corporations as an evil," and that "they ought not to be increased, but should be diminished as far as could be done consistently with the preservation of vested rights." If such were "the extrinsic circumstances," and the reasons which induced the convention that framed our constitution to impose the restriction, is it not indisputable that we can give full effect to the intention of the framers of the constitution, and of the people by whom it was ratified, only by insisting upon such a construction as the words themselves justify; and that to affirm the general banking law of this state constitutional would be warranting an interpretation at war both with the letter and spirit of that instrument? Indeed, Chief Justice Nelson, in the case of Thomas v. Dakin, admits that the *intention* of the framers of the constitution of New York would be best ful-

filled by the construction contended for by the defendant. If such be the case, and the letter of the clause in question not only warrants, but demands a literal construction, I know of no power less potent than that of the people competent to change, alter, or modify the clause. We are the mere creatures of the constitution, bound by the highest motives to preserve it unimpaired, as it came from the hands of those by whom it was ordained and established. We do not sit here to make constitutions and laws, but to expound them. Who that is familiar with the opinions of the convention, or has consulted the journal of its proceedings upon the subject of corporations, can hesitate as to the true construction of the clause relating to this subject? Those opinions were hostile to the multiplication of corporations. Not only is this manifest from the clause itself, which requires a vote of two-thirds of each house to pass an act of incorporation, but the journal shows that the clause was *unanimously* adopted. That member would have been regarded as insane who should have offered a separate proposition, or a proviso to the clause as it now stands, granting to the legislature a power to pass a general law, for the erection of moneyed corporations, at the will of any twelve inhabitants of the state. * * *

And yet it has been gravely argued that, notwithstanding the inhibition in the constitution, that law can be sustained which violates its letter and spirit; that law which gave birth in twelve short months to some forty banks, with an aggregate capital of nearly $4,000,000, while there were in existence eighteen chartered banks, with an aggregate capital of over $2,000,000; that law whose history was blackened with frauds and perjuries; under the operation of which individual and state credit staggered and at last fell; a law which brought odium and reproach upon the state within a year after its enactment. I have not been unmindful of the fact that the policy of the act was attempted to be vindicated, upon the ground that, under the system of creating private corporations, which prevailed before the adoption of the constitution, but comparatively a small number of the community could participate in the rights, privileges and profits of banking; whereas under the general law, the many might have privileges which before were enjoyed by the few; and hence the doctrine of equal rights and equal privileges, so much cherished by the people, was respected. In other words, that the law struck a death blow at the monopoly which previously existed. This reasoning is plausible; but is it sound? All corporations are, to a certain extent, monopolies. In the language of Mr. Justice McLean, in the case of Beaty v. Knowles, 4 Pet. 168, the "exercise of the corporate franchise is restrictive of individual rights." If so, it is difficult to sustain the construction contended for by the plaintiff, on the ground of policy; for in proportion as corporations are created, in the same proportion are the rights of individuals restricted; so that, although more individuals would, under the general banking law, become members of banking corporations, yet the consequences would be an increase of institutions admitted to be monopolies and restrictive of individual rights. The

remedy for the mischief, then, would certainly be worse than the mischief itself; and I think a community, like an individual, should endure a lesser evil, if, in attempting to cure it, a greater one would be entailed upon them. * * *

[This case held the Michigan banking act to be unconstitutional.]

See note, *supra*, p. 32.

Sec. 57b. Same.

DEADY, J., IN WELLS, FARGO & CO. v. NORTHERN PACIFIC RY. COMPANY,

1884, Circuit Court of Oregon, 23 Fed. Rep. 469, on pp. 473–4, in a suit by the Wells Fargo Express Company, organized under a special act of the territory of Colorado, to constrain the railway company to furnish it with express facilities in Oregon, says:

Another objection is made to the relief demanded in this bill on the ground of the inability of the plaintiff to exercise the powers claimed by it in Washington Territory, and that is that it is created by a special act of Colorado. This objection is founded upon section 1889, of the Revised Statutes, which is applicable to all territories, and reads as follows:

"The legislative assemblies of the several territories shall not grant private charters or special privileges; but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing and other industrial pursuits, or the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable or scientific association."

Now, it is argued, first, that because a corporation can not be organized in Washington Territory by a special act of the legislature, but must be organized under a general law; therefore, a corporation existing before this restriction was made, under a special act of a sister state or territory, can not come into that territory and exercise the powers, although they are in no way excluded by the law of the land, or contrary to the public policy. The ground is that it is not brought into being in the peculiar or particular way in which the general law now requires corporations to be formed in Washington Territory; but I can not see that there is anything in this objection. There is nothing in this section (1889) to prevent any corporation exercising its powers in Washington Territory in particular cases. *Everybody who is familiar at all with the history of the growth and organization of corporations in the United States knows that this rule, requiring corporations to be organized under a general law, is the growth of some years, and has grown out of the confusion, corruption, the partial and inequitable legislation that was the result of allowing parties to go before the legislature and ask for a special charter.* The time of the legislature was unnecessarily consumed by it; the integrity of the members of the legislature was unduly exposed; or,

through the ignorance or carelessness of the legislature, and the astuteness and diligence of designing and overreaching men, there were constantly coming to light obscure clauses in these acts of the legislature, giving powers and granting privileges which were unjust, inequitable, and which would never have been done with the knowledge of the legislature.

Therefore, owing to the evils resulting to the territory of Washington, to the people and to the legislature, this act was passed, and has no reference whatever to the fact whether a corporation, otherwise formed, might exercise powers in that territory not prohibited or contrary to its public policy. It is a matter of no moment whatever to Washington Territory that corporations in Colorado are created by special acts. The people of the latter territory are not corrupted by it; the legislature is not corrupted by it; their time is not taken up with it. The only interest that they have in the matter is the interest that any portion of the people of the United States have in the welfare of all the other people in the United States. See, also, on this point, the remarks of Mr. Justice Field in Cowell v. Springs Co., 100 U. S. 59.

Note. 1879, Cowell v. Springs Company, 100 U. S. 55.

Sec. 58. Same. (*b*) Difference between method by general and by special laws.

MOKELUMNE HILL CANAL AND MINING CO. v. WOODBURY.[1]

1859. IN THE SUPREME COURT OF CALIFORNIA. 14 Cal. 424–428; 73 Am. Dec. 658.

COPE, J., delivered the opinion of the court, BALDWIN, J., and FIELD, C. J., concurring.

It is alleged in the complaint that the plaintiff is a corporation, and this allegation being denied in the answer, the case was tried in the court below upon that issue alone. The plaintiff dates its corporate existence as far back as 1852, and claims to have been duly and regularly incorporated under the general act of 1850, providing for the formation of corporations for manufacturing, mining, mechanical and chemical purposes. Section 122 of that act provides that any three or more persons, who may desire to form a company for either of these purposes, "may make, sign and acknowledge before some officer competent to take the acknowledgment of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, a certificate in writing," etc. Section 123 provides, that "when the certificate shall be filed as aforesaid," the persons executing the same and their successors shall be a body politic and corporate. Sec-

[1] Arguments omitted.

tion 130 provides, that "the copy of any certificate of incorporation filed in pursuance of this act, certified by the county clerk or his deputy, to be a true copy, and of the whole of such certificate, shall be received in all courts and places as presumptive legal evidence of the facts therein stated. On the trial of the case, it was shown that a certificate, in conformity with the requirements of the act had been filed in the office of the clerk of the proper county, and a certified copy thereof was produced and read in evidence, but it was not shown that a duplicate had been filed in the office of the secretary of state. It appeared in proof that the company had been doing business as a corporation since 1852, but the court held, that as it was not shown that a duplicate had been filed as required by the act, the evidence did not establish the fact of incorporation.

The general rule is, that the existence of a corporation may be proved by producing its charter, and showing acts of user under it; but this rule has no application to a corporation formed under the provisions of a general statute, requiring certain acts to be performed before the corporation can be considered in esse, or its transactions possess any validity. The existence of a corporation thus formed must be proved by showing at least a substantial compliance with the requirements of the statute. But there is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of, collaterally, in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the corporation is responsible only to the government, and in a direct proceeding to forfeit its charter. The right of the plaintiff to be considered a corporation, and to exercise corporate powers, depends upon the fact of the performance of the particular acts named in the statute as essential to its corporate existence. Under the issues presented in the pleadings, there is no doubt that performance of these acts should have been shown, and if the filing of the duplicate of the certificate of incorporation is to be regarded as one of them, the court below properly held that the existence of the corporation had not been established. But we do not see upon what principle such a construction of the statute is admissible. It is certainly not justified by the natural and ordinary import of the language used, which must furnish the rule of construction, unless a contrary intention clearly appear. Section 122 of the act provides, as we have seen, for the filing of a certificate with the clerk, and a duplicate with the secretary of state; but section 123 declares that when the *certificate* shall be filed, the persons executing the same and their successors, shall be a body politic and corporate. The intention of the legislature clearly was, that, so far as individuals are concerned, the corporation should acquire a valid legal existence upon the filing of the certificate.

The filing of the duplicate is exclusively a matter between the corporation and the state. The rights and privileges conferred by the statute vest in the corporation upon the filing of the certificate, and can be divested only by a direct proceeding for that purpose. If the duplicate has not been filed, the assumption of the corporate powers amounts simply to a usurpation of the sovereign rights of the state, the remedy for which rests with the state alone.

Judgment reversed, and cause remanded for a new trial.

Note. See below, cases upon Conditions Precedent to Valid Corporate Existence, pp. 585, 614, 630; When Does Corporate Existence Begin? pp. 565-585; also, Schemes of Organization.

Sec. 59. (2) Same. By implication.

DUNN ET AL. v. THE UNIVERSITY OF OREGON.[1]

1881. IN THE SUPREME COURT OF OREGON. 9 Oregon Reports 357-362.

This suit was brought by respondents in the circuit court for Lane county, to set aside a conveyance of real property situated in said county, from the Union University Association to the said board of directors of the University of Oregon, executed on or about December 31, 1873, upon the ground of fraud, and to subject such property to the payment of certain judgments, which had been recovered in said court by respondents against said association.

The complaint alleges the due incorporation of the Union University Association as a private corporation under the laws of Oregon, and the creation of the board of directors of the University of Oregon by act of the legislature, approved October 19, 1872, subsequently changed to the "Regents of the University," by act of the legislature October 21, 1876. It also shows that in the year 1873, and prior to the conveyance sought to be impeached, the Union University Association became indebted to the respondents severally in large amounts which have never been paid. That at the time said indebtedness accrued, and prior thereto, said association was the owner in fee-simple of certain real property in Eugene City, in said county, worth $50,000, and gives a description of it by metes and bounds. That said real estate was all the property owned by said association, and that by conveying it to the board of directors of the University of Oregon, it made itself insolvent, and thereupon became and has ever since remained wholly unable to pay its debts. That said conveyance was executed in fraud of the rights of the respondents, and for the purpose of hindering and delaying them in collecting their said debts, and that there was no consideration therefor, and these facts were fully within

[1] Arguments omitted. Parts of opinion omitted.

the knowledge of said board of directors when they received said conveyance.

Prior to instituting this suit the respondents severally duly recovered judgments against the Union University Association upon their said claims, in said circuit court, and caused them to be duly docketed in said county, and executions to be issued and placed in the hands of the sheriff for service, which were duly returned by him wholly unsatisfied.

The board of regents demurred, and the court below overruled the demurrer, and upon their failing to answer, rendered a decree for respondents as prayed for in their complaint. From this decree the board of regents have brought this appeal.

By the court, WATSON, J.:

That the state university itself was incorporated under the provisions of the act of October 19, 1872, entitled "an act to create, organize and locate the university of the state of Oregon," is not claimed; but that the "board of directors" created by that act was an incorporated body can hardly be denied. Section 2 declares: "The general government and superintendence of the university shall vest in a board of directors, to be denominated the board of directors of the university of Oregon," to consist of nine members, all of whom shall be citizens and permanent residents of the state of Oregon."

Section 4 provides: "The board of directors shall have the custody of the books, records, buildings and all other property of the university. All lands, money, bonds, securities and other property which shall be donated, transferred or conveyed to the said board of directors by gift, devise or otherwise, for the use and benefit of the university, shall be taken, received, held and managed, invested and reinvested, sold, transferred and in all respects managed, and the proceeds thereof used, bestowed and invested in the manner, for the purpose and under the terms and conditions respectively prescribed by the act or gift, devise or other act in the respective cases. They shall have power, and it shall be their duty, to enact by-laws for the government of the university; to elect a president of the university, and the requisite number of professors, instructors and employes, and to fix their salaries and the term of office of each, and to do all other acts necessary and proper to carry out the design of this act."

Sections 11 and 12 provide, that on or before January 1, 1874, "The Union University Association of Eugene City, Ore., shall secure a site for said university at or in the vicinity of Eugene City, and erect thereon and furnish a building for the use of the state university, on a plan to be approved, and, after the erection of the same, to be accepted by the board of commissioners for the sale and management of the school and university lands, and for the investment of the funds arising therefrom; said building and furniture to be of not less value than $50,000; and to convey the said site and building, in fee-simple, free from all incumbrances, to said board of directors, on or before said January 1, 1874."

By an amendatory act, passed October 16, 1874, the time was ex-

tended to January 1, 1877, for securing such site and building and conveying them to the board of directors.

While it can not be denied that some of these powers might be exercised by a board of directors in their collective capacity, without being incorporated, it is equally undeniable that some of them could not. The capacity and power to take conveyances of lands and hold and dispose of them for the use and benefit of the university, according to the various and diverse trusts imposed upon them by their donors, and to transmit title to lands to their successors in office in perpetual succession, without intermediate conveyances, could not belong to this board of directors unless incorporated.

It is true the legislature has not declared it to be a corporation in express terms, but this was not essential. (Angell & Ames on Corporations, § 76; Thomas v. Dakin, 22 Wend. 70, 103, 106.)

"*It is indeed a principle of law which has been often acted on, that where rights, privileges and powers are granted by law to an association of persons by a collective name, and there is no mode by which such rights can be enjoyed, or such powers exercised, without acting in a corporate capacity, such associations are, by implication, a corporation, so far as to enable them to exercise the rights and powers granted.*" (Angell & Ames on Corporations, § 78.) * * *

The decree of the court below is affirmed with costs.

Decree affirmed.

Note. **Creation by implication.** 1. No precise words, such as found, erect, establish, create, or incorporate, are necessary, provided the legislative intent be manifest. 1613, Sutton's Hospital, 10 Coke 30, *supra*, p. 264; 1817, Denton v. Jackson, 2 Johns. Ch. (N. Y.) 320; 1828, North Hempstead v. Hempstead, 2 Wend. (N. Y.) 109; 1829, River Tone v. Ash, 21 E. C. L. 152, 10 Barn. & C. 349; 1839, Thomas v. Dakin, 22 Wend. 9 on 94, *supra*, p. 19; 1857, Bow v. Allenstown, 34 N. H. 351, 69 Am. D. 489; 1869, O. & V. R. R. Co. v. Plumas Co., 37 Cal. 354 (*contra*); 1870, Liverpool Ins. Co. v. Mass., 10 Wall. (U. S.) 566; 1881, Cent. Ag. & Mech. Assn. v. Ala. G. L. Ins. Co., 70 Ala. 120, 3 Am. & Eng. C. C. 78; 1884, Walsh v. Trustee N. Y. & B. Bridge, 96 N. Y. 427, 6 Am. & E. C. C. 45; 1889, People, *ex rel.*, v. Wemple, 52 Hun (N. Y.) 434; 1894, Shields v. Clifton Hill L. Co., 94 Tenn. 123, 45 Am. St. R. 700; 1896, Edgworth v. Wood, 58 N. J. L. 463, *supra*, p. 29; 1898, Andrews Bros. v. Youngstown Coke Co., 86 Fed. R. 585.

2. The implication may arise from legislative recognition or ratification. 1830, Society for Propagation of Gospel v. Town of Pawlet, 4 Peters (U. S.) 480, 502; 1839, McIntyre Poor School v. Zanesville, 9 Ohio 203; 1841, Williams v. Union Bank, 2 Humph. (Tenn.) 339; 1864, People v. Farnham, 35 Ill. 562; 1867, Toledo P. & W. R. R. v. Town of Chenoa, 43 Ill. 209; 1884, Walsh v. Trustees, 96 N. Y. 427, 6 Am. & Eng. C. C. 45; 1894, Shields v. Clifton Hill L. Co., 94 Tenn. 123, 45 Am. St. R. 700; 1894, Andes v. Ely, 158 U. S. 312.

3. Or by a grant of lands to be held as a corporation holds lands. 1468, "If the king granted land to the men or inhabitants of D. to their heirs and successors, rendering rent therefor, as to everything touching this land they are a corporation, but for no other purpose." Rolle's Abr. Corp. F, citing Y. B. 7 Ed. 4, 30; 1817, Denton v. Jackson, 2 Johns. Ch. (N. Y.) 320; 1828, North Hempstead v. Hempstead, 2 Wend. (N. Y.) 109; 1830, Society for Prop. of Gospel, etc., v. Town of Pawlet, 4 Peters (U. S.) 480; 1840, Commissioners of Bath v. Boyd, 1 Ired. Law (N. C.) 194; 1855, People v. Schermerhorn, 19 Barb. (N. Y.) 540.

4. Or by grants of powers. 1154–89, "Of ancient times the inhabitants of

a vill were incorporated when the king granted to them to have a merchant guild." Rolle, Abr., Corporations F, p. 513, citing Register of Writs, 219, 10 Co. 30. But see 1 Kyd, 64. (The first printed edition of the Register was in 1531, but Coke claims to have had edition containing entries of writs used prior to the Norman Conquest. *Preface*, 10 Rep. The Register is usually considered as dating in the reign of Henry II, 1154–1189.) 1831, Justices of Cumberland v. Armstrong, 3 Dev. (N. C.) 284; 1839, Thomas v. Dakin, 22 Wend. (N. Y.) 9 on 94, *supra*, p. 19; 1844, Proprietors, etc., of Southhold v. Horton, 6 Hill (N. Y.) 501; 1857, Bow v. Allenstown, 34 N. H. 351; 1870, Liverpool Ins. Co. v. Mass., 10 Wall. (U. S.) 566; 1896, Edgworth v. Wood, 58 N. J. L. 463, *supra*, p. 29; 1898, Andrews Bros. v. Youngstown C. C., 86 Fed. Rep. 585.

5. By grant to successors. 1829, Conservators of River Tone v. Ash, 10 Barn. & C. 349.

6. But in order that a grant of powers will have the effect to create a corporation by implication, they must be really corporate powers, and not merely such as could as well be exercised by unincorporated persons or associations. 1830, Stebbins v. Jennings, 10 Pick. (Mass.) 172; 1858, Shelton v. Banks, 10 Gray (Mass.) 401.

Sec. 59a. (3) **Same.** By consolidation. See *infra*, pp. 984–1007.

CHAPTER 3.

LIMITS ON THE POWER OF THE STATE TO CREATE.

ARTICLE I. FROM THE NATURE OF LEGISLATIVE AUTHORITY.

Sec. 60. (a) *Delegation:* General rule: There can be no general delegation of legislative authority to create corporations.

See Franklin Bridge Company v. Wood, *supra*, p. 279, and note below, p. 304.

Sec. 61. (b) *Exceptions*, or apparent exceptions:

1. Territorial legislatures.

RIDDICK, CHAIRMAN, ETC., v. AMELIN ET AL.

1821. IN THE SUPREME COURT OF MISSOURI. 1 Missouri Reports 5-7.

COOK, J., delivered the opinion of the court. This is a writ of error, prosecuted to reverse the judgment of the circuit court of St. Louis county in an action of debt instituted by the plaintiff, Riddick, as chairman of the board of trustees of the town of St. Louis, on a bond executed by said defendants to said chairman. To which the defendants plead that said Riddick and others, trustees of said town, fraudulently represented that they had legal right to lease a certain ferry, and that said Riddick, as chairman of the board of trustees, was authorized to make and execute such lease, and that said bond was executed in consideration of a lease so made by said chairman to the defendant, Amelin. To this plea the plaintiff replied: The act of the territorial legislature, authorizing the incorporation of towns; the order of the court of St. Louis county incorporating the town of St. Louis; the act of said legislature authorizing said corporation to license and regulate ferries therein, and the ordinance of said corporation authorizing the chairman thereof to let and license such ferries. To which replication the defendants agreed to demur generally, and except to the legal force and effect of the statute authorizing the incorporation of towns, and to the right of said trustees to have of and from any person licensed to keep a ferry in said town more than one hundred dollars for such license.

In support of the first point, it is insisted by the defendants that nothing short of sovereign power can create a corporation; that the

territorial legislature was not sovereign, and hence draw the conclusion that the act of that legislature had not the force and effect of a law. That the power which creates a corporation must be sovereign as to that matter is a principle which seems to be well settled; but sovereignty may be either general or limited, absolute or controllable. If this be not true, sovereignty could exist nowhere but with the original power of making laws, which alone is absolute. The power to legislate on any subject is sovereign as to that matter, and to general sovereignty is incident the power of general legislation. It remains then only to ascertain the power of the territorial legislature, under the act of congress creating that body, and vesting it with legislative powers. It seems to be admitted that congress possessed the power of legislating for the territory, with no other limitations than such as were imposed by the federal constitution, and it has not been denied that the establishment of the territorial government with legislative powers was a constitutional exercise of the powers of congress. If congress could impart to the territorial legislature a power to legislate on any subject in relation to the government of the people of the territory, that power might, by the same authority, be made as general as the legislative powers of congress over such territory; and that congress intended to vest the territorial legislature with general powers, for the government of the inhabitants thereof, is manifest, the terms of the provisions being general, with a restrictive proviso, that no law should be passed inconsistent with the constitution of the United States.

The territorial legislature, then, had power to make all laws which they might deem conducive to the good government of the inhabitants of said territory, and the right being reserved by congress to disapprove and thereby revoke any law passed by said legislature, does not render the power of such legislature less sovereign in relation to one subject of their legislation than another; it is sovereign as to all, subject to the control of congress. On the second part, it was contended by the plaintiff's counsel that the corporation was not limited by law as to the sum which they may demand for ferry license within the limits of their corporation, and if they are, the defendants having executed their bond to the chairman, can not avoid it by showing that it was given for the payment of a sum which the trustees had no right to demand.

The fourth section of the act extending certain powers to said trustees (Acts of 1814–'15) provides that said trustees shall have full power to license and regulate ferries established within their limits, and to apply the license money to the use of the town. Here the court see no other power vested in the trustees than such as had been given by law to the courts of the several counties on that subject. On the last point the court can not see the propriety of the reasoning why this is assimilated to an individual transaction not regulated by special enactment. It is the statute which authorizes the trustees to license and regulate ferries within their limits. The terms of such license and manner of such regulations were prescribed by

law, and not left to the discretion of the trustees who were to exercise those powers. It is the opinion of the court that the trustees were not authorized by law to demand, or exact of any person, more than one hundred dollars for any such license, and that any obligation or promise for the payment of a greater sum for such license is void and not obligatory on the party making it. It is, therefore, considered and adjudged, that the said judgment of the circuit court of the county of St. Louis be affirmed, and that said defendants recover of the said Thomas F. Riddick, chairman as aforesaid, their costs by them about their defense of this writ of error expended, etc.

Note. See below, Note on delegation of power to create corporations.

Sec. 62. Same, (2) Regents of University of New York:

2 Rev. St. N. Y., p. 1474. Laws of 1892, c. 378, provides:

§ 27. Charters.—The regents [of the University of New York, established in 1784] may, "by an instrument under their seal and recorded in their office, incorporate any university, college, academy, library, museum or other institution or association for the promotion of science, literature, art, history or other department of knowledge, under such name, with such number of trustees or other managers, and with such powers, privileges and duties, and subject to such limitations and restrictions in all respects as the regents may prescribe in conformity to law." (As Am. by L. 1893, c. 859, going into effect June 1, 1895.)

Note. DELEGATION OF POWER TO CREATE CORPORATIONS.

1. **In England:** Although it was early stated that the *king* could not delegate his power to create a corporation (2 Henry VII, 13, 10 Coke Rep. 27) it has been settled otherwise on the theory of the maxim *qui facit per alium facit per se*. This authority has been delegated for the creation of a single corporation, or for an indefinite number. (1 Kyd 50; 1 Bl. Com. 473.) The chancellor of the university of Oxford has a general power by charter to create corporations, and has created many, including trading corporations, to serve the students. (1 Bl. Com. 474; Angell & A., § 74.) The lords and proprietors of Maryland (McKim v. Odom, 3 Bland Ch. 416, *supra*, p. 222) and of Pennsylvania (3 Wils. Lect. 409) exercised such delegated authority (Ang. & Ames, § 74).

Parliament, in theory not exercising delegated but original sovereign authority, and not hampered by constitutional restrictions, can delegate, either generally or specially, its power to create corporations. Morawetz Corp., § 15; Am. & Eng. Ency., vol. 7, p. 645 (2d ed.).

2. **In the United States:** (*a*) **In general.** For the reasons that there is no *executive* with authority to create corporations in the United States, that this function pertains to legislative bodies exclusively, and these, with us, exercise only *delegated*, and not original power, and that the creation of a corporation is the enactment of a law that requires the exercise of discretion, it is held that there can be no general delegation of the power to create corporations in this country, on the maxim, *delegatus delegare non potest*. Franklin Bridge Co. v. Wood, 14 Ga. 80, *supra*, p. 279; 1884, State v. Simons, 32 Minn.

540; 1821, Cohen's v. Virginia, 6 Wheat (U. S.) 264, 442; 1822, *In re* St. Mary's Church, 7 S. & R. (Pa.) 517; 1843, Case of Borough of West Philadelphia, 5 Watts & S. 281; 1856, State v. Armstrong, 3 Sneed (Tenn.) 634; 1858, Mayor, v. Shelton, 1 Head (Tenn.) 24; 1885, Factors' & Traders' Ins. Co. v. N. H. P. Co., 37 La. Ann. 233; 1889, Heiskell v. Chickasaw Lodge No. 8, 87 Tenn. 668. What violates and what does not violate this doctrine are well illustrated by the two cases of State v. Armstrong, 3 Sneed (Tenn.) 634, and Mayor v. Shelton, 1 Head (Tenn.) 24, to the effect that "when the extent, character of powers and objects of incorporation are fixed by the legislature," and not left to the persons themselves seeking incorporation, or the body to whom certain ministerial acts are delegated, there is no delegation of legislative powers.

(*b*) **Apparent exceptions:** (1) The power of the regents of the University of New York, as above indicated, however, is discretionary to a great extent, and Mr. Morawetz (§ 15, note 5) considers this a valid delegation of power. Thomas v. Dakin, 22 Wend. 110. The power to create churches under the Pennsylvania act of 1791 (3 Pa. Laws 40) was largely discretionary, to be exercised by those seeking incorporation, and the courts and attorney-general. (Case of St. Mary's Church, 7 S. & R. (Pa.) 517.)

By the present New Jersey law "The certificate of incorporation may also contain any provision which the incorporation may choose to insert * * * *creating* * * * the powers of the corporation, the directors and the stockholders * * * not inconsistent with this act." N. J. L. 1896, Am. 1898, § 8.

See Ellerman v. Chicago Junct. Ry. Co., 49 N. J. Eq. 217, holding that the certificate of incorporation is equivalent to special act of the legislature.

Similar provisions exist in the Delaware, Connecticut and North Carolina laws. Such provisions, it would seem, can hardly be supported under the early holdings. They do not seem to have been passed upon.

(2) *Ministerial functions*, such as certifying compliance with laws, recording articles, etc., can be delegated—the creative power in such cases is that of the legislature. 1853, Franklin Bridge Co. v. Wood, 14 Ga. 80, *supra*, p. 279; 1877, *In re* New York Elevated R. Co., 70 N. Y. 327; 1883, Heck v. McEwen, 12 Lea (Tenn.) 97; 1888, Granby Min. & S. Co. v. Richards, 95 Mo. 106. There seems to be no inherent incapacity in the nature of legislative power that prevents its delegation, and there has always been a well recognized exception in the case of municipal ordinances, and the tendency is to extend the sphere of delegating legislative functions. Am. & Eng. Ency., vol. 6, p. 1022 (2d ed.); Cooley's Const'l Lim., p. *120, n. 1; Oberholtzer, The Referendum in America, 17.

(3) *Congress and the territorial legislatures:* It seems never to have been questioned that congress could not delegate a general power to create corporations to the territorial legislatures, on the ground that such was a delegation of delegated powers. Perhaps aside from the constitutional power to legislate for the territories, it might be held that congress does not exercise delegated powers in its purely national or international relations, outside of the states of the Union, but that it is sovereign in those particulars, much as the parliament of England, so far as ways and means are concerned.

See, 1821, Douglas v. State Bank, 1 Mo. 24; 1831, Williams v. Bank of Michigan, 7 Wend. (N. Y.) 539; 1844, People v. Marshall, 1 Gilm. (6 Ill.) 672; 1851, Myers v. Manhattan Bank, 20 Ohio 283; 1852, Vincennes v. University of Indiana, 14 How. (U. S.) 268; 1864, Allen v. Pegram, 16 Iowa 163; 1888, Carver Mercantile Co. v. Hulme, 7 Mont. 566; 1894, Bashford-Burm. Co. v. Agua Fria C. Co., 35 Pac. (Ariz.) 983.

Territorial corporations become state corporations upon admission of the territory to the Union, as a state. 1820, Vance et al. v. Farmers' and M. Bank, 1 Blackf. (Ind.) 80; 1823, Bank of Vincennes v. State, 1 Blackf. (Ind.) 267; 1884, Kansas Pac. R. Co. v. A., T. & S. F. R. Co., 112 U. S. 414. But see, 1851, Myers v. Manhattan Bank, 20 Ohio 283.

They are subject to the power of congress to control or abolish. 1887, United States v. Church of Jesus Christ, 5 Utah 361; 1889, Mormon Church v. United States, 136 U. S. 1, *infra*, p. 906.

See below: Limits on power of territorial legislatures, p. 332.

ARTICLE II. LIMITS ON LEGISLATIVE AUTHORITY, FROM THE NATURE OF A FRANCHISE.

Sec. 63. (*a*) Can not be forced on any one.

ELLIS v. MARSHALL.[1]

1807. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 2 Mass. Reports, 269–279; 3 Am. Dec. 49.

[Ejectment by plaintiff, claimed under a sale, by the Front Street Corporation, of the defendant's land to pay an assessment for constructing a street. The corporation was composed of sundry persons described as being "owners and proprietors of the land over which the street will pass," the defendant being one of such proprietors, and named in the act of incorporation, which had been passed upon petition by a majority of said proprietors. Marshall had not been one of such petitioners, and, although a public notice of a time for a hearing by all persons interested was given by the general court, Marshall did not appear. The proprietors were duly incorporated and authorized to make the improvement, levy the cost upon the adjoining lands, and upon failure to pay the assessment made, seize and sell the land.]

PARKER, J. From the foregoing facts and the arguments thereon by the counsel, it appears that all the proceedings of the corporation relative to the assessment and sale were correct, so that if Marshall were, at the time thereof, a member of the corporation, the title to the demanded premises in Ellis could not be disputed.

We are, therefore, necessarily brought to the question, indeed, the only one in the case, whether Marshall, by virtue of the act aforesaid, became a member of the said corporation, subject to its rules and regulations, and liable to be assessed for the purpose of building said street.

The counsel for the plaintiff have contended.

1. That by the virtue of the act itself, Marshall being named therein, he became, *ipso facto*, a member of the corporation, the legislature having competent power to compel him thereto.

2. That should this not be the case, the foregoing facts contain sufficient evidence of his consent, tacit at least, to the passing of said act, and the insertion of his name therein.

The determination of the first point requires that we should ascertain the true nature and character of this legislative proceeding. If it were a public act, predicated upon a view to the general good, the question would be more difficult. If it be a private act, obtained at the solicitation of individuals, for their private emolument or for the

[1] Statement of facts abridged. Arguments omitted. Part of opinion omitted.

improvement of their estates, it must be construed, as to its effect and operation, like a grant. We are all of opinion that this was a grant or charter to the individuals who prayed for it, and those who should associate with them; and all incorporations to make turnpikes, canals and bridges must be so considered.

Can then one, whose name is by mistake or misrepresentation inserted in such an act, refuse the privileges it confers and avoid the burdens it imposes? If he can not, then the legislature may, at all times, press into the service of such corporations those whose lands may be wanted for such objects whenever they may be prevailed on to insert the names of such persons by the intrigue or mistake of those more interested in the success of the object. No apprehension exists in the community that the legislature has such power. That the land of any person, over or through which a turnpike or canal may pass, may be taken for that purpose if the legislature deem it proper, is not doubted. The constitution gives power to do this, provided compensation is made. But it was never before known that they have power over the person, to make him a member of a corporation, and subject him to taxation, *nolens volens*, for the promotion of a private enterprise.

That a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the support of authorities. That he may decline to improve his land no one will doubt. Although the legislature may wisely determine that a certain use of his property will be highly beneficial to him, he has a right to judge for himself on points of this nature. The fact, therefore, in the case, that Marshall is benefited equally with the other owners by the making of this street, is of no importance. In Bagg's Case, Rolle's Reports, 224, it seems to be agreed by the court that a patent procured by some persons of a corporation shall not bind the rest, unless they assent. And in Brownlow's Reports, 100, there is this passage: "It was said that inhabitants of a town can not be incorporated without the consent of the major part of them, and an incorporation "without their consent is void."

In Comberbach 316, Holt, speaking of a new charter made to the city of Norwich by Henry IV and confirmed by Charles II, says the new charter had been void, if the corporation had refused it, but when they accept it, and put it in execution, it is good.

If these principles were correct in England in times when prerogative ran high, and the crown or the parliament could not force charters or patents upon the subject without his assent, surely in this free country, where the legislature derives its power from the people, such authority can not be contended for.

It being then the opinion of the court that this act is of a nature to require the assent of Marshall, either express or implied, before it can operate upon him, it is necessary to inquire into the second point, viz., whether the facts agreed upon in this case furnish evidence of such assent.

It is contended that the act itself, as it contains Marshall's name,

furnishes such evidence, since it must be presumed that the legislature were satisfied on this point before they passed the act.

This argument would have great weight, if its force were not impaired by the facts stated in the case. It appearing that Marshall did not sign the petition; that he did not, in word or writing, assent to it, or to the act founded upon it; that he did not attend before the committee, and that in the only transaction, in which he noticed the corporation, he protested against its authority over him, the presumption arising from his name being in the act is weakened, if not destroyed.

It is then said that, public notice having been given of the hearing intended by the committee, his silence is evidence of his tacit assent to the passage of the act. As we are bound to presume everything in favor of the doings of the legislature, we should think this a strong, if not a conclusive argument, if the notice given had been such as necessarily to signify to Marshall that he was to be included in the act prayed for. But on perusing the petition, which probably was published in the papers, we find nothing in it from which we could infer that his property or rights were to be affected in the manner contemplated by this act. He may be considered as notified that a street was intended to be built over his ground: and all that he could infer from this was that so much of his land as the street would pass over would be taken for this purpose, and that he would receive indemnity for it in the usual way, and that any opposition to it would be unavailing. He certainly could never have understood that it was intended to make him a member of the corporation without his consent. There is therefore no evidence, even of a tacit consent, before the passing of the act, and his conduct, after it passed, amounts to a direct disavowal of all the doings of the corporation, as they respected him or his property.

Upon the whole, therefore, we are of opinion that the act, under which the plaintiff sets up his title, could not bind Marshall without his assent: that he, having uniformly, whenever opportunity occurred, signified his dissent, is not a member of the corporation it created, was not liable to their assessments, and therefore the sale of his land was without authority of law and is void. * * *

Plaintiff non-suit.

Note. 1. While the granting of a charter is the enactment of a law, it is a law of a peculiar character; it is one made to take effect upon any one only after its *acceptance* by those to whom, or for whose use, it is granted. It does not become binding upon them or any one till accepted, but when accepted by the grantees it then becomes the law of the corporate existence, binding upon, not only those who accept, but also upon all others who may have any dealings with or be affected by the existence of the corporation thereby created. It then becomes a law of the state, the same as any other law, and the maxim that "ignorance of the law excuses no one," applies in this case as in all others, not only to the corporators and members, but others as well. Not only this, but after its acceptance it becomes an executed grant upon a condition subsequent—*i. e.*, that it will be used properly under penalty of forfeiture for abuse—but otherwise not the subject of revocation or amendment without consent of the grantees, unless the power to do so is reserved at the time of

the grant. See *infra*, cases on the subject, acceptance of the charter, contracts contained in the charter, pp. 409, 707.

See 1765, Rex v. Chancellor of Cambridge, 3 Burr. 1661; 1787, Rex v. Amery, 1 T. R. 575; 1789, King v. Passmore, 3 T. R. 240; 1819, Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, *infra*, p. 708; 1820, Lincoln, etc., Bank v. Richardson, 1 Greenleaf (Me.) 79; 1825, Rex v. Westwood, 4 B. & C. 781; 1833, Fire Department v. Kip, 10 Wend. 266; 1840, Falconer v. Campbell, 2 McLean (U. S. C. C.) 196, *supra*, p. 287; 1840, Coffin v. Collins, 17 Me. 440; 1842, Bailey v. Mayor of N. Y., 3 Hill (N. Y.) 531; 1847, Haslett v. Wotherspoon, 1 Strob. Eq. (S. C.) 209; 1854, New Orleans J. & G. N. R. v. Harris, 27 Miss. 517; 1861, State v. Dawson, 16 Ind. 40, *infra*, p. 412; 1883, McKay v. Beard, 20 S. C. 156; 1885, Smith v. Silver Valley M. Co., 64 Md. 85; 1889, *Re* Metropolitan Transit Co., 111 N. Y. 588; 1891, Demarest v. Flack, 128 N. Y. 205; 1892, Welsh v. Plumas Co., 94 Cal. 368; 1896, Quinlan v. Houston, etc., Ry., 89 Tex. 356.

Sec. 64. (*b*) May be exclusive, but not so unless expressly made so. But even when made exclusive may be appropriated to a public use under the power of eminent domain, upon compensation being made.

THE PROPRIETORS OF THE PISCATAQUA BRIDGE v. THE NEW HAMPSHIRE BRIDGE ET AL.[1]

1834. IN THE SUPERIOR COURT OF THE JUDICATURE OF NEW HAMPSHIRE. 7 N. H. Rep. 35–72.

[Bill in chancery to restrain defendants from erecting a bridge across the Piscataqua river at any place between Nanny's Island and Walton's Point. In 1793 plaintiffs were incorporated to build a bridge between Bloody Point and Furbur's Ferry (as stated in the title), the preamble stating that a bridge at the place above named would be of public utility. The third section of the act authorized the bridge to be built anywhere between Bloody Point and Furbur's Ferry, inclusively, while the sixth section provided that the "exclusive right of building and maintaining a bridge across said Piscataqua river, anywhere between Walton's Point, so called, being easterly of Knight's or Bloody Point Ferry and Nanny's Island, so called, laying at the bottom of Great Bay, above Furbur's Ferry, be and the same is fully granted to said petitioners, and such as are or may be associated with them, and become proprietors, their heirs and assigns." In 1833, the defendants were incorporated with authority to build and maintain a bridge across the same river between Newington and Durham. Plaintiff's bridge was erected in 1794 between these towns. It was conceded that the place where the defendants proposed to erect this bridge was within the limits stated in the sixth section of plaintiff's charter, but not within the limits set forth in the title, preamble and third section.]

[1] Statement of facts abridged. Arguments omitted. Part of opinion omitted.

PARKER, J. * * * The answer admits that defendants are about to erect a bridge at the place specified, and claims a right so to do under the authority of the legislature, and we must, therefore, proceed to inquire whether its erection will infringe the rights of the plaintiffs, and be the means of such injustice to them as should be prevented by a writ of injunction.

It is objected, on the part of the defendants, that the charter of the plaintiffs does not give them such limits that the erection of a proposed bridge, by the defendants, will interfere with their exclusive rights. It is said that by the terms of their charter the plaintiffs had no right to build a bridge anywhere, except between Bloody Point and Furbur's Ferry, and that, taking the title of the act, together with the section cited, all the exclusive rights of the plaintiffs, if they have any beyond the place occupied by their bridge, must be limited to Bloody Point on the one hand and Furbur's Ferry on the other; that if they have any claim of right above Furbur's Ferry, it can be only a right to preclude others from building a bridge, not to build one themselves, that this can not be a franchise, and that their exclusive limits can not extend beyond the limits in which they might erect a bridge. And if this be the true construction of the plaintiffs' rights, the defendants allege that they can accomplish all they are attempting to do without any violation of the rights or franchises of the plaintiffs.

But we can not restrict the grant to the plaintiffs by the title and preamble of the act. If we find within the body of the act an express and unequivocal grant of powers and rights not mentioned in the title or preamble, we can not restrict the grant of those rights merely because the terms of such grant are more extensive than the terms of the title and preamble. 7 Pick. 455.

If the title had been an act to incorporate certain persons for the purpose of building a bridge at Fox Point, the place where the plaintiffs erected their bridge, and the act itself granted to the corporation, in explicit terms, the right to build between Walton's Point and Nanny's Island, the grant could not be construed to be of the right mentioned in the title alone.

The sixth section of the plaintiffs' charter gave them, in terms, the exclusive right of building and maintaining a bridge across the Piscataqua river, anywhere between Walton's Point and Nanny's Island; and there is, in this section, no reference to any other part of the charter by which this grant of power and right is to be restricted.

On the supposition that by the charter the plaintiffs were obliged to erect this bridge within the limits between Bloody Point and Furbur's Ferry, as specified in the third section, we see no reason, if the legislature may grant exclusive rights, to doubt their power to grant to the plaintiffs exclusive limits, connected with the grant of their bridge even beyond the limits in which their bridge must be erected.

Such right of exclusion might be essentially necessary to ensure the erection and maintenance of the bridge, notwithstanding the bridge itself might be required to be erected within smaller limits, or at a definite place—and if so it was competent for the legislature to make

such a grant, attached to the grant of the bridge, if they might lawfully grant any exclusive limits.

It might, perhaps, admit of question whether the sixth section did not give the plaintiffs power to erect their bridge anywhere within the exclusive limits designated in that section, but this is not material to the present case.

It is further contended that the plaintiffs' charter gave them only the exclusive right of selecting a site for their bridge within certain limits, and that, having made their selection and erected their bridge, the place of erection becomes thenceforth the only exclusive right which they can claim under their charter.

But we can not adopt this construction of the grant, not only because such are not the terms in which the grant is made, but because it is apparent that such construction would defeat the object which must have been in contemplation in procuring and making the grant of an exclusive right.

The charter of the plaintiffs, then, confers upon them by its terms the exclusive right of building and maintaining a bridge between Walton's Point and Nanny's Island, and it is conceded that these limits cover the whole ground upon which the defendants claim a right to erect their bridge.

The next question is whether this was a constitutional and valid grant.

The answer alleges that at the time of this grant one Levi Furbur had a right of ferry within those limits; that no compensation was provided for Furbur, and that the grant is unconstitutional and void.

That Furbur was in the occupation of a ferry at the time of the grant of the plaintiffs, which was within the exclusive limits granted to them, seems to be conceded. What his right was, or how it originated, does not appear.

There is nothing to show that his ferry was not set up by him without any authority.

On the supposition that he occupied under a grant, it is not to be inferred of course that the grant extended beyond the place he occupied.

If Furbur had had the grant of a ferry, generally, we should pause before holding that the legislature could not grant a bridge, or even another ferry, so near as to be consequentially injurious to him. Upon this subject different opinions have been entertained; *and it may be well questioned whether the grantee of a ferry, or of a right to erect and maintain a bridge at a particular place without any terms of exclusion in the grant, can set up that right in avoidance of any other grant which is not directly injurious in its operation, but injurious merely in its remote consequences by diverting travel and tolls.* Callender v. Marsh, 1 Pick. 432.

It would seem to have been the understanding in this state, at least, that if the party intended to secure himself from competition of this character he must obtain a provision to that effect in his grant; and if no such provision is found, it may well be held that the grant was

taken with a reliance on the wisdom and discretion of the legislature to protect the grantee from injurious competition, by refusing to authorize any other enterprise of a similar character in the immediate vicinity, unless required by an imperious necessity; and with an assent on the part of the grantee that, whenever the legislature should deem it expedient, they might make other grants remotely affecting the former, so long as the right and privilege conferred by the terms of the grant were not infringed. But it is not important to settle that question here.

If it was shown that Furbur had an exclusive right of ferry within certain limits, we are not prepared to hold that the legislature might not lawfully grant a right to erect a bridge within those limits if the *locus in quo* occupied by him for his ferry was not taken, and he was left to the enjoyment of an exclusive right of ferry as before.

The erection of a bridge near his ferry might be consequentially injurious to him. It might deprive him of the profits of his ferry; and yet if his right of ferry was not infringed, how could the act be held to be unconstitutional?

The grant of an exclusive right of ferry is certainly not an exclusive right of all modes of transportation and conveyance.

Whatever Furbur's rights may have been, he does not appear to have complained of the erection of the plaintiffs' bridge; and whether they purchased his consent, or he abandoned his ferry without, the defendants are in no way connected with him, nor would the state, by an extinguishment of his right of ferry, gain a right to grant a bridge within the exclusive limits for a bridge already granted to the plaintiffs; although the legislature might perhaps for that reason grant another ferry at the same place.

It is further contended that the legislature which granted the charter of the plaintiffs' had no power to grant such an exclusive right, and that the act, therefore, so far as it purports to give exclusive limits, is void.

By the constitution of this state, full power and authority are given and granted to the general court "from time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of the state," etc. N. H. Laws 7.

There is certainly no express provision of the constitution authorizing, in so many words, a grant of this character. It is equally certain that there is no express prohibition of such an act. "When," says Chief Justice Kent, "the people erect a single entire government, they grant at once all the rights of sovereignty. The powers granted are indefinite and incapable of enumeration. Everything is granted that is not expressly reserved in the constitutional charter, or necessarily retained as inherent in the people." Livingston v. Van Ingen, 9 Johns. 574.

It will not be necessary to resort to any principle so broad as this to show that the legislature may make a grant of this character.

The constitution nowhere gives the legislature, in terms, the power to make a grant of land, or a charter of incorporation, or to confer a right to make bridges, turnpikes or canals, but such power has always been exercised, and no one doubts the right to make such grants. Fletcher v. Peck, 6 Cranch 128.

If this is conceded, the legislature may certainly make exclusive grants.

They may grant land in fee-simple, and the grantee will have an exclusive right. "*Cujus est solum ejus est usque ad coelum, et ad inferos*"—and he has this to him, and his heirs and assigns forever. Nothing can well be imagined more exclusive than this.

They may grant a bridge across a navigable river. No one can justify such erection without a grant. But such grant is necessarily exclusive to a certain extent. So far as the structure itself extends, so far the right must be exclusive. No one will contend that a subsequent legislature could regard such grant as void, and for that reason authorize the building of another upon the same foundation, or one which should occupy a part of the space already in the possession of the grantee.

The legislature then has power to grant a right to build and maintain a bridge, and the right will be exclusive to the extent occupied by the bridge, which may be of greater or less dimensions, according to the grant.

What limits the power of the legislature to the positions occupied by the wood and stone used in the construction of the work?

If the legislature may grant a right which will be exclusive to the extent of forty feet or sixty feet, or what number of feet or rods, shall we fix the limits of the power so that all beyond is void?

If it be necessary, in order to effect the object, that the grant should be exclusive to the usual width of the bridge, it may be equally necessary to the accomplishment of the purpose, that the limits should be still more extensive. It may be necessary to lay the foundation much broader. It may be necessary to erect works above and below for the preservation of the structure.

If the legislature may grant the right to build the bridge, and may grant exclusive power over space sufficient for its erection, because otherwise the grant could not be carried into effect, why may they not grant such power over space sufficient in other respects to insure its erection? Why may they not make a grant of such extent that the grantees will think the prospect of remuneration sufficient to induce them to undertake the work?

Again the legislature may undoubtedly grant with reference to the preservation of the bridge. Such is one of the objects in granting a toll. If they may grant powers and rights with a view to preserve it from floods, by the erection of works of security above or below; and if they may grant tolls in order to preserve it from decay, why

may they not extend the exclusive right so far that these tolls will furnish adequate means for keeping it in repair?

It is not our province to judge how extensive the grant to the plaintiffs ought to have been. It was said in the argument that the necessity of the act authorizing the defendants to erect a bridge is conclusively proved by the grant itself—that the court are not to inquire into that necessity. And so of the plaintiffs' exclusive limits—the necessity of their extent in order to effect the object was for the consideration of the legislature and not for us.

Charters with exclusive privileges have been repeatedly granted here and elsewhere. 9 Wheat. 97, note a. They have been deemed necessary to the promotion of enterprises of public utility, and have in many instances operated greatly to the convenience of the community, as the means of accomplishing public improvements which would not otherwise have been undertaken, or must have been delayed to a much later period.

The right to make such exclusive grants has been supported by some of the most eminent counsel in the United States, and has not been contested by others who would not have failed to deny it had it been deemed of a questionable character. It has received the sanction of some of the most learned tribunals in the Union, and we see no reason to doubt the soundness of the principle. Proprietors of Charles River Bridge v. Warren Bridge, 7 Pick. 393, 440, 448, 456, 465, 473, 476, 492, 519; Livingston v. Van Ingen, 9 Johns. 525, 551, 559, 563, 573, 584; Ogden v. Gibbons, 4 Johns. C. R. 150; 17 Johns. 488; Gibbons v. Ogden, 9 Wheat. 74, 143.

It has not been contended that there is anything in the provision of the constitution of the United States authorizing congress to regulate commerce, or in any act of congress which militates, in any degree, with the power of granting an exclusive right of building a bridge within the territory of a state, and there seems to be no ground for any such supposition. North River Steamboat Co. v. Livingston, 3 Cowen 733, 754, 9 Wheat. 19, 203, 235; The People v. Babcock, 11 Wendell 590; 2 Peters S. C. R. 245.

It has been urged in the argument that if the legislature may grant exclusive rights of this character, a legislature opposed to manufactures, to internal improvements or to banking might grant a small cotton factory, with the exclusive right of manufacturing within the state, or a short railroad or a single bank, with exclusive privileges, and the public thus suffer great injury.

It will be in time to consider whether grants of such a character are within the constitutional exercise of the legislative power and whether they may or may not be avoided, when a case is presented to us in which it is apparent that a fraud must have been practiced in obtaining the grant, or the circumstances under which it was made show that it was merely colorable, and intended to effect other purposes than those which appear upon the face of it.

There is nothing in this case to lead to a supposition that this grant was not fairly obtained—that the public good did not require a grant

of the powers and rights contained in the charter—or that the consideration on the part of the grantees, in providing a great public highway for the convenience of the citizens, was not fully adequate to all the rights and privileges they received. It appears that the grantees did not overreach the legislature. The enterprise was one of great public utility; and while the community have had all the benefit which was contemplated from the grant, the grantees, it is not denied, were subjected to great loss—the expenditure far exceeding the estimates.

Cases may exist where, owing to a change in the population, business and intercourse of the country, the public interest may require the opening of new avenues within the limits of such exclusive grants, and in which the individual right should be made subservient to the public use; but this may be done without a violation of the public faith. Whatever the public requires they are able to pay for—and it is not for the public interest that the grants of the government should be held good so long only as there is no desire to interfere with them—good while they are onerous to the grantee, and invalid when others may wish to participate in the benefits derived from them.

It is argued that the only pretended right of the plaintiffs is a promise not to give liberty to others to build a bridge; but we do not view it in that light. The charter of the plaintiffs contains a grant of a franchise—an incorporeal hereditament. The grant of an exclusive right is part of that franchise—granted in connection with their right to build a bridge, and in aid of that right—holden with that right—capable of being used by the erection of a bridge elsewhere than in its present location—may be attached with the rest of the franchise, and taken on execution—and under it the plaintiffs may grant a license to build a bridge within those limits to any one who has obtained a grant of authority from the legislature to erect such bridge.

The plaintiffs have a property in their exclusive grant and it is not a mere stipulation on the part of the legislature that no other liberty to erect a bridge shall be granted.

The plaintiffs then having an exclusive grant to the extent set forth in their bill, the next inquiry is, whether the defendants, by virtue of their charter, can lawfully proceed to erect another bridge within those limits?

It is urged that if the charter of the plaintiffs is a contract, it is subject to the implied condition of yielding to the public necessity and convenience—that if their grant be property, it may, like other property, be taken for public use, and that although no compensation is provided here, that does not make the grant to the defendants void, but the plaintiffs may have an action.

The charter of the defendants is not unconstitutional or void. Of itself it impairs no rights. As a grant to the individuals named in it to be a corporation, it is conceded to be good. As against the public, it contains a valid grant of a right to build a bridge and to take tolls, and if the defendants can agree with the plaintiffs, we see no objection with their proceeding under their charter, and enjoying all the privileges it purports to confer.

If the charter itself was an unconstitutional act, it would be wholly void, and the defendants could not rightfully build a bridge and demand tolls, on purchasing of the plaintiffs a right or license to erect one within their limits, which it is admitted they might do.

But can they lawfully proceed to erect such bridge without the consent of the plaintiffs?

We are of opinion that if the charter of the defendants had made proper provision for a compensation to the plaintiffs, the legislature might have authorized the building of another bridge within their exclusive limits, even without their consent.

In such case the grant itself would furnish plenary evidence that the public interest required the taking of private property for public use; and we see no objection to taking a part of the plaintiffs' franchise.

That franchise, as we have said, is property. "No part of a man's property shall be taken from him or applied to public uses, without his own consent, or that of the representative body of the people." N. H. Bill of Rights, Art. 12.

This has always been understood necessarily to include, as a matter of right, and as one of the first principles of justice, the further limitation, that in case his property is taken without his consent, due compensation must be provided. 1 Black. Com. 139; Gardner v. Village of Newburgh, 2 Johns. C. R. 166, and authorities there cited.

It is not supposed here that even the consent of the representative body of the people could give authority to take the property of individual citizens for highways, bridges, ferries and other works of internal improvement without the assent of the owner, and without any indemnity provided by law. Such a power would be essentially tyrannical and in contravention of other articles in the bill of rights.

This defense is not attempted to be supported upon any such principle.

But if adequate compensation is provided, in a proper manner, it is admitted that private property may be taken without the special consent of the owner in each particular case.

No distinction is made in the constitution between property of one description and that of another; and if a franchise is property we do not discover upon what ground it claims an exemption from the same liabilities to which other property is subjected.

If the government had been the owner of the land along the Piscataqua river, and had granted to the plaintiffs a tract of land co-extensive with their exclusive limits, the legislature might, afterwards, have authorized the taking of a portion of the land so granted, making provision for compensation to the grantee—notwithstanding the exclusive nature of the grant.

If instead of a corporeal hereditament, the legislature have granted an incorporeal hereditament of such a nature that it may afterwards be necessary that the property, or a part of it, be taken for public use, why is not that subjected to the public servitude, and in the same

manner? There seems to be no substantial difference between the two which requires the adoption of a different rule in this respect.

Had the legislature granted merely the right to build and maintain a bridge from point to point, and take tolls, and the public necessities afterward required that a portion or even the whole of that bridge should be taken for other public purposes, is there any question that this might have been done, if due compensation was provided for the owners? We think not. 7 Pick. 459, 500. Yet, as has been before stated, the grantees would most unquestionably have had an exclusive right in their bridge and tolls. Where, then, is the difference between a grant exclusive in its effect, and one exclusive in its terms? The latter is no more than exclusive.

If the grant had been of the "exclusive" right of building a bridge from point to point, without any extended limits, the property of the bridge when built would be no more exclusive, nor the right more exclusive than it would be if the grant had been made without the use of the term "exclusive;" and if the property is subject to be taken for public use in the one case it must be so in the other. If these extended limits of exclusion are added, how does that change the nature of the case?

If the grant amounts to an extinguishment of the right of the legislature to bestow the same identical franchise upon another corporate body, and implies a contract not to reassert the right to grant the franchise to another, or to impair it (4 Wheat. 658, 682), there is the same extinguishment of the right of the grantor, and the same implied contract not to reassert that right in a grant of lands. 6 Cranch 137. *The grantee of a fee-simple takes, under a contract, an absolute estate in some respects, but subject to an implied condition or limitation, by which the lands may afterwards be taken for public use—for turnpikes, railroads, canals, bridges, etc., whenever the public necessities demand it; and a "grant of franchises is not in point of principle distinguishable from a grant of any other property."* 4 Wheat. 684.

The grant under which the plaintiffs took this property is admitted to be a contract, and that contract is inviolable. The legislature can not annul that contract, or in any way impair its obligation. The plaintiffs have taken and received all the legislature contracted to give. It is an executed contract (4 Wheat. 690), and the plaintiffs entitled to be protected in the enjoyment of the property acquired under it, to as great an extent as they are protected in the enjoyment of any other species of property.

It does not impair that contract to hold that the property acquired under it may be taken for public use—that it is liable to be subjected to the public servitude and the public burdens. Fletcher v. Peck, 6 Cranch 145; Green v. Biddle, 8 Wheat. 89, 101; Providence Bank v. Billings, 4 Peters S. C. R. 563.

The grant contains no covenant, in terms, that the state will never grant another bridge within those limits, nor do we think that any such covenant is to be implied, and of course no obligation to that

effect is imposed. Sturgis v. Crowninshield, 4 Wheat. 197; Jackson v. Lamphire, 3 Peters 289.

The terms and object of the grant are satisfied without any such stipulation. The grantees have all the state professed to grant—the exclusive right. They have a property in this, and no part of it can be taken from them except for public use, and upon adequate compensation being made.

If a grant of a franchise is like other grants of property, why should a covenant be implied extending the right of property in a franchise of this character beyond the rights of the holders of other property, and enabling the grantees to resist all public improvements, and deny all public wants entirely, or until such compensation as they please to demand shall be made to them?

When the legislature shall have granted land, with a covenant that no highway, canal or railroad shall ever be made through it,—or a bridge, with a stipulation that no other bridge shall ever be erected within a certain distance, it may deserve inquiry whether such a contract is within the scope of its constitutional power?—whether the right to provide for the public necessities, and to take property for public use whenever those necessities require it, making therefor an adequate compensation, are not inherent rights of sovereignty which no legislature can part with or control by any stipulation so as to bind the people or their successors who represent the people?

How far the case, New Jersey v. Wilson, 7 Cranch 164, may countenance the supposition that the legislature may even make a contract of that character, need not be considered. It may be remarked that the question, whether the legislature had the power to make a contract which would bind the state not to tax the lands after they came into the possession of the citizens, does not seem to have been brought into discussion. But it must have been involved in the decision, the inquiry being whether the act of exemption was a contract.

Whether upon reconsideration the principle of that case can be supported, and if it may, whether it is to be extended beyond the decision itself, we do not inquire. 4 Peters' S. C. R. 561.

We conclude, then, that the legislature might lawfully authorize the taking of a portion of the plaintiffs' franchise for public use, making a just compensation; but have they done so in the present instance?

It is not pretended that the defendants' charter provides for any indemnity to the Piscataqua Bridge corporation; and the position that the defendants may take their property because the plaintiffs will have a right of action can not be supported.

Had the plaintiffs seen fit to suffer their property to be taken, and sought redress for the injury by action, it might have been sustained; but this is not the compensation intended by the law when property is taken for public use. Gardner v. The Village of Newburgh, 2 Johns. C. R. 162; Perry v. Wilson, 7 Mass. 393; Callender v. Marsh 1 Pick. 430; Proprietors of Charles River Bridge v. Warren Bridge, 6 Pick. 404.

It is not by way of damages to be obtained in an action for an in-

jury done that the party is entitled to be indemnified for property thus lawfully taken.

There is a *dictum* in Stevens v. The Proprietors of Middlesex Canal, 12 Mass. Rep. 408, implying that the act of taking may be lawful, and yet an action sustained for the injury, but this evidently had not been fully considered. 1 Pick. 430, 435. Such a proposition may be said to be *felo de se.*

The plaintiffs have a grant of certain exclusive limits. The defendants claim a right to erect a bridge within those limits, upon the ground that their charter give them a right to erect such bridge, and that the plaintiffs may have compensation for the injury done to them by a suit at law. But if the defendants have a right to erect a bridge, what wrong or injury is done? If the plaintiffs might have an action on the case for the injury, which was the form in Chadwick v. The Proprietors of Haverhill Bridge, cited in support of the position, that negatives the idea of a right. It presupposes an interference contrary to law. The legislature can not empower any one to do a wrong, and a right to take by wrong would be a solecism. So far as the defendants may act lawfully under their charter, they will not subject themselves to an action for an injury. So far as they can not lawfully act, they ought to refrain from acting.

Whenever lawful authority is given to take property for public use, the act of taking is justifiable. There is no injury to the rights of the party, and no action as for a *tort* can accrue. Recompense is made for what is legally taken, and the party can not complain that a wrong is done, for his property has been taken according to the laws of the land.

It might have been sufficient, in this case, to have said that the charter of the defendants does not purport to give them any right to interfere with the property of the plaintiffs without their consent. It authorizes them to purchase real estate, and hold it in fee-simple. It does not authorize the taking of any property whatever, except by agreement with the owners; and there is, of course, no evidence of any public necessity requiring that the property of others should be taken, except by their own consent.

The defendants, therefore, in attempting to build their bridge without the consent of the plaintiffs, can not, for this reason, rely upon their charter; and we might have waived any discussion of some of the questions raised in the case; but the interest of these parties, and perhaps of others, rendered it expedient for us to consider all the points which have been suggested.

It has been said that equity will not relieve against a statute. The authority cited only goes to establish the position, that equity can not disregard the provisions of a valid law, and relieve against it. Of this there is no question. It is not pretended that we can restrain the defendants from doing a lawful act.

But if the principle was, that, sitting as a court of equity, we would not decide in this mode against the constitutionality or validity of a statute or grant, which we find nowhere sustained, there is nothing in

the facts in this case that would bring us in conflict with such a principle.

The question is, whether we shall enjoin the defendants from doing an act under color of their charter, which it does not authorize them to do, and we are all of opinion that the right being clear, the relief sought by the bill must be granted, and an injunction issued to restrain the defendants from building a bridge at any place within the limits of the exclusive grant to the plaintiffs, without their consent.

Injunction issued.

Note. See 1835, Dyer v. Tuskaloosa Bridge Co., 2 Porter (Ala.) 296, 27 Am. Dec. 655; 1837, Charles River Bridge v. Warren Bridge, 11 Peters (U. S.) 420; 1840, Tuckahoe Canal Co. v. Tuckahoe, 11 Leigh (Va.) 42, 36 Am. Dec. 374; 1845, Enfield Toll Bridge Co. v. H. & N. H. R. Co., 17 Conn. 40, 454, 42 Am. Dec. 716, note 728, 44 Am. Dec. 556; 1848, West River Bridge v. Dix, 6 How. (47 U. S.) 507, 531; 1859, LaFayette Plank Road Co. v. N. A. & S. R., 13 Ind. 90, 74 Am. Dec. 246; 1863, Bridge Proprietors v. Hoboken, 1 Wall. (68 U. S.) 116; 1865, The Binghampton Bridge, 3 Wall. (70 U. S.) 51; 1872, Eastern R. v. Boston, etc., R., 111 Mass. 125, 15 Am. Rep. 13; 1877, Hudson v. Cuero Land & Em. Co., 47 Tex. 56, 26 Am. Rep. 289; 1885, Louisville Water Works Co. v. Rivers, 115 U. S. 674; *infra*, p. 1416; 1885, New Orleans Gas L. Co. v. L. L. & H. P. Co., 115 U. S. 650; 1888, Appeal of Pittsburgh J. R., 122 Pa. St. 511, 9 Am. St. Rep. 128; *infra*, p. 1342; 1888, Rockland Water Co. v. Camden & R. W. Co., 80 Maine 544, 25 Am. & Eng. C. C. 423.

ARTICLE III. CONSTITUTIONAL LIMITS.

(*a*) In the National Constitution.

Sec. 65. (1) On congress.

LUXTON[1] v. NORTH RIVER BRIDGE COMPANY.

1894. IN THE SUPREME COURT OF THE UNITED STATES. 153 U. S Reports 525–534; 14 Sup. Ct. Rep. 891.

This was a petition by the North River Bridge Company, incorporated by the act of congress of July 11, 1890, ch. 669, for the appointment under that act of commissioners to assess damages for the appropriation and condemnation, for the approaches to its bridge across the Hudson or North River, between the states of New York and New Jersey, of land of Sarah Luxton in the city of Hoboken and the county of Hudson, in the latter state. Upon the order of the circuit court, appointing commissioners, she sued out a writ of error, which was dismissed by this court, at the last term, because that order was not a final judgment. 147 U. S. 337. The commissioners afterwards made an award and report, assessing her damages at the sum of $2,000, to the acceptance of which she objected, upon the grounds that the act of congress was unconstitutional, and particularly that congress could not confer the right of eminent domain upon the company. But the court overruled the objection, and adjudged that the award be approved and confirmed, and remain on record in the office of its clerk, and that, upon payment or tender of the sum awarded, the company might

enter upon and take possession of the land for the purpose for which it was condemned. She thereupon sued out this writ of error.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The validity of the act of congress incorporating the North River Bridge Company rests upon principles of constitutional law, now established beyond dispute.

The congress of the United States being empowered by the constitution to regulate commerce among the several states, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end. As said by Chief Justice Marshall, "the power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which can not be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished." Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the states. McCulloch v. Maryland, 4 Wheat. 316, 411, 422; Osborn v. Bank of United States, 9 Wheat. 738, 861, 873; Pacific Railroad Removal Cases, 115 U. S. 1, 18; California v. Pacific Railroad, 127 U. S. 1, 39. Congress has likewise the power exercised early in this century by successive acts in the case of the Cumberland or National Road from the Potomac across the Alleghenies to the Ohio, to authorize the construction of a public highway connecting several states. See Indiana v. United States, 148 U. S. 148. And whenever it becomes necessary for the accomplishment of any object within the authority of congress, to exercise the right of eminent domain and take private lands, making just compensation to the owners, congress may do this with or without a concurrent act of the state in which the lands lie. Van Brocklin v. Tennessee, 117 U. S. 151, 154, and cases cited; Cherokee Nation v. Kansas Railway, 135 U. S. 641, 656.

From these premises, the conclusion appears to be inevitable that, although congress may, if it sees fit, and as it has often done, recognize and approve bridges erected by authority of two states across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water. 1 Hare's Constitutional Law, 248, 249. See acts of July 14, 1862, ch. 167, 12 Stat. 569; February 17, 1865, ch. 38, 13 Stat. 431; July 25, 1866, ch. 246, 14 Stat. 244; March 3, 1871, ch. 121, § 5, 16 Stat. 572, 573; June 16, 1886, ch. 417, 24 Stat. 78.

The judicial opinions cited in support of the opposite view are not,

having regard to the facts of the cases in which they were uttered, of controlling weight.

Mr. Justice McLean, indeed, in an opinion delivered by him in the circuit court, by which a bill by the United States to restrain the construction of a bridge across the Mississippi River was dismissed, no injury to property of the United States and no substantial obstruction to navigation being shown, and there having been no legislation by congress upon the subject, took occasion to remark that "neither under the commercial power, nor under the power to establish post roads, can congress construct a bridge over a navigable water;" that "if congress can construct a bridge over a navigable water, under the power to regulate commerce or to establish post roads, on the same principle it may make turnpike or railroads throughout the entire country;" and that "the latter power has generally been considered as exhausted in the designation of roads on which the mails are to be transported; and the former by the regulation of commerce upon the high seas and upon our rivers and lakes." United States v. Railroad Bridge Co., 6 McLean 517, 524, 525.

The same learned justice repeated and enlarged upon that idea in his dissenting opinion in Pennsylvania v. Wheeling Bridge, 18 How. 421, 442, 443, where, after the Wheeling Bridge, constructed across the Ohio river under an act of the state of Virginia, had by a decree of this court, at the suit of the state of Pennsylvania, been declared to be in its then condition an unlawful obstruction of the navigation of the river, and in conflict with the acts of congress regulating such navigation, and therefore ordered to be elevated or abated, congress passed an act declaring the bridge to be a lawful structure in its then position and elevation, establishing it as a post road for the passage of the mails of the United States, authorizing the corporation to have and maintain the bridge at that site and elevation, and requiring the captains and crews of all vessels and boats navigating the river to regulate the use thereof, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of the bridge. Act of August 31, 1852, ch. 111, secs. 6, 7, 10 Stat. 112.

But the majority of this court in that case held that "the act of congress afforded full authority to the defendants to reconstruct the bridge." 18 How. 436. Mr. Justice Nelson, in delivering its opinion, said: "We do not enter upon the question whether or not congress possess the power under the authority of the constitution to establish post offices and post roads, to legalize this bridge, for conceding that no such powers can be derived from this clause, it must be admitted that it is, at least, necessarily included in the power conferred to regulate commerce among the several states. The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation; and that power, as we have seen, has been exercised consistently with the continuance of the bridge." 18 How. 431. And Mr. Justice Daniel, in a concurring opinion, sustaining the validity of the act of congress, said:

"They have regulated this matter upon a scale by them conceived to be just and impartial, with reference to that commerce which pursues the course of the river, and to that which traverses its channel, and is broadly diffused through the country. They have at the same time, by what they have done, secured to the government and to the public at large the essential advantage of a safe and certain transit over the Ohio." 18 How. 458. A similar decision was made in the Clinton Bridge, 10 Wall. 454. See also Miller v. New York, 109 U. S. 385.

In the cases cited at the bar, of The Passaic Bridges, 3 Wall. App. 782, decided by Mr. Justice Grier in the circuit court, and of Gilman v. Philadelphia, 3 Wall. 713, and Wright v. Nagle, 101 U. S. 791, in this court, the bridge in question had been erected under authority of a state, and was wholly within the state, and no question arose or was considered as to the power of congress, in regulating interstate commerce, to authorize the erection of bridges between two states.

But in Stockton v. Baltimore and New York Railroad, 32 Fed. Rep. 9, Mr. Justice Bradley, sitting in the circuit court, upheld the constitutionality of the act of congress of June 16, 1886, ch. 417, authorizing a corporation of New York and one of New Jersey to build and maintain a bridge, as therein directed, across the Staten Island Sound or Arthur Kill. 24 Stat. 78.

The reasons upon which the decision in that case rested were, in substance, the same as were stated by that eminent judge in two opinions afterwards delivered by him in behalf of this court, in which the power of congress, by its own legislation, to confer original authority to erect bridges over navigable waters, whenever congress considered it necessary to do so to meet the demands of interstate commerce by land, is so clearly demonstrated as to render further discussion on the subject superfluous.

In Willamette Bridge v. Hatch, 125 U. S. 1, in which it was held that section 2 of the act of February 14, 1859, ch. 33 (11 Stat. 383), for the admission of Oregon into the Union, providing that "all the navigable waters of the said state shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States," did not prevent the state, in the absence of legislation by congress, from authorizing the erection of a bridge over such a river, Mr. Justice Bradley, speaking for the whole court, said: "And although, until congress acts, the states have the plenary power supposed, yet, when congress chooses to act, it is not concluded by anything that the states, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of congress over the whole subject-matter, that the consent of congress is so frequently asked in the erection of bridges over navigable streams. It might itself give original

authority for the erection of such bridges, when called for by the demands of interstate commerce by land; but in many, perhaps the majority, of cases its assent only is asked, and the primary authority is sought at the hands of the state." 125 U. S. 12, 13.

In California v. Pacific Railroad, 127 U. S. 1, it was directly adjudged that congress has authority, in the exercise of its powers, to regulate commerce among the several states, to authorize corporations to construct railroads across the states as well as the territories of the United States; and Mr. Justice Bradley, again speaking for the court, and referring to the acts of congress establishing corporations to build railroads across the continent, said: "It can not at the present day be doubted that congress under the power to regulate commerce among the several states, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. *The power to construct or to authorize individuals or corporations to construct national highways and bridges from state to state is essential to the complete control and regulation of interstate commerce. Without authority in congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce.* This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products and the invention of railroads and locomotion by steam, land transportation has so vastly increased a sounder consideration of the subject has prevailed and led to the conclusion that *congress has plenary power over the whole subject.* Of course, the authority of congress over the territories of the Unites States, and its power to grant franchises exercisible therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction in the creation of the vast system of railroads connecting the east with the Pacific, traversing states as well as territories, and employing the agency of state as well as Federal corporations." 127 U. S. 39, 40.

The act of congress now in question declares the construction of the North River Bridge between the states of New York and New Jersey to be "in order to facilitate interstate commerce," and it makes due provision for the condemnation of lands for the construction and maintenance of the bridge and its approaches, and for just compensation to the owners, which has been accordingly awarded to the plaintiff in error.

In the light of the foregoing principles and authorities, the objection made to the constitutionality of this act can not be sustained.

Judgment affirmed.

Note. **National corporations.** See generally 16 Am. & Eng. Ency. 216; 24 Am. & Eng. R. Cas. 21; 21 Am. L. R. 258; Angell & Ames, §§ 72, 73;

Beach, §§ 3-6; Clark, p. 39, *et seq.*; Cook, § 1001; Elliott, § 28; Field, § 13; 1 Morawetz, § 9; Taylor, § 467; 1 Thompson, §§ 665-685.

1. *In the District of Columbia:* Chapter 15 of the Compiled Statutes of the District of Columbia relates to the formation of corporations within the District. The following are provided for: Institutions of learning, religious societies, benevolent, educational, etc., societies, manufacturing, agricultural, mining, mechanical, insurance, transportation, market, savings banks, cemetery associations, boards of trade, trust companies, insurance and vestries. This is under the constitutional provision giving congress exclusive legislative authority within the District. Art. i, § 8, cl. 17.

Such corporations may act in the states by their consent and that of congress. Hadley v. Freedman's Trust Co., 2 Tenn. Ch. 122; Williams v. Creswell, 51 Miss. 817. Congress has authorized a District insurance company to do business in the states, with their consent, 15 St. at L. 184; also authorizes National Trades' Unions with power to establish branches in the states, 1 Supp. R. S. 498 (1886). The Freedman's Saving & Trust Co. was authorized by 13 St. at L. 510; National Asylum for Disabled Volunteers, 14 St. at L. 10; Centennial Board of Finance, 17 St. at L. 203. Societies for benevolent purposes, R. S. §§ 546; 1 Supp. R. S. 425.

2. *In the Territories:* Congress has general legislative authority over the territories, and can, therefore, create corporations within the territories, or authorize the territorial legislatures to create corporations. It has provided for the territorial legislatures to do so by a general act. U. S. Const., art. iv, § 3, cl. 2; Rev. Stat., § 1889, *infra*, p. 332.

3. *In the States:* Substantially all the authorities upon this point are cited in the Luxton case. The U. S. bank was chartered in 1791, by 1 St. at L. 191, and in 1816, 3 St. at L. 266; the present national banking system was established in 1863 by 12 St. at L. 665; the Union Pacific Ry. in 1862, 12 St. at L. 489; Northern Pacific Ry., 1864, 13 St. at L. 365; Atlantic and Pacific Ry., 1866, 14 St. at L. 292; Texas and Pacific Ry. in 1871, 16 St. at L. 573, and 1872, 17 St. at L. 59. Sections 5263-5269, Revised Statutes, authorize state incorporated telegraph companies to construct their lines on all post roads. See Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1, *infra*, p. 326.

Such a corporation is not a foreign corporation within any state. 1881, Commonwealth v. Texas, etc., R., 98 Pa. St. 90; 1882, Market National Bank v. Pacific, etc., Bank, 64 How. Pr. (N. Y.) 1; 1879, Eby v. Northern Pac. Ry. Co., 36 Leg. Int. 164, s. c. 6 Weekly N. C. 385.

Such corporation may exercise the power of eminent domain within the states. 1875, Kohl v. United States, 91 U. S. 367; 1890, Searl v. Dist. No. 2, 133 U. S. 553; 1890, Cherokee Nation v. R. Co., 135 U. S. 641; 1890, Ryan v. U. S., 136 U. S. 69; 1892, Bellaire v. R. Co., 146 U. S. 117.

Such corporation is exempt from state taxation or control, so far as the same might impair its efficiency as an instrument of the national government. 1869, National Bank v. Commw., 9 Wall. (U. S.) 353; 1869, Thomson v. Pacific R. R., 9 Wall. (U. S.) 579; 1873, Railroad Co. v. Peniston, 18 Wall. (U. S.) 5. But state taxation of national banks is provided for by U. S. Rev. Stats., § 5219.

A national corporation has a right to sue and be sued in the United States courts. 1897, Texas, etc., R. v. Cody, 166 U. S. 606; *infra*, p. 1098.

4. *To operate outside of the territory of the United States:* In 1889 congress chartered the Maritime Canal Company of Nicaragua (25 St. at L. 673). The company also has a charter from the state of Vermont. Beach Corp., § 6, n. 2, p. 10.

5. *Dissolution:* The constitutional provision (art. i, § 10, cl. 1) forbidding the states from passing any law impairing the obligation of contracts, does not apply to congress. Hence, congress may repeal a corporate charter created by itself or the territorial legislatures, prior to the territory becoming a state. 1890, Corporation of Church of Jesus Christ, etc., v. United States, 136 U. S. 1, *infra*, p. 906. But see 1878, United States v. Union Pacific Railroad Co., 98 U. S. 569, and 1878, The Sinking Fund Cases, 99 U. S. 700. But in the early bank charters, the creating congress pledged the faith of the

government not to repeal the charter before the charter period elapsed. See 1 St. at L. 191; 3 St. at L. 266.

Sec. 66. (2) On state legislatures.

PENSACOLA TELEGRAPH COMPANY v. WESTERN UNION TELEGRAPH COMPANY.[1]

1877. IN THE SUPREME COURT OF THE UNITED STATES. 96 U. S. Reports 1–24.

Appealed from the circuit court of the United States for the northern district of Florida.

In 1859 an association of persons, known as the Pensacola Telegraph Company, erected a line of electric telegraph upon the right of way of the Alabama and Florida Railroad from Pensacola, in Florida, to Pollard, in Alabama, about six miles north of the Florida line. The company operated the whole line until 1862, when, upon the evacuation of Pensacola by the confederate forces, the wire was taken down for twenty-three miles, and Cooper's Station made the southern terminus. In 1864 the whole was abandoned, as the section of the country in which it was situated had fallen into the possession of the United States troops.

On the 1st of December, 1865, the stockholders met, and it appearing that the assets of the company were insufficient to rebuild the line, a new association was formed for that purpose, with the old name, and new stock to the amount of $5,000 subscribed. A resolution was adopted by the new company to purchase the property of the old, at a valuation put upon it in a report submitted to the meeting, and a new board of directors was elected.

A meeting of the directors was held on the 2d of January, 1866, at which the president reported the completion of the line to Pensacola, and a resolution was adopted, authorizing the purchase of wire for its extension to the navy yard. The attorneys of the company were also instructed to prepare a draft for a charter, to be presented to the legislature for enactment.

On the 24th day of July, 1866, congress passed the following act:

"An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes.

"Be it enacted by the senate and the house of representatives of the United States of America in congress assembled, That any telegraph company now organized, or which may hereafter be organized, under the laws of any state in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States over and along any of the military or post roads of the United States which have been or may be hereafter declared such by act of congress, and over, under or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not

[1] Arguments and dissenting opinions of Justice Field and Hunt omitted.

to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"Sec. 2. And be it further enacted, That telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the postmaster-general.

"Sec. 3. And be it further enacted, That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association or person: *Provided, however*, That the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military or other purposes, purchase all the telegraph lines, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent disinterested persons, two of whom shall be selected by the postmaster-general of the United States, two by the company interested, and one by the four so previously selected.

"Sec. 4. And be it further enacted, That, before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the postmaster-general of the restrictions and obligation required by this act." 14 Stat. 221; Rev. Stat., § 5263, *et seq.*

All railroads in the United States are by law post roads. Rev. Stat., § 3964; 17 Stat. 308, § 201.

On the 11th of December, 1866, the legislature of Florida passed an act incorporating the Pensacola Telegraph Company, and granting it "the sole and exclusive privilege and right of establishing and maintaining lines of electric telegraph in the counties of Escambia and Santa Rosa, either from different points within said counties, or connecting with lines coming into said counties, or either of them, from any point in this (Florida) or any other state." The capital stock was fixed at $5,000, with privilege of increasing it to such an amount as might be considered necessary. The company was authorized to locate and construct its lines within the counties named, "along and upon any public road or highway or across any water, or upon any railroad or private property for which permission shall first have been obtained from the proprietors thereof." In this act all the stockholders of the new association which had rebuilt the line were named as corporators. No meeting of the directors was held until January 2, 1868, when the secretary was instructed to notify the

stockholders "that the charter drawn up by Messrs. Campbell & Perry, attorneys, as per order of board, January 2, 1866," had been passed.

On the 5th of June, 1867, the directors of the defendant, the Western Union Telegraph Company, a New York corporation, passed the following resolution, which was duly filed with the postmaster-general:

"*Resolved*, That this company does hereby accept the provisions of the act of congress, entitled 'An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes,' approved July 24, 1866, with all the powers, privileges, restrictions, and obligations conferred and required thereby; and that the secretary be, and he is hereby authorized and directed to file this resolution with the postmaster-general of the United States, duly attested by the signature of the acting president of the company and the seal of the corporation, in compliance with the fourth section of said act of congress."

In 1872 the property of the Alabama and Florida Railroad Company, including its right of way and railroad, was transferred to the Pensacola and Louisville Railroad Company; and on the 14th of February, 1873, the legislature of Florida passed an act, which, as amended February 18, 1874, authorized the last named company "to construct, maintain and operate a telegraph line from the Bay of Pensacola along the line of the said (its) road as now located, or as it may hereafter be located, and along connecting roads in said county to the boundary lines of the state of Alabama, and the said lines may connect and be consolidated with other telegraph companies within or without the state, and said company may pledge, mortgage, lease, sell, assign and convey the property appertaining to the said telegraph lines, and the rights, privileges and franchises conferred by this act, with full power in such assignees to construct, own and operate such telegraph lines, and enjoy all the privileges, rights and franchises conferred by this act, but in such case the said railroad company shall be responsible for the proper performance of the duties and obligations imposed by this act."

This was within the territory embraced by the exclusive grant to the Pensacola Telegraph Company.

On the 24th of June, 1874, the Pensacola and Louisville Railroad Company granted to the Western Union Telegraph Company the right to erect a telegraph line upon its right of way, and also the rights and privileges conferred by the acts of February, 1873 and 1874. The Western Union Company immediately commenced the erection of the line, but before its completion, to wit, July 27, 1874, the bill in this case was filed by the Pensacola Telegraph Company to enjoin the work and the use of the line, on account of the alleged exclusive right of that company under its charter. Upon the hearing, a decree was passed dismissing the bill, and this appeal was taken.

Mr. Chief Justice WAITE delivered the opinion of the court.

Congress has power "to regulate commerce with foreign nations and among the several states" (Const., art. i, § 8, par. 3), and "to

establish post-offices and post roads." (Const., art. i, § 8, par. 7.) The constitution of the United States and the laws made in pursuance thereof are the supreme law of the land. Art. vi, par. 2. A law of congress made in pursuance of the constitution suspends or overrides all state statutes with which it is in conflict.

Since the case of Gibbons v. Ogden (9 Wheat. 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of congress. Post-offices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of congress, because, being national in their operation, they should be under the protecting care of the national government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation.

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent. of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movements of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interests they have in charge. Under such circumstances, it can not for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of congress, certainly as against hostile state legislation. In fact, from the beginning, it seems to have been assumed

that congress might aid in developing the system, for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than thirty years ago, with money appropriated by congress for that purpose (5 Stat. 618), and large donations of land and money have since been made to aid in the construction of other lines. (12 Stat. 489, 772; 13 Stat. 365; 14 Stat. 292.) It is not necessary now to inquire whether congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that congress has power, by appropriate legislation, to prevent the states from placing obstructions in the way of its usefulness.

The government of the United States within the scope of its powers operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.

The state of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. This embraces the two western most counties of the state, and extends from Alabama to the Gulf. No telegraph line can cross the state from east to west, or from north to south, within these counties, except it passes over this territory. Within it is situated an important seaport at which business centers, and with which those engaged in commercial pursuits have occasion more or less to communicate. The United States have there also the necessary machinery of the national government. They have a navy-yard, forts, custom-houses, courts, post-offices, and the appropriate officers for the enforcement of the laws. The legislation of Florida, if sustained, excludes all commercial intercourse by telegraph between the citizens of the other states and those residing upon this territory, except by the employment of this corporation. The United States can not communicate with their own officers by telegraph except in the same way. The state, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other states, and to control the transmission of all telegraphic correspondence within its own jurisdiction.

It is unnecessary to decide how far this might have been done if congress had not acted upon the same subject, for it has acted. The statute of July 24, 1866, in effect, amounts to a prohibition of all state monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege. To this extent, certainly, the statute is a

legitimate regulation of commercial intercourse among the states, and is appropriate legislation to carry into execution the powers of congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.

It is insisted, however, that the statute extends only to such military and post roads as are upon the public domain; but this, we think, is not so. The language is, "Through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of congress, and over, under or across the navigable streams or waters of the United States." There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post roads, and the navigable waters of the United States. These are all within the dominion of the national government to the extent of the national powers, and are, therefore, subject to the legitimate congressional regulation. No question arises as to the authority of congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the constitution is not interfered with. Only national privileges are granted.

The state law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of congress. To that extent it is, therefore, inoperative as against a corporation of another state entitled to the privileges of the act of congress. Such being the case, the charter of the Pensacola Company does not exclude the Western Union Company from the occupancy of the right of way of the Pensacola and Louisville Railroad Company under the arrangement made for that purpose.

We are aware that, in Paul v. Virginia (8 Wall. 168), this court decided that a state might exclude a corporation of another state from its jurisdiction, and that corporations are not within the clause of the constitution, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." Article 4, section 2. That was not, however, the case of a corporation engaged in interstate commerce; and enough was said by the court to show that, if it had been, very different questions would have been presented. The language of the opinion is, "It is undoubtedly true, as stated by counsel, that the power conferred upon

congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. * * * This state of facts forbids the supposition that it was intended in the grant of power to congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations and corporations. * * * The defect of the argument lies in the character of their (insurance companies) business. Issuing a policy of insurance is not a transaction of commerce. * * * Such contracts (policies of insurance) are not interstate transactions, though the parties are domiciled in different states."

The questions thus suggested need not be considered now because no prohibitory legislation is relied upon, except that which, as has already been seen, is inoperative. Upon principles of comity, the corporations of one state are permitted to do business in another, unless it conflicts with the law or unjustly interferes with the rights of the citizens of the state into which they come. Under such circumstances, no citizen of a state can enjoin a foreign corporation from pursuing its business. Until the state acts in its sovereign capacity, individual citizens can not complain. The state must determine for itself when the public good requires that its implied assent to the admission shall be withdrawn. Here, so far from withdrawing its assent, the state by its legislation of 1874, in effect, invited foreign telegraph corporations to come in. Whether that legislation, in the absence of congressional action, would have been sufficient to authorize a foreign corporation to construct and operate a line within the two counties named, we need not decide; but we are clearly of the opinion that with such action and a right of way secured by private arrangement with the owner of the land, this defendant corporation can not be excluded by the present complainant.

Decree affirmed.

Sec. 67. (3) On territorial legislatures.

"Congress shall have power to make all needful rules and regulations respecting the territory belonging to the United States." Const. art. iv, sec. iii.

The Revised Statutes of the United States provide: "The legislative assemblies of the several territories shall not grant private charters or special privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing and other industrial pursuits, and for conducting the business of insurance, banks of discount and deposit (but not of issue), loan, trust and guarantee associations, and for the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries or any other benevolent, charitable or scientific association."[1]

[1] Revised Statutes of the United States, 1873-74 (§ 1889), as amended July 30, 1886, ch. 818, § 5 (24 St. 170).

Statute June 8, 1878, ch. 168 (20 St. 101) provided that the foregoing section should not be so construed as to prevent the territorial legislatures from creating municipal corporations either by a general or special act, subject to amendment or repeal at any time.

Note. Territorial charter is binding on the state legislature after the state is organized. 1822, State v. N. O. N. Co., 11 Martin (La.) 309; 1831, Williams v. Bank of Michigan, 7 Wend. (N.Y.) 539. But see, 1851, Myers v. Manhattan Bank, 20 Ohio 283.

(*b*) In the State Constitutions.

Sec. 68. (1) General and special laws, what are.

"The legislature shall pass no special act creating corporations or conferring corporate powers, but they shall provide by general law for the creation and formation of corporations, but all such laws shall be subject to amendment, alteration or repeal at the will of the legislature."

THE STATE, EX REL. JACOB J. VAN RIPER ET AL., v. CHARLES H. PARSONS ET AL.[1]

1878. IN THE SUPREME COURT OF JUDICATURE OF NEW JERSEY. 40 N. J. L. Rep. 1–11.

On demurrer.

By the charter of Jersey City, passed in 1871, provision was made for the appointment by the senate and general assembly, in joint meeting, of a fire board, and certain other municipal boards.

On March 6, 1877 (Laws 1877, p. 54), an act was passed entitled "An act concerning commissioners to regulate municipal affairs," which provided for abolishing all laws in reference to legislative commissioners, and terminating the offices of the legislative commissioners then in existence, and for substituting therefor new boards, to be elected by the people.

Under this latter act an election was held in Jersey City, and the defendants were elected members of the fire board in lieu of the legislative commissioners. There was no question made with respect to the fairness and formality of this election.

The present proceeding is an information in the name of the attorney-general, in the nature of a *quo warranto*, charging that the defendants usurp the office to which they were thus elected.

Argued at November term, 1877, before Beasley, chief justice, and Justice Depue, Van Syckel and Knapp.

The opinion of the court was delivered by BEASLEY, chief justice.

[1] Part of opinion relating to another point omitted.

The purpose of this proceeding is to test the constitutionality of the act of the legislature passed on the 6th day of March, in the year of 1877, entitled "An act concerning commissioners to regulate municipal affairs."

The law thus brought under our cognizance is composed of two sections, the first of which declares "that such parts of all public, special and local laws as provide for the appointment of commissions or commissioners, by the senate and general assembly of the legislature, in joint meeting, to regulate municipal affairs in any city in this state, be and the same are hereby repealed," and the second section provides "that in all cases where the above repealing section shall operate in any city in this state, there shall be substituted, in lieu of each of the existing boards of said commissions or commissioners, to exercise all the powers heretofore conferred upon such commissions or commissioners, a board to consist of six persons, namely, one shall be chosen by the electors in each aldermanic district in said city, who shall be a qualified voter of said city." The rest of this latter section consists of regulations touching the mode of canvassing the votes at the election thus authorized, or designating the terms of office and the salaries of the officers thus to be chosen.

Against this law thus summarized, the principal exception that has been urged is, that it is, in substance and effect, special and local, and consequently is in conflict with one of the recent amendments of the constitution of the state. The provision of the primary law thus invoked in clause 2, section 7 of article iv, and which, so far as relates to the present subject, is in these words, viz., "The legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say: * * * Regulating the internal affairs of towns and counties; appointing local officers or commissions to regulate municipal affairs," and, again, subsequently, in the same clause, the words are, "the legislature shall pass no special act conferring corporate powers, but they shall pass general laws, under which corporations may be organized and corporate powers of every nature obtained, subject, nevertheless, to repeal or alteration at the will of the legislature. * * *"

First, then, is this statute, obviously and upon judicial view of its contents, a local or special law?

In point of form it is manifest that this act does not belong to such a category. It imports generality of provision in all its parts; its title is general, embracing all commissioners appointed by the legislature to regulate municipal affairs, so, in its body, it repeals such parts of all public, special or local laws as provide for the appointment of such commissioners, and substitutes for such officers others, to be selected by the people. Upon the face of this law, therefore, the repealer is general, and the substitution of other agencies is equally so.

But it is said that, although such is the frame and aspect of this statute, still it must be regarded as local and special, as of necessity it can be applicable to but a few places of the state, inasmuch as it is well known that but few localities in the state have been subjected to

the rule of legislative commissions. This contention assumes the truth of the hypothesis that a law that embraces but a few localities, or a small number of objects, is not a general, but a special or local law. But I think there is a mistake in this. The term "general law" does not import universality in the subjects or operation of such law. The constitutional clause in question calls for the enactment, in this particular field of legislation, of general acts, but such so-called general acts are, for the most part, special and local in their effect and applicability, provided we put the widest possible signification on the terms special and local. But these two latter terms do not carry with them such a compass of meaning as this, as they stand in the clause of the constitution now under consideration. If such were their scope, they would render almost every attempt at useful legislation abortive. A law settling the methods by which all railroads should become incorporated would be special in the sense that it would be confined in its operation to but a single kind of corporation, and so a law would be local, by this same test, that should provide for the organization, under one system, of all the municipal governments in the state, as such a law would manifestly have a restricted effect with respect to locality. But who, conversant with the usage touching these terms, would venture the assertion that such statutes as these would not be general laws? All legislation is based of necessity on a classification of its subjects, and when such classification is fairly made, and the legislation founded upon it is appropriate to such classification, such legislation is as legitimate now as it would have been prior to the recent amendments to the constitution. My theory is, that *if a set of objects be fairly classified, a law embracing them will be a general one, and in all respects unobjectionable; but undoubtedly if the classification be illusive, being contrived with a view of escaping the constitutional restriction, it can lend no support to the legislation connected with it.* As, for example, a statute declaring that all cities containing a population over a certain number shall have a given number of voting places, and all cities containing a lesser number shall have a prescribed lesser number, would be, to my mind, obviously legal, because the classes of persons thus distinguished from each other would naturally stand upon a different footing with respect to the particular subject to which such legislation related; but if a law, based on the same classifications, should provide that the former of such classes should have a certain system of laying out streets, and the latter a different system, such a classification would be clearly illusive, inasmuch as the law thus enacted would bear no affinity to the qualities or attributes forming the basis of classification. *Interdicted local and special laws are all those that rest on a false or deficient classification; their vice is that they do not embrace all the class to which they are naturally related; they create preference and establish inequalities; they apply to persons, things or places possessed of certain qualities or situations, and exclude from their effect other persons, things or places which are not dissimilar in these*

respects. The present law therefore is not objectionable on the former of the grounds assigned—that in its operation it must necessarily be confined to certain localities. As it does not exclude from its sway or effect any place or subject belonging to the class to which it relates, it is, upon its face, a general, and not a local or special law, within the clause of the constitution now under consideration.

The second objection above noted to the statute in question is that, in point of fact, it applies to but a single place, that is, to Jersey City, and therefore, being thus local and special, it is invalid for the want of a notice of an intention to apply for its passage.

In laboring this point in their argument the counsel of the relators seemed to incline to the conclusion that a special or local law could in no case be passed, the purpose of which was to regulate the internal affairs of any municipality. But I can not agree to this view. According to my reading of the constitutional clause in question, its purpose was not to limit legislation, but to forbid only the doing, by special or local laws, those things that can be done by general laws. The provision relates to the methods and not to the substance of legislation, and the substitution of general laws in the stead of those that are special or local, necessarily indicates the limits and extent of the prohibition, for as the mandate is to do, by general legislation, that which is interdicted to special or local legislation, it seems unavoidably to follow that it is only those things that can be accomplished by the former method that are forbidden to the latter method. The intent here, I think, is perfectly plain, and was to require, within this department, all things that could be effected by general statutes, to be effected in that way, but there was no intent to abrogate the legislative power outside of this field. The opposite interpretation would be full of impracticabilities, not to say absurdities. By its prevalence, the peculiar imperfections inherent in the frame of any existing public corporation would at once be made unalterable and irremediable; the boundary of every city, township and county would become insusceptible of change, and the constitution of such bodies, with respect to matters unique, and therefore not to be reached by general laws, would be beyond the hand of improvement or modification. Indeed, the present case, if we assume that this statute applies to Jersey City alone, and is on that account to be regarded as special and local and consequently forbidden, would stand as a conspicuous example of the evils that would result, for although in this same constitutional provision, the ruling of particular places by legislative commissions is denounced in the form of a prohibitory clause, the success of the view set up would be to establish such a mode of government, so long as our organic law should retain its present characteristics in the only place in which it is said at present to exist. The correct interpretation of the passage, as already denoted, keeps it clear of any such hurtful efficiency.

But it is further, and in the last place, urged that as this statute can apply to Jersey City alone, it is, at all events, special and local within the effect of that other provision of the constitution which ex-

acts a notice of an intention to make application to the legislature for bills of this character. Article iv, § 7, pl. 9. But unfortunately, it is in this information assumed without the necessary showing of facts, that this law has this singleness of applicability. This pleading shows that the defendants are clothed with office by force of a popular election duly held in accordance with this legislative act, and as under such circumstances the regularity and validity of such act will be strongly implied, the facts necessary to vacate it must be set forth in a direct and traversable form. This has not in this case been done. An allegation that the statute is special and local as to Jersey City is not the statement of a fact, but a naked inference as to the law. The question, therefore, that was discussed, and which was founded on the assumption that the present law was operative in but a single place, can not be considered or disposed of upon the record as it is now presented to our attention.

As the pleadings at present stand, the demurrer must be sustained.

Note. **General and special laws.** It has been said that a statute which relates to persons or things *as a class*, is a general law; while one which relates to particular things or persons *of a class*, is special. 1875, Wheeler v. Philadelphia, 77 Pa. St. 338; 1884, Ewing v. Hoblitzelle, 85 Mo. 64; 1892, Smith v. McDermott, 93 Cal. 421.

So, a general law need not operate upon all classes of persons or things in a state, but if it relates to or operates uniformly upon the whole of any class it is general. 1890, Abeel v. Clark, 84 Cal. 226.

And "a law which applies only to an individual or to a number of individuals, selected out of any class to which they belong, is a special law." 1880, State v. California Min. Co., 15 Nev. 234.

"Public statutes are those which concern the government, or the public interest, or all persons, or the whole of any class of persons." Robinson's Elementary Law, § 10. Citing, 1 Bl. Com. 86; 1 Kent Lect., 20; Bac. Abr. Stat. F. L.; Potter's Dwarris on Stat., 52; Sedgwick Stat. & Const. L., 30.

See, also, 1897, Wanser v. Hoos, 60 N. J. Law 482, 64 Am. St. Rep. 600; 1895, State v. Bargus, 53 Ohio St. 94, 53 Am. St. Rep. 628; 1892, State v. Sheriff, 48 Minn. 236, 31 Am. St. Rep. 650, n. 653; 1890, State v. Ellett, 47 Ohio St. 90, 21 Am. St. Rep. 772, n. 780, *et seq.*; 1889, Town Council v. Pressley, 33 S. C. 56, 26 Am. St. Rep. 659; 1889, Allen v. Pioneer Press Co., 40 Minn. 117, 12 Am. St. Rep. 707, n. 716; 1888, People v. Squire, 107 N. Y. 593, 1 Am. St. Rep. 893, n. 903.

See, further, on the general topic of creation under general and special laws. 1 Abb. Digest 362, 4 Am. & Eng. Ency. 194, 1st ed.; 7 Am. & Eng. Encyc. 639, *et seq.*, 2d ed.; Baldwin's Polit. Inst., ch. 6, Freedom of Incorporation; 1 Beach, §§ 9–12; Boone, §§ 21–23; Clark, §§ 19–20; Cook, §§ 2, 231–235; Elliott, §§ 32–50; Field, § 13; 2 Kent. Comm. *272, *n.*, *a*, *b*, *c*, 12th ed.; 1 Morawetz, §§ 26–30; Taylor, § 451; 1 Thompson, §§ 35–249. For statutory provisions, see *infra*, Schemes of Organization, pp. 426, 560; American Corp. Legal Manual, vol. 7, 1899, and previous volumes; 2 Stimson's Am. Statute Laws, ch. 1; Annotated Corporation Laws of all the states, by Cumming, Gilbert & Woodward, 1899; Appendix.

Sec. 69. (2) *Creating.*

"The legislature shall pass no special or local act creating corporations."

WALLACE v. LOOMIS.[1]

1877. IN THE SUPREME COURT OF THE UNITED STATES. 97 U. S. Reports 146–163.

Appeal from the circuit court of the United States for the southern district of Alabama.

The facts are stated in the opinion of the court.

Mr. Justice BRADLEY delivered the opinion of the court.

This suit was instituted by a bill in equity filed May 30, 1872, by Francis B. Loomis, John C. Stanton and Daniel N. Stanton, trustees of what is known as the first mortgage of the Alabama and Chattanooga Railroad Company, for the purpose of procuring a foreclosure and sale of the mortgaged premises, being the railroad of said company, with its appurtenances and rolling-stock, situated in Tennessee, Georgia, Alabama and Mississippi, but principally in Alabama. A further object of the bill was to remove the cloud from the title caused by the bankruptcy of said company, the seizure of its property by the governor of Alabama, and the sale thereof by the assignees in bankruptcy; also to protect and preserve the property from waste and dilapidation until it could be applied to the satisfaction of the mortgage. * * *

In February, 1873, by leave of the court, Wallace was made a defendant, and thereupon filed an answer and cross-bill, claiming to be the holder and owner of five second mortgage bonds for $1,000 each. * * *

The answer alleges that the Alabama and Chattanooga Railroad Company was not a corporate body, and the decree affirms the contrary. The cross-bill states at large the reason for the allegation of the answer. It is, that the company had its alleged corporate existence alone in virtue of a special act of the legislature of Alabama, passed the 17th of September, 1868, which act upon its face was a violation of the constitution of the state, which declares that "*corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes.*" The act referred to is set out in full as an exhibit to the cross-bill. It authorizes the Wills Valley Railroad Company (a pre-existing corporation) to purchase the railroad and franchises of the Northeast and Southwestern Alabama Railroad Company (another pre-existing corporation), and after doing so, to change its own name to that of the Alabama and Chattanooga Railroad Company.

We are unable to see anything in this legislation repugnant to the constitutional provision referred to. That provision can not surely be construed to prohibit the legislature from changing the name of a cor-

[1] Only so much of the case is given as relates to the single point.

poration, or from giving it power to purchase additional property, and this was all that it did in this case. No new corporate powers or franchises were created. * * *

Decree affirmed.

Sec. 70. Same.

GEORGE GREEN v. KNIFE FALLS BOOM CORPORATION.

1886. IN THE SUPREME COURT OF MINNESOTA. 35 Minnesota Reports 155–162.

Plaintiff brought this action, in the district court for St. Louis county, to recover possession of certain logs, alleged to be wrongfully detained by the defendant. The answer admits the detention of the logs by the defendant, and justifies such detention under claim of a lien for boomage in accordance with the provisions of Sp. Laws 1872, ch. 106. On plaintiff's motion judgment on the pleadings was directed by STEARNS, J., on the ground that Sp. Laws 1872, ch. 106, is unconstitutional.

Defendant appeals from the judgment.

The cause was argued at the April term, and, by order of the court, was reargued at the October term, 1885.

VANDERBURGH, J. The defendant, it appears, first organized as a boom corporation under the general law. The original articles of incorporation are not disclosed by the record, but it is manifest (and it is not disputed) that the organization must have been made under Gen. St., ch. 34, tit. 2, and that the powers and privileges thereby acquired could not include either the right to exercise the power of eminent domain, or to take tolls, or to obstruct the navigable portion of the St. Louis river, where the defendant's booms and works are located, so as to prevent the free passage of the logs of other owners. Stevens Point Boom Co. v. Reilly, 44 Wis. 295, 305; s. c. 46 Wis. 237, 242. It was, by virtue of its original articles of incorporation, entitled only to the same rights in the river as other riparian owners, and to erect and maintain booms in connection with the navigation of the stream, for its own use, and the use of others who might contract for its services. It was merely a private boom corporation. Soon after such organization under the general laws, the legislature passed an act entitled "An act relating to the Knife Falls Boom Corporation" (Sp. Laws 1872, ch. 106), which purports to confer new and independent franchises and enlarge powers upon the defendant corporation, within the St. Louis river, and over the navigation and use thereof, as respects the passage of logs, including the right of eminent domain, the right to charge compensation for boomage, in the nature of tolls, prescribed by the act, upon all logs passing through their works, and to receive and take the entire charge and control of all logs and timber which might run, come or be driven within the same, and to boom, scale and deliver them as provided in such act. Osborne v. Knife Falls

Boom Co., 32 Minn. 412 (21 N. W. Rep. 704). And the corporation is also thereby granted a lien upon all such logs or timber for their compensation, which may be enforced by a sale.

The detention of the plaintiff's logs, taken and held *in invitum* by defendant under a claim of lien for the boomage allowed by this act, brings up the question of its constitutionality in this case. This question was not suggested or mooted in the case of Osborne against the defendants, just cited, but the question there determined was as respects the power of the legislature to authorize such improvements in the use of a navigable river. The question which is raised here, and which has been elaborately argued by counsel, is the constitutional power of the legislature to so amend the charter, and to confer upon an existing corporation additional special powers and privileges of the character described, under the provisions of article 10, section 2, *of the constitution, forbidding the formation of corporations by special acts.* The discussion by counsel at the bar embraced the question of the proper original construction of this clause, and the intention of the framers of the constitution in inserting it, and also the question of the construction thereof which has in fact prevailed and been acted on in this state, and the effect which the court ought to give to such construction in considering this case.

1. *The charter of a corporation represents a two-fold contract:* (a) *The executed grant by the state of a portion of its sovereignty, irrevocable in its nature, when once accepted and acted on;* (b) *the mutual compact between the corporators or stockholders among themselves.* And in the absence of constitutional restraints, a corporation might be endowed with new and enlarged powers by legislative grant, and its original character, object and business might thereby be changed, with the consent of the stockholders, for any lawful purpose. If the clause under consideration was intended simply to prohibit special acts establishing corporate entities or granting original charters, then it is clear that an existing corporation may receive the grant of new and extensive privileges and franchises, and the amendment to the defendant's charter by the act in question may undoubtedly be upheld as a valid exercise of legislative power. But the respondent contends that this provision of the constitution has a wider significance, and was intended to restrain all grants of corporate privileges and franchises by special acts of the legislature, and this is, in the opinion of the writer, the proper construction. A corporation, created or formed by special acts, could only be so formed by means of the grant of a charter conferring essential corporate powers or franchises. "Franchises" are defined to be special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right. Bank of Augusta v. Earle, 13 Pet. 519. The grant of such a franchise is the essential thing in a charter, and whether given to new corporators, or those already organized, or in an original or amended charter, the grant of a corporate franchise is, as between the sovereign and the corporators, so far the grant of a charter, or the grant of a "franchise by act of incorporation."

Attorney-General v. Railroad Cos., 35 Wis. 425, 560. Such grants, I think, it was clearly the purpose of the framers of the constitution to prohibit by special acts.

It is true, the right to be a corporation is itself a franchise, but all franchises granted to a corporation become corporate franchises, and essential portions of its charter or act of incorporation, and the chief value of the charter in order to accomplish the purposes of the corporate organization. *The constitutional provision requires that corporations, except for municipal purposes, shall be formed under general laws, and not under or by special acts. This can not, I think, mean that a portion of the franchises or privileges in a proposed charter might be obtained under a general law, and the remainder by special enactments; or, in other words, that a general law might be a mere enabling act to confer corporate existence, leaving the door open to the corporation thereafter to apply to the legislature for additional franchises.* Such construction must be given to the provision in question as will manifestly be in harmony with its spirit, and give effect to the intent and purpose of its framers. The object being to restrict the granting of charters to general laws, the courts can not sanction an evasion by limiting the application of the principle to the case of original charters or corporate organizations. The object of this constitutional restriction was, as it is well understood, to correct an existing evil, and prevent favoritism and abuses in securing grants of special charters, and to establish uniform rules for the endowment of corporations with chartered privileges. Any special legislation affecting the charters of corporations should therefore be strictly construed, so as to give full effect to the leading object of the provision. 1 Dill. Mun. Corp., § 17; Atkinson v. Marietta, etc. R. Co., 15 Ohio St. 21, 35.

Charters, then, since the adoption of the constitution, are to be acquired under general laws, and to them must we look to ascertain what franchises may be conferred by charter upon corporations. Every new grant of special powers must, as between the sovereign and a corporation, be regarded, as respects the exercise of such powers, in the light of a new charter, and especially since, when accepted, the new or amended charter becomes a contract irrevocable, unless the power of amendment or repeal is reserved in the grant. Every new grant of a portion of its sovereignty by the state through the legislature must, in principle, be within the prohibition, and be equivalent to the grant of a charter *de novo*. In accordance with this view, the legislature accordingly, upon the adoption of the constitution, enacted general laws for the formation of corporations for the various purposes required in the commonwealth, and carefully defined their powers and obligations, and made them of uniform application. These general provisions have been amended from time to time, as the public needs have required, and general laws have been passed applicable alike to corporations of the same kind, and proper provisions made for amended articles of incorporation. The general provisions of law applicable to any class of corporations, together with

the articles of association, constitute the charter of any particular corporation. The general character of this legislation is entirely in harmony with the construction that corporations under general laws must derive their essential powers therefrom. We lay no stress upon the use of the word "formed" instead of "create" in the constitution; the distinction is immaterial in respect to the matter of the grants of corporate franchises. The supreme court of Wisconsin, upon a careful consideration of the question, while determining that the charters of pre-existing corporations were subject to alteration or amendment under the power expressly reserved in the constitution of that state, hold that there is no distinction, as respects the constitutional inhibition, between a grant of corporate powers and privileges, and the grant of corporate charters *de novo*. Attorney-General v. Railroad Cos., 35 Wis. 425, 560; Kimball v. Town of Rosendale, 42 Wis. 407, 416; Stevens Point Boom Co. v. Reilly, 44 Wis. 295, 301. And the same doctrine is also affirmed in San Francisco v. Spring Valley Water-Works, 48 Cal. 493, 507; Spring Valley Water-Works v. Bryant, 52 Cal. 132, 140.

2. The defendant also makes the point that it was competent for the state to invest a corporation, as it might an individual, with the power and duty to assume an agency in behalf of the public to make the improvements and transact the business authorized by the amendment to the charter here in question for the purpose of facilitating the business of driving, handling and assorting logs in the common interest. But the nature of the agency and business thereby created and authorized does not affect the application of the rule. The precise point was raised in Stevens Point Boom Co. v. Reilly, 44 Wis. 295, 301, where the plaintiff was organized under a general law, and subsequently granted powers similar to those conferred on this plaintiff by the act in controversy, and the court, by Ryan, C. J., said: "The court was not indisposed, if it could, to construe the sections of the latter statute relied on as an employment of an existing corporation to improve the navigation of the river in the public right, and provide a compensation for it; but the argument of the learned counsel for the appellant appears to be conclusive against such a view. His position was that corporate franchises are always supposed to be granted on some public consideration, with corresponding benefit to the grantees; and that to hold the sections in question a valid grant of power on the ground suggested would open the door indefinitely to special grants to corporations under general laws, so far nullifying the constitutional amendment and continuing the evils which the amendment was intended to obviate." *Such powers when conferred upon a corporation, become corporate powers or franchises, and hence, subject to the same objection as in other cases where a franchise which may lawfully be conferred upon an individual by special act can not be so conferred upon a corporation.* Ames v. Lake Superior and Mississippi R. Co., 21 Minn. 241, 258.

3. It is unnecessary to consider whether there is any distinction between corporations formed under general laws and corporations

created by special charters prior to the adoption of the constitution, as respects the effect of subsequent special legislation. It has been the habit of the legislature, in both classes of cases, and especially in the latter class, to amend and alter charters, by special acts, ever since the constitution was adopted; but I have not been able to discover that there are many other instances like the case at bar, wherein such new and important grants of power have been made to pre-existing corporations. The legislation in such cases is more generally, as I understand it, confined to amendments and alterations relating to matter of form, or affecting the remedy, or the method and details of the management of the corporate business, or the mutual relations, rights or interests of the corporators among themselves, in the exercise of franchises already possessed by them, which legislation might be had, with the consent of the corporators, without any new or further grant of corporate powers by the state. This court, in the several cases which have been before it for adjudication, has always recognized the restrictive force of the constitution as respects such grants, though it has never attempted to define the exact limits of such legislation, or to formulate any rule on the subject; and while some of the cases have recognized and sustained departures from the strict rule we have attempted to lay down, none of them, I think, lend any sanction to so wide a departure therefrom as would be necessary to sustain the grant of the special charter in this case. But no case seems to have gone farther in upholding a grant of new powers than the limits suggested in Ames v. Lake Superior and Mississippi R. Co., 21 Minn. 241, 286, where the court, while not assuming to accurately define the limits of the constitutional restriction, indicate very clearly that *a law authorizing such additions or changes in the business of a corporation as to constitute substantially a new enterprise, to which its old business would be a mere incident, would be unconstitutional;* and the legislature has not generally transcended such limits in amendments made to corporate charters. In exceptional cases, like the one under consideration, the corporators should be deemed to have accepted and acted under the charter amendments assumed to be granted, at their peril.

It would not, in my judgment, be a reasonable construction of this act to hold that the new business authorized was incidental to the original enterprise, or a mere extension or enlargement of it; nor do I think that public interests would be seriously affected by a construction that should defeat legislation of this kind. I think that the difficulties and inconvenience likely to result could, in a great measure, be remedied through the operation of general laws, as was the case in Stevens Point Boom Co. v. Reilly, *supra*, and see People v. Perrin, 56 Cal. 345.

In San Francisco v. Spring Valley Water-Works, 48 Cal. 493, 523, the court, in the face of similar arguments and considerations, reversed what was held to be an erroneous construction of a similar clause in a state constitution, in an earlier case, decided eleven years

before, and which upheld legislative grants of new franchises, and adopted the strict rule contended for by the respondent here.

4. *The majority of the court, however, do not agree to the views above expressed in respect to the character of the special law in question, and the effect to be given to it, and are of the opinion that it ought not be held unconstitutional. They hold that the strict rule forbidding the grant of additional powers or franchises, while it may be the more logical and satisfactory, treated as an original question, has never in fact been recognized or adopted by the legislature or courts of the state;* that this constitutional provision was open to construction, and, during a long course of legislation, the practical construction placed upon it by the legislature and people has been a liberal one in respect to amendments, and that the court should be very slow to change it, at this late day, for the reason that the extensive and varied legislation affecting corporate charters, so long continued, has come to involve very large public and private interests. Considering the amount and character of such legislation, and in view of the decisions of this court, it would often be difficult to accurately define the boundary line between valid and void acts, leaving many cases in doubt and uncertainty until actually adjudicated.

Under these circumstances the constitutional amendment of 1881 was adopted (laws 1881, c. 3), which, in direct and plain terms, forbids special legislation of the character complained of. The language of this amendment is: "The legislature is prohibited from enacting any special or private laws in the following cases: * * * (7) For granting corporate powers or privileges, except to cities." This amendment, in their opinion, indicates a change of policy, and unquestionably inaugurates or restores the strict rule of construction as to all subsequent legislation affecting the charters of existing corporations. Its language and meaning are too clear to call for construction, and there will be no ground upon which to build any subsequent erroneous legislation or popular construction.

My brethren are also of the opinion that the act in question does not, within the rule laid down in Ames v. Lake Superior and Mississippi R. Co., *supra*, work such a change in the character of the corporation as to constitute it essentially a new or different corporation, though it enlarges its business, and grants the necessary incidental powers to make such enlargement practical and effective, and that for these reasons the act should not be held void.

Judgment reversed.

See 1899, Bank of Commerce v. Wiltsie, 153 Ind. 460, 47 L. R. A. 489.

Sec. 71. Same.

THE CITY AND COUNTY OF SAN FRANCISCO v. THE SPRING VALLEY WATER-WORKS.[1]

1874. IN THE SUPREME COURT OF CALIFORNIA. 48 Cal. Rep. 493–535.

[Appeal from the district court. The general law providing for the incorporation of water-works companies took effect April 22, 1858. The next day the legislature enacted the "Ensign Act," permitting one Ensign and his associates, upon becoming incorporated under the general corporation laws, to supply water to San Francisco, use the city streets therefor, charge certain rates, have certain privileges, and be subject to certain burdens, not included in the general law relating to the incorporation of water companies.]

By the court, CROCKETT, J. On the former appeal, and at the first hearing of the present appeal, it was assumed, by both court and counsel, that the rights and obligations of the defendant were to be ascertained by reference to the act of April 23, 1858, authorizing Ensign and his associates to lay down water-pipes in the streets of San Francisco. But on the rehearing the point is made for the first time by the defendant that the Ensign act is unconstitutional and void, and consequently can confer no rights on the plaintiff nor impose any duties on the defendant. The eighth section of the act is in these words: "This act shall not take effect unless the parties named in section 1 shall, within sixty days after its passage, duly organize themselves in conformity with the existing laws regulating corporations now in force in this state."

It is contended that this is an attempt to confer corporate rights by a special act upon Ensign and his associates, in violation of section 31, article 4, of the constitution, which provides that "*corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.*" The act in question does not purport to organize Ensign and his associates as a corporation. On the contrary, it requires them to "organize themselves in conformity with the existing laws regulating corporations," as a condition on which they shall become entitled to the benefits and privileges enumerated in the act. It is clear, therefore, that the corporation, when formed, did not derive its corporate existence from the Ensign act; nor could it have done so under the constitution. But it is claimed that under this provision of the constitution, corporations must not only be formed under general laws, but that their rights, duties and obligations must be prescribed in the same method, and can not be created by special acts. On the other

[1] Statement of facts abridged. Arguments omitted. Opinions of McKinstry (concurring) and Rhodes, J., dissenting, omitted.

hand, it is insisted that the constitution is wholly silent as to the powers and duties of corporations, and goes no further than to require that they shall be "formed" under general laws, and prohibits them from being "created by special act;" but left the legislature free to confer upon them, by either general laws or special acts, such powers as it shall see fit. If this theory be correct, the constitutional provision has imposed upon the legislature only the duty of providing by general laws the formulas by which corporations may be formed—the mere routine by which an artificial entity may be created—but has in no degree limited the power of the legislature to confer upon it by special grant, at its discretion, any powers or privileges of whatsoever nature. On this construction, it would be competent for the legislature to provide, by a general law, that any number of persons might become a body corporate, on filing a certificate stating their intention to that effect, and the name of the corporation; and the legislature might then, by special grant, confer on the corporation any powers, however great, and any privileges, however diversified. It might authorize it to construct railroads, to transact the business of banking or insurance, deal in lands and establish steamship lines. There would be no limit to its power in this respect. Nor, when once granted by special act, could these privileges be recalled or modified by the legislature. The grant, and its acceptance by the corporation, would have created a contract, the obligation of which could not be impaired by any subsequent legislation.

Long prior to the adoption of our constitution, experience had demonstrated the enormous evils resulting from legislation of this character. By means of hasty or corrupt legislation, great monopolies had been created, which were beyond legislative control.

Capital was aggregated in the hands of large corporations with peculiar and oppressive privileges, frequently procured through venal legislation. There was no uniformity in the powers exercised by corporations pursuing the same business. So long as they derived their powers, privileges and immunities from special legislative grants, these, of course, varied according to the temper of the legislature, and the result was that each succeeding corporation had greater or less powers than its predecessors. With no limitation upon the discretion of the legislature in respect to the particular powers and privileges to be granted to each, nor as to the innumerable purposes for which corporations might be formed, nor as to the term of their duration, gross abuse necessarily resulted from such a system. Extraordinary privileges, oppressive powers, and onerous monopolies were conferred upon some and denied to others engaged in the same business. Their powers were frequently enlarged, and the terms of their duration extended by special grant. Under this system there was danger that large aggregations of capital would so practice upon the credulity or venality of legislative bodies as to secure the most oppressive monopolies, and seriously interfere with the enterprise and industry of the individual citizen. One of the latest and most startling illustrations of this danger is to be found in an act of the legislature of

Louisiana, passed in the year 1869, by which a corporation was created by special grant, with the exclusive right to establish and maintain slaughter-houses and landings for cattle for a period of twenty-five years in the city of New Orleans and several of the contiguous parishes. The constitution of Louisiana contains no limitation on the power of the legislature to confer corporate rights by special act, and the validity of this statute has been upheld by the supreme court of the state and of the United States.

But this unrestricted power to endow corporations with peculiar and exclusive privileges would be less dangerous if a succeeding legislature could correct the abuses practiced by its predecessor, and abolish or restrict the privileges once granted. * * *

It was the special purpose of the framers of our constitution to guard against these abuses by providing that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes." Nor were they content to leave it doubtful whether the legislature would have power to modify or abrogate these general laws or special acts to create municipal corporations so as to affect the rights of existing corporations. Hence, the constitution contains the further provision that all general laws and special acts "passed pursuant to this section may be altered from time to time, or repealed." * * *

Under these provisions the source from which private corporations must derive their powers and immunities is perfectly apparent. They can only "be formed under general laws," and can exercise no powers, except such as are derived from general laws. If this provision means nothing more than that the legislature shall prescribe the mere formula by which a corporate entity may be called into life, and may then proceed to confer upon it by special act, at its discretion, extraordinary powers and privileges which it could not afterwards revoke or modify, because they were granted under special and not general laws, then, indeed, has the constitution signally failed to provide a remedy for the abuses already adverted to. On this construction, when a railroad corporation is once formed under a general law, the legislature, by special grant, may confer upon it extraordinary powers, greatly in excess of those exercised by other similar corporations. It may authorize it to engage in banking, mining or any other business enterprise, or to charge higher rates of fare then are permitted to other competing roads. In like manner it might discriminate in favor of a particular banking corporation, or confer special, or perhaps, exclusive privileges on a particular mining, insurance or manufacturing corporation. But, on the other, and the true construction of this constitutional provision, all private corporations must derive their powers from general laws, and not from special statutes. The general laws under which they were formed, and such others as shall afterward be enacted, must alone define their rights and powers. On this theory, all private corporations, formed for similar purposes, will stand upon the same footing, enjoy the same rights, and be subject to

the same burdens, which can not be increased or diminished except by general laws, applicable to all. * * *

Nothing short of some imperative rule of constitutional construction would justify us in holding at this late day, that, though corporations must be "formed" under general laws, it is, nevertheless, competent for the legislature, by special grant, to confer upon a corporation once organized, any powers, however extraordinary. We think, on the contrary, that no corporate rights or powers can be conferred by special grant, but must all be derived under general laws.

This brings us to the consideration of the Ensign act, so-called. The first seven sections confer upon Ensign and his associates certain privileges, and impose upon them certain duties in respect to furnishing the city and county of San Francisco with water for the extinguishment of fires and other municipal uses. Section 8, already quoted, provides that "this act shall not take effect unless the parties named in section 1 shall, within sixty days after its passage, duly organize themselves in conformity with the existing laws regulating corporations now in force in this state." The grant, therefore, was not to take effect until Ensign and his associates had become a corporation under existing laws. It took effect as a grant, not to Ensign and his associates as private individuals, but to the corporation when formed. It was an attempt by the legislature to confer, by special grant, upon a private corporation about to be formed, certain peculiar privileges, and to subject it to certain duties not common to other corporations formed under the same general law. For the reasons already stated, this was not within the constitutional power of the legislature.

Judgment and order affirmed.

The foregoing opinion was delivered at the April term, 1874, and a rehearing having been applied for, the following opinion, denying the same, was delivered at the July term, 1874.

In the former opinion on this appeal, we held that the act of April 23, 1858, known as the "Ensign Act," is in violation of art. iv, § 31 of the constitution, which provides that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes." A rehearing is asked, partly on the ground that this clause of the constitution has received a different construction in the case of the California State Telegraph Company v. Alta Telegraph Company (22 Cal. 398), and that this decision has become a rule of property in this state, and ought not now to be disturbed, even though it was erroneous. After a careful examination of that case, I am satisfied that it can not be sustained, either on reason or authority. Mr. Justice Crocker, in delivering the opinion of the court, refers to several adjudged cases as supporting the conclusions at which he arrived, but an examination of these cases shows that they were misapprehended by the court, and do not support the decision. * * *

[After discussing the cases of Aurora v. West, 9 Ind. 85; Gifford v. New Jersey R. & T. Co., 2 Stockton Ch. R. 171; C., P. & A. R.

v. Erie, 27 Pa. St. 380, relied upon by Justice Crocker in the former decision, and holding they did not involve the question here proceeds:]

The only remaining case referred to was the Syracuse City Bank v. Davis (16 Barb. 188). The constitution of New York provides that "the legislature shall have no power to pass any act granting any special charters for banking purposes; but corporations or associations may be formed for such purposes under general laws." The Syracuse City Bank was organized under the general law; but in some trifling particulars, the forms prescribed by the general law were not complied with, and the legislature passed a curative act, to the effect that the bank should be deemed a valid corporation, and to have been duly incorporated notwithstanding these informalities. The court held the curative act to be valid, on the ground that it did not create a corporation, but only remedied defects in the organization of one already created. That proposition has no analogy to the question involved here, which relates to the power of the legislature to confer upon an existing corporation, by special act, other powers than those derived from the general law. These are the only cases referred to by Mr. Justice Crocker, and none of them support his ruling. * * *

On the other hand, authorities are not wanting in support of the opposite construction of the clause of the constitution. In Low v. The City of Marysville (5 Cal. 214) the question was whether it was competent for the legislature, by special act, to authorize the city (a municipal corporation) to subscribe for stock in a steamboat company organized to establish a line of steamers plying between that city and San Francisco. In delivering the opinion of the court, Chief Justice Murray holds that "the powers of municipal corporations must be confined strictly to police or governmental purposes," and that the power conferred upon the corporation to subscribe for stock in a railroad could not be granted by special act; "for as it would have been in violation of the constitution to create an incorporation by special act, for other than municipal purposes, it follows that it would be equally unconstitutional to confer special power on a corporation already created. In other words, it would be doing by two acts that which the legislature could not do by one, and corporations for almost every purpose might be created by special act, by first incorporating the stockholders as a municipal body." This reasoning, I think, is unanswerable, and the decision is a direct adjudication upon the question involved here.

The constitution of Ohio contains these clauses:

"Section 1. *The general assembly shall pass no special act conferring corporate powers.*

"Section 2. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

In Atkinson v. The M. & C. R. Co., 15 Ohio St. Rep. 35, the court, in construing these clauses, says: "Constitutional provisions would be of little value if they could be evaded by a mere change of forms. These provisions of the constitution are too explicit to admit of the least doubt that they are intended to disable the general assem-

bly from either creating corporations or conferring upon them corporate powers by special acts of legislation. It was intended to correct an existing evil, and to inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to all future grants of power; of making such laws applicable to all parts of the state, and thereby securing the vigilance and attention of its whole representation, and, finally, of making all judicial constructions of their powers, or the restrictions imposed upon them, equally applicable to all corporations of the same class." * * *

The constitution of Iowa provides that "*the general assembly shall not pass local or special laws in the following cases:* * * * *for the incorporation of cities and towns*," *and for other specified purposes.* "*In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state.*"

The legislature passed a special act to amend the charter of the city of Davenport, a municipal corporation, and in *Ex parte Pritz* (9 Iowa 30), the question before the court was, whether the legislature, by a special act, could amend the charter of a municipal corporation, and thereby place it upon a different footing from other municipal corporations, organized under the general law. In considering this point, the court says the intention of the constitution was "to prevent special or local legislation; to require that the legislature should pass general laws upon all the subjects named, and in all other cases where such general laws could be made applicable. There can be no question but that it was designed to confine the legislature to general legislation, and leave the people, in their municipal capacity, to organize and carry out their government under such general laws. If this be so, then to say that the legislature may not pass a law to incorporate a city, but may, to amend an act of incorporation in existence before the adoption of the constitution, or charters formed under the general law, would make this provision of the constitution practically amount to nothing. For if they may amend, they may, to the extent of passing an entire new law, except as to one section. Or they may at one session amend half the law, and the next the other half, and thus the plain and positive prohibition of the fundamental law be evaded. By such a construction the evil sought to be remedied would continue, if possible, in a more objectionable form."

The same principle was substantially decided in the Town of McGregor v. Bauliss (19 Iowa 43). It will be observed that by the constitution of Iowa, the prohibition of the constitution was against special laws, "for the incorporation of cities and towns;" whilst in our constitution the provision is that corporations, except for municipal purposes, shall not be "created" by special act. In neither is the legislature in express terms prohibited from conferring additional powers upon, or amending the charter of an existing corporation formed under the general law. The reasoning of the supreme court of Iowa, however, is conclusive on the point that, under our constitution, the legislature, by special act, can not either amend the

charter of an existing corporation, or confer upon it powers and immunities not granted by the general law. * * *

In the case of the Dartmouth College v. Woodward (4 Wheat. 519) it had been decided by the supreme court of the United States that privileges secured by special acts of incorporation constituted contracts, which were protected by that clause of the constitution of the United States, which prohibits a state from passing laws impairing the obligation of contracts. That case was followed by numerous other decisions of like import, in the same court, and in almost every state of the Union, including New York, Massachusetts, New Hampshire, Pennsylvania, Michigan, Iowa, Indiana, Illinois and Virginia.

In his work on Constitutional Limitations (page 279), Judge Cooley says: "It is under the protection of the decision in the Dartmouth College case that the most enormous and threatening powers in our country have been created, some of the great and wealthy corporations actually having greater influence in the country at large, and upon the legislation of the country, than the states to which they owe their corporate existence. Every privilege granted or right conferred, no matter by what means or on what pretense, being made inviolable by the constitution, the government is frequently found stripped of its authority in very important particulars by unwise, careless or corrupt legislation; and a clause of the federal constitution whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil. To guard against such calamities in the future, it is customary now for the people in framing their constitutions to forbid the granting of corporate power, except subject to amendment and repeal, but the improvident grants of an early day are beyond their reach." In view of these calamities, the framers of our constitution were not content merely to reserve to the legislature the power of amendment and repeal, but prohibited in terms the power to create corporations, except for municipal purposes by special act, and almost every state which has recently amended its constitution has followed our example. In the face of these facts it is altogether incredible that in forbidding corporations, except for municipal purposes, to be "created" by special act, it was intended to provide only that the mere forms by which corporate entity was created should be prescribed by the general laws; but that when thus formed, it may be endowed by special act with any powers however diversified, at the discretion of the legislature. * * *

It is claimed, however, that the introduction of water in a city for the use of the inhabitants and of the corporate authorities, is a "municipal purpose" within the sense of the constitution, and that private corporations may be created by special act for such purposes. In Low v. Marysville, *supra*, it was decided that the term "municipal purposes," as employed in this section of the constitution, referred only to governmental and police powers, and that the legislature is prohibited from conferring even upon a municipal corporation by special act, any powers except for police and governmental purposes." But however this may be in respect to the corporation itself, it is

clear that the right to introduce water into a city can not be conferred upon a private corporation by special act, upon the plea that it was a corporation organized for "municipal purposes" in the sense of the constitution. If the legislature, by special act, can confer such powers upon a private corporation for supplying a city with water, it can confer similar powers upon all corporations for similar purposes. It might by special act incorporate a gas company to furnish the inhabitants with gas, or a coal or wood company to furnish them with fuel, or a paving company to pave the streets, or a slaughter-house company to furnish the people with meat, or a milling company to supply them with bread. Every county in the state is a *quasi* municipal corporation, and it is the duty of the corporation to see that proper roads, bridges and public buildings are provided for the use of the inhabitants. On this theory, the legislature, by special act, might organize private corporations for all these purposes, and endow them with peculiar, oppressive, and, perhaps, exclusive powers and privileges. In this way the constitutional prohibition would be frittered away, and would practically amount to nothing. * * *

It is further claimed that the decision in the case of The California State Telegraph Co. v. The Alta Telegraph Co. has become a rule of property, and ought not now to be disturbed, even though it be conceded to be erroneous. In support of this proposition we have been referred to numerous statutes claimed to be similar to the Ensign act, under which it is said great property rights have grown up. It may be that some, but I think no serious, injury will result to property rights from overruling that decision. If it shall be found that serious inconvenience would otherwise result, the legislature may amend the general law regulating corporations, so as to obviate the difficulties that would otherwise arise, and allow these corporations to reincorporate under the new law. But, in any event, it is better that some temporary inconvenience should be submitted to rather than that one of the most valuable provisions of the fundamental law should be practically obliterated. No greater calamity could befall this state than to open wide the door leading to careless or corrupt legislation in the form of special acts granting peculiar and onerous privileges to private corporations. * * *

It has been suggested that the grant to the Spring Valley Water-Works under the Ensign act was not a grant of corporate rights, but only an easement permitting the company to lay its pipes through the streets, subject to the performance of certain duties imposed by the act. The argument is that an easement of this character is property, which it was in the power of the state to grant to an existing corporation as it might grant property to any corporation, coupled with such conditions as it saw fit to impose; and that this is not a grant of corporate rights within the purview of the constitution. It is a conclusive answer to this proposition that the Ensign act did not grant to the Spring Valley Water-Works any easement of this character which it did not already possess under the general law, under which it was incorporated. By the fifth section of the general act (Statutes 1858,

p. 219), the company had the absolute right "to use so much of the streets, ways, and alleys in any town, city or county, or any public road therein, as may be necessary for laying pipes for conducting water into any such town, city, or city and county, or through or into any part or parts thereof." The corporation already having this right, under its act of incorporation, it is clear that the Ensign act conferred upon it no additional privileges in this respect.

When the state grants to a private corporation an easement over the streets, not common to the public at large, it acts in its sovereign capacity and grants a franchise, which enters into and forms an essential element in the corporate powers of the corporation; which becomes entitled to the right, not because the state has parted with any proprietary interest in the land, but because in its sovereign capacity, having the control of public highways, it has granted to the corporation a franchise, entitling it to an easement over the streets not common to the general public. This is purely a grant of corporate power, and nothing more or less, and, as we have already seen, such rights can not be conferred by special act. But even if it be conceded that the right to the use of the streets may be granted by special act, still the Ensign act must fail, because the right to use the streets is inseparably blended with the grant of other rights, and the imposition of certain burdens, which are in plain violation of the constitution. As, for example, the right in a certain contingency to charge higher rates for water than other corporations organized under the same general law, and the imposition of greater burdens upon the company, than are imposed by the general law. It is a well-settled rule, that where a portion of an act is constitutional and another portion is unconstitutional, if the two are so inseparably blended together as to make it clear that either clause would not have been enacted without the other, the whole act must fall. It is perfectly clear that such is the condition of this act, and that all its provisions must stand or fall together.

We are satisfied that these views are in strict accordance with the letter and spirit of the constitution. On the opposite theory the legislature, by special act, may grant to a railroad corporation the right to lay down its tracks in the streets on condition that it supply the inhabitants with water or gas, or keep the streets in repair at a specified price, thus opening the door to corrupt and vicious legislation, against which the constitution has so carefully guarded.

Rehearing denied.

See note, p. 706.

Sec. 72. Same.

SOUTHERN PACIFIC R. CO. v. ORTON.[1]

1879. IN THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF CALIFORNIA. 32 Fed. Rep. 457–480.

[Action to recover lands. Plaintiff claimed, under congressional grant, to aid Southern Pacific Railroad. Patent had issued. Defendant claimed by pre-emption. The railroad company was incorporated by the state of California in 1861.

On April 4, 1870, the legislature of California passed an act as follows: "Whereas, by the provisions of a certain act of congress of the United States of America, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from San Francisco to the eastern line of the state of California,' approved July 27, 1866, certain grants were made to, and certain rights, privileges, powers and authority were vested in and conferred upon the Southern Pacific Railroad Company, a corporation duly organized and existing under the laws of the state of California; therefore, to enable the said company to more fully and completely comply with and perform the requirements, provisions and conditions of the said act of congress, and all other acts of congress now in force or which may hereafter be enacted, the state of California hereby consents to said act; and the said company, its successors and assigns are hereby authorized and empowered to change the line of its railroad so as to reach the eastern boundary line of the state of California by such route as the company shall determine to be the most practicable, and to file new and amendatory articles of association; and the right, power and privilege is hereby granted to, conferred upon and vested in them, to construct, maintain and operate, by steam or other power, the said railroad and telegraph line mentioned in said acts of congress, hereby confirming to and vesting in the said company, its successors and assigns, all the rights, privileges and franchises, power and authority conferred upon, granted to or vested in said company by the said acts of congress, and any act of congress which may be hereafter enacted."]

SAWYER, J. * * * But it is insisted that this act was passed in violation of the provisions of section 31 of article iv of the constitution of California, which reads: "Corporations may be *formed* under general laws, but shall not be *created* by special act except for municipal purposes." After a careful consideration of the question, I am, myself unable to perceive wherein that portion of the act, at least, which authorizes the company to change the line of its road, and to accept the grant made by and to build the road provided for in the act of congress is in contravention of this provision of the constitution. It is unnecessary to consider the provision of this act authorizing the cor-

[1] Only that part of the case relating to construction of constitutional provision given.

poration to file amended articles of association, for, if that be conceded to be in excess of the legislative power, it can be separated from the others, and does not vitiate the other provisions. I do not perceive that any amendment of the articles was necessary, for the corporation was already formed or created, was already in existence with all the essential faculties that go to make up a corporation for building a railroad, and the act authorizing the change of line and acceptance of the congressional grant with its conditions, only granted to an existing person permission to do a thing which had no necessary relation to the *corporate* grantee, and was not at all essential to the existence of the legal entity created by law, or to any other person, natural or artificial. But if an amendment to the articles was necessary, it was already authorized and provided for by the prior act of March 1, 1870, and it was not necessary to repeat the authority in this act, and the act of March 1 is a *general* act, and, therefore, not obnoxious to the objection urged against the said act of April 4, 1870. The settled rule of construction of state constitutions is that they are not special grants of power to legislative bodies, like the constitution of the United States, but general grants of all the usually recognized powers of legislation not actually prohibited or expressly excepted. In the language of Mr. Justice Shafter in Bourland v. Hildreth, 26 Cal. 183: "The constitution is not a grant of power or an enabling act to the legislature. It is a limitation on the general powers of a legislative character, and restrains only so far as the restriction appears either by express terms or by necessary implication, and the delicate office of declaring an act of the legislature unconstitutional and void should never be exercised unless there be a clear repugnancy between the statute and the organic law." See, also, Bourland v. Hildreth, 26 Cal. 215, 225, *et seq.;* People v Sassovich, 29 Cal. 482; Railroad Co. v. City of Stockton, 41 Cal. 161. And it is equally well settled that the *exception* must be *strictly* construed. In the language of Mr. Chief Justice Wallace in the last case cited: "The construction is '*strict* against those *who stand upon the exception* and *liberal in favor of the government itself*.'" Railroad Co. v. City of Stockton, 41 Cal. 162. And in Sharpless v. Mayor of Philadelphia, 21 Pa. St. 160, Mr. Chief Justice Black said upon the same subject: "The federal constitution confers powers expressly enumerated, that of the state contains a *general grant of all* powers *not excepted.* The construction of the former instrument is strict against those who claim under it, the interpretation of the latter is strict *against those* who *stand upon the exceptions*, and liberal *in favor of the government itself;* the federal government can do nothing but what is authorized expressly, or by clear implication; the state *may do whatever is not prohibited.*"

The authorities establishing this canon of construction are numerous, and, so far as I know, uniform. Bearing this rule of construction in mind, what does the constitutional prohibition relied on mean? The only prohibitory words are that corporations of the class in question "shall not be *created* by special act." The word "create" has

a clear, well-settled, and well-understood signification. It means to bring into being, to cause to exist, to produce, to make, etc. To my apprehension, it appears to be one thing to create, or bring into being, a corporation, and quite another to deal with it as an existing entity, a person, after it is created by regulating its intercourse, relations and acts as to other existing persons, natural and artificial. "A corporation is a franchise possessed by one or more individuals, who subsist as a body politic, under a special denomination, and are vested, by the policy of the law, with the capacity of perpetual succession, and of acting in several respects, however numerous the association may be, as a single individual." 2 Kent Comm. (9th ed.) 306; Railroad Co. v. Commissioners, 112 U. S. 609, 5 Sup. Ct. Rep. 299. The ordinary incidents to a corporation are to have perpetual succession, and the power of electing or otherwise providing members in the place of those removed by death or otherwise, to sue and to be sued, to grant and receive and to purchase and hold lands and chattels by their *corporate name;* to have a common seal; to make by-laws for the government of the corporation, and sometimes the power of amotion or removal of members. "The essence of a corporation consists only of a capacity to have perpetual succession under a special denomination, and an artificial form, and to take and grant property, contract obligations, and sue and be sued by its corporate name, and to *receive and enjoy in common* grants of privileges and immunities." Railroad Co. v. Commissioners, 112 U. S. 609, 3 Sup. Ct. Rep. 325.

The creative act necessarily extends only to the bringing into being of an artificial person, with the capacities stated, among which is "*a capacity* to receive and enjoy in common grants and privileges, and immunities;" that is to say, a capacity to receive and enjoy such grants, privileges, and immunities as may be made either at the time of the creation or any other time. The creation of the being with the capacity to receive grants is one thing; the granting of other privileges and immunities, which it has the capacity to receive when created, is another. When such a being is brought into existence, a corporation has been created. A legal entity, a person, has been created, with a capacity to do by its corporate name such things as the legislative power may permit, and receive such grants of such rights and privileges, and of such property, as the legislature itself or private persons with the legislative permission may give. But I do not understand that every right, privilege, or grant that can be conferred upon a corporation must be given simultaneously with the creative act of incorporation. On the contrary, I suppose the artificial being must be created with a capacity to receive before anything can be received. The right to be a corporation is itself a separate, distinct, and independent franchise, complete within itself. And a corporation having been created, enjoying this franchise, may receive a grant and enjoy other distinct and independent franchises, such as may be granted to and enjoyed by natural persons; but because it enjoys the latter franchises, they do not, therefore, constitute a part of the distinct and independent essential franchise,—the right to be a corporation. They are ad-

ditional franchises given to the corporation, and not parts of the corporation itself,—not of the essence of the corporation.

Natural persons, with certain physical capacities, being brought into existence through the process appointed by nature, may be prohibited by law from doing one thing and permitted to do another; may enjoy one franchise and be excluded from the enjoyment of another; but these permissions and prohibitions constitute no part of the person, and were in no manner connected with the creative act. So, with reference to corporations, being once created, they have the physical capacity, through their officers, to do anything that a natural person may do; such as building a church, a steamship or a railroad. But, being created, they may be prohibited from doing one thing and permitted to do another, like natural persons; but this permission or prohibition is not a creative act, but an act regulating the conduct of the corporation, and determining its rights and relations to the public, and to other existing persons, natural and artificial. *Corporate* powers, strictly speaking, I suppose, are those peculiar and essential to a corporation—not those which are or may be possessed in common with natural persons; and they are very few in number, embracing those which pertain to the essence of the corporation. The term is, undoubtedly, often and conveniently used in a broader sense, but it is not found in the constitutional provision in question. Section 33, article 4, defines the term "corporation" as used in the constitution, and says it "shall be construed to include all associations and joint-stock companies having *any of the powers of corporations not possessed by individuals or partnerships.*" Of course, it excludes all associations that do not have any powers other than those possessed by individuals and partnerships. And this provision is a recognition of the idea that *corporate* powers are only such as are not possessed in common with individuals and partnerships—or natural persons.

The power to create a corporation, as the terms are used in section 33, extends, therefore, to the bringing into being of a legal entity, having powers and privileges not possessed by individuals; that is to say, possessing the powers, which, as before stated, constitute the essence of a corporation, or corporate powers, strictly speaking, and has no reference to the legislative dealings with that artificial person after its creation. I suppose the constitution might have devolved the power of creating a corporation on some other body, as the supreme court, and the power to deal with it after its creation—to regulate its conduct and relations to the public, and to prescribe its rights, powers, and duties other than those strictly corporate, to the legislature. Had it been so provided, there can be no doubt that such powers would have been wholly distinct and independent. I do not perceive that they are any the less so because exercised by the same body. The act of creating a corporation by conferring upon an association of individuals certain strictly corporate powers, embracing only powers and privileges not possessed by individuals and partnerships, and then granting to it other privileges, enlarging or restricting its right to the enjoyment of other franchises that may be possessed in common with

natural persons, and regulating its external relations are, to my mind, distinct and independent, and I find nothing in the constitution prohibiting the latter power to the legislature. There are numerous distinct, independent franchises, any one or more of which may be granted indifferently either to natural persons or existing corporations, and, in my judgment, the constitution no more prohibits the granting of any one of those franchises, except such as are expressly prohibited, to corporations, by special act, than to individuals. It only prohibits the *creation* of a corporation by special act; that is to say, that the creating or granting of the *particular franchise constituting* a corporation shall not be by special act. The prohibition applies to no other of the numerous franchises which are subjects of legislative grant.

In this case there was a corporation—a railroad corporation—duly created under the general act, for the purpose of building a railroad in a southeastern direction through the state of California to the eastern line of the state, to intersect with a road which, it was supposed, would soon be built to the eastern states, the route of which was still undetermined and uncertain. It had all the faculties physically necessary to enable it to build any railroad. Afterward congress authorized the building of a road across the continent on or near the thirty-fifth parallel of latitude to intersect the line of the state at a point different from that designated in the articles of association of said corporation, and made a grant to the corporation on condition that it should build a road from a point of intersection with said transcontinental road, near the eastern line of the state, to San Francisco, and the legislature, by special act, authorized the said corporation, already in existence, with authority and capacity to build a railroad, to build its road upon said line, and accept and receive said grant. In my judgment, this is in no sense an act creating a corporation, or a new corporate power, or new corporate franchise within the proper meaning of the term, but a dealing with a corporation already in existence authorized to build a road in the same general direction, with the same object in view; that the change of line was a matter of detail only, and, if not, but on the contrary, the grant of an independent right, and an additional privilege or franchise, it was still one entirely competent for the legislature to confer upon the existing corporation, as well as on any natural person, and in no way obnoxious to the provision prohibiting the creation of a corporation for such purpose by special act. To reach any other conclusion would be to violate the canon of constitutional construction before stated; to disregard the plain meaning of the terms used in the constitution, and upon imaginary grounds interpolate into that instrument language which the people have not seen fit to place there themselves. As said, in substance, by Mr. Justice Crocker, in Telegraph Co. v. Telegraph Co., 22 Cal. 425, to give the constitution any such construction as claimed we would have to make it read thus: "Corporations may be formed, *and other franchises and special privileges granted*, under general laws, but shall not be created, nor shall *other franchises or special privileges* be granted by special act, except for municipal purposes." He well re-

marks: "If such had been the meaning intended by the framers of the constitution, they could easily have expressed it in apt words. The language used by them is clear, and they well knew that it included *but one* of the numerous class of franchises the subject of legislative grant, and that a regulation of *one* could not by any reasonable implication be extended to others *not mentioned.*" * * *

I should have contented myself with the simple reference to this authority without any discussion of the question, but for the fact that defendant has cited the case of San Francisco v. Water-Works, 48 Cal. 493, decided by the supreme court of the state, in which it is held that corporations can exercise no powers except such as are conferred by the general laws under which they are formed, and that the legislature can not confer on such corporations any powers, or grant them any privileges by special act. * * *

In 1863, the same question arose in Telegraph Co. v. Telegraph Co., 22 Cal. 398, and was elaborately considered. It was then held that the legislature might confer upon existing corporations by special act a direct grant of special privileges and franchises; and that there was no restriction upon the power imposed by the constitution, except as to the particular privileges therein specified. * * *

Of the six justices of the supreme court, who have considered the question, three took one view and three the other, so they stand in number equally balanced. The able and eminent justice who delivered the opinion of the court in the last case, for whose opinion I entertain profound respect, very ably presented the same views adopted in his opinion, in his argument as counsel in the former case, so that the court in the first case did not overlook, but, on the contrary, fully considered them. Had the justices who have passed upon the question in the two cases sat as one court, there would have been no decision of the question. Thus, the matter stands equally balanced, the only difference as authority being that the decision against the constitutionality of the power is last. * * *

For these reasons, under the following authorities, I feel at liberty to adopt my own and the views of the United States supreme court, which accord with the first case decided by the supreme court of California, and not with the second. Insurance Co. v. Debolt, 16 How. 431, 432; Gelpcke v. City of Dubuque, 1 Wall. 206. But this case falls within the principle decided in the two cases cited, as well as others, in another particular. The act in question was passed and acted upon by the railroad company four years before the decision in San Francisco v. Water-Works, and rights have become vested under it. During all that time it was the settled construction of the constitutional provision in question that such legislation was valid. The act, therefore, became a contract between the state and the company, under which the latter entered upon the construction of its road in pursuance of the terms of the several statutes mentioned.

In the last case cited the court, quoting from the opinion in the next preceding case, says: "The sound and true rule is, that if the contract, when made, was valid by the laws of the state, *as then ex-*

pounded by all the departments of the government and *administered in its courts of justice*, its validity and obligation can not be impaired by any subsequent legislation, *or decision of its courts altering the construction of the law.* The same principle applies when *there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule we adhere. It is the law of this court. It rests upon the plainest principles of justice.* To hold otherwise would be as unjust as to hold that rights acquired under statutes may be lost by repeal. The rule embraces this case." 1 Wall. 206. And so it does the case now in hand. * * *

I, therefore, hold the act of April 4, 1870, authorizing the defendant to build its road upon the line indicated in the plat filed with the commissioner of the general land office, and to accept the congressional grant, was a valid act, and at the time of its passage conferred the rights and powers indicated upon the Southern Pacific Railroad Company. * * *

Judgment for plaintiff.

Note. Supporting this view see: 1880, Attorney-General v. North Am. L. Ins. Co., 82 N. Y. 172; 1881, Central Ag. & Mech. Assn. v. Ala. G. L. Ins. Co., 70 Ala. 120; 1884, Attorney-General v. Joy, 55 Mich. 94; 1887, Wiley v. Bluffton, 111 Ind. 152; 1891, St. Joseph and Iowa R. Co. v. Shambaugh, 106 Mo. 557; 1898. Indianapolis v. Navin, 151 Ind. 139, 47 N. E. Rep. 525; 1901, Detroit Citizens' Ry. Co. v. Detroit, 125 Mich. 673, 84 Am. St. R. 589.

Sec. 73. (3) *Conferring corporate powers.*[1]

"The legislature shall pass no special or local act conferring corporate powers."

THE STATE OF OHIO, EX REL. ATTORNEY-GENERAL, v. THE CITY OF CINCINNATI.[2]

1870. IN THE SUPREME COURT OF OHIO. 20 Ohio State Reports, 18–37.

BRINKERHOFF, C. J. [This is an information in the nature of a writ of *quo warranto*, filed in this court by the attorney-general for the purpose of testing and contesting the validity of certain extensive annexations of outlying territory and incorporated villages claimed by the city to have been made to it under the authority and in accordance with the provisions of the act of the 16th of April, 1870, to prescribe the corporate limits of Cincinnati. 67 Ohio L. 141.

The city, by plea, set out the statute, and relied upon it for her authority in annexing the territory and exercising her jurisdiction over it. The state filed a reply, to which the city demurred, and thereby raised the legal sufficiency of all the preceding pleadings, the main

[1] See also State v. Dawson, *infra*, p. 412, on 413.

[2] Statement of facts abridged. Arguments and part of opinion omitted.

point being the constitutionality of the act. The constitution, article xiii, provides:

"Sec. 1. The general assembly shall pass no *special* act, conferring corporate powers."

"Sec. 2. Corporations *may* be formed under *general* laws, but all such laws may, from time to time, be altered or repealed."

"Sec. 6. The general assembly *shall* provide for the organization of cities and incorporated villages by *general* laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit so as to prevent the abuse of such power."]

In looking at these provisions of our constitution—and indeed, in looking over all the provisions of our constitution from beginning to end—it will be seen that they make no distinction as respects legislative power in the creation of them, and in the conferring of powers upon them between any classes of corporations proper. They make no distinction between private corporations such as railroad, manufacturing or mining corporations or the like and public municipal corporations, such as cities and villages. On the contrary, and as if to preclude the hypothesis of any such distinction, the sixth section of the thirteenth article assumes the imperative form of expression and declares that "the general assembly *shall* provide for the organization of cities and incorporated villages by *general* laws." In respect to corporations proper, whether private or municipal, the provisions of section 1, article xiii, are all comprehensive. "The general assembly shall pass *no* special act conferring corporate powers." These provisions of the constitution are as imperative, as comprehensive and emphatic as if the people, speaking through their constitution, had said: "The bane and curse of our legislation, as it existed under the latitudinarian provisions of the constitution of 1802, is in future utterly and absolutely prohibited. Henceforth, the laws conferring corporate powers shall be *general*, affecting or liable to affect the interests of the constituency of every individual member of the general assembly and so by powerful motives calling his attention to the effect of proposed enactments upon his own immediate constituency as well as upon the people of other localities." This is the policy and intent of the provisions of the constitution above quoted, and they are as clearly apparent as if they had been expressed in so many words. No one who has read the proceedings and debates of the convention which presented to the people of Ohio the framework of the constitution which the latter by their votes established and adopted, or is old enough to remember the apprehensions of evil consequences with which the conferring of corporate powers by special acts were regarded, can fail to see that it was one of the ends and aims of the constitutional convention and of the people who adopted the framework of a constitution which that convention presented for their adoption or rejection, to cut up by the roots at once and forever, all capacity of the general assembly to confer by special act any powers whatsoever upon any corporate body whatsoever.

At one time, indeed, an attempt was made to escape the effect of

these constitutional restrictions on legislative power, on the theory that the phrase "conferring corporate powers" meant simply the conferring of corporate existence—the *creation* of a corporation, so that if corporations were only *created* under general laws, the legislature might then proceed by special acts to confer upon existing corporations as many and as varied powers as it pleased. Such a construction would leave a door wide open for the re-introduction of all the evils of special legislation which these restrictions and mandatory provisions of the constitution were obviously designed to guard against and prevent. Accordingly such a construction was distinctly repudiated by this court in the carefully considered case of Atkinson v. The Marietta, etc., R. Co., 15 Ohio St. 21. In that case Ranney, J., delivering the opinion of the court, and referring to the first and second sections of the thirteenth article of the constitution above quoted, says: "These provisions of the constitution are too explicit to admit of the least doubt that they were intended to disable the general assembly from either creating corporations or conferring upon them corporate powers by *special* acts of legislation. It was intended to correct an existing evil, and to inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to all future grants of power, of making such law applicable to all parts of the state, and thereby securing the vigilance and attention of its whole representation, and finally, of making all judicial constructions of their powers, or the restrictions imposed upon them, equally applicable to all corporations of the same class. We must give such a construction to the constitution as will preserve its leading objects intact."

I think the following propositions to be impregnable:

1. The general assembly can not, by a special act, create a corporation.

2. It can not, by special act, confer additional powers upon corporations already existing.

3. In the purview of these propositions and of the constitutional provisions on which they are based, there is no distinction between private and municipal corporations.

Now for the application of these propositions to the case before us. The act of the general assembly under which the corporate authorities of Cincinnati proceeded to make the annexations of outside territory which they claimed to have made and consummated, is "*a special act.*" It does not purport to be otherwise. Its language is: "Be it enacted by the general assembly of the state of Ohio, that the corporate limits of the city of Cincinnati shall be as follows: Commencing at the mouth of the Little Miami river, thence northeastwardly," etc. And now but one question remains. Does this special act assume to confer upon the corporation of the city of Cincinnati additional corporate powers—powers which, as a municipal corporation, she did not previously possess? The answer is plain. It does assume to confer, on certain prescribed conditions, the power of municipal government, the power of police regulation, the power of judicial jurisdiction, and the powers of assessment and taxation, over

a number of outlying suburban incorporated villages, and of other territory hitherto subjected to no jurisdiction except such as belongs to the township, county and state organizations.

A majority of the court are of opinion that the act is clearly in contravention of the restrictive provisions of the constitution, and, therefore, of no binding force and validity.

And here I might properly stop; yet, for the purpose of excluding a possible conclusion, I will, on my own individual responsibility, say one word more. It may be asked, Do we intend to include township and county organizations in the category with municipal and other corporations proper? The question is not involved in the present case, and so it is not properly before us; but, if it were, I apprehend the answer to it would readily be found in the case of the Commissioners of Hamilton County v. Mighels, 7 Ohio St. 109,[1] where it is held that a county is not properly a corporation, but that "it is at most but a local organization, which, for purposes of civil administration, is invested with a few functions characteristic of a corporate existence."

Judgment of ouster.

SCOTT, WELCH and DAY, JJ., concurred.

WHITE, J., did not concur.

Note. See, 1878, State v. Maloy (City of Council Grove), 20 Kan. 619; 1880, School District v. Insurance Co., 103 U. S. 707; McGregor v. Baylies, 19 Iowa 43.

Sec. 74. (4) *Title and special privileges.*

"The legislature shall pass no bill embracing more than one subject, and that shall be expressed in the title; nor shall any private or local bill be passed granting to any corporation, association or individual any special or exclusive right, privilege, immunity or franchise whatsoever."

JOHN JACOB ASTOR ET AL., RESPONDENTS, v. THE ARCADE RAILWAY COMPANY, APPELLANT.[2]

1889. IN THE COURT OF APPEALS OF NEW YORK. 113 New York Reports 93–115.

Appeal from an interlocutory judgment of the general term of the supreme court in the first judicial department, entered upon an order made May 18, 1888, which reversed a judgment of special term sustaining a demurrer to the complaint herein and dismissing said complaint, and which overruled said demurrer. (Reported below, 48 Hun 562.)

This action was brought by plaintiffs, who are the owners of the

[1] *Supra*, p. 214.

[2] Arguments omitted.

property fronting upon Broadway and Madison avenue, in the city of New York, to restrain the construction by defendant of a railway under the surface of said streets, which the complaint alleged defendant was about to attempt to do, claiming authority under the act (ch. 312, Laws of 1886), which act the complaint alleged to be unconstitutional and void.

EARL, J. The sole question for our determination is whether the defendant has legal authority to construct and operate a railway under Broadway and Madison avenue in the city of New York. The defendant traces its corporate existence to the act, chapter 842 of the laws of 1868, entitled "An act to provide for the transmission of letters, packages and merchandise in the cities of New York and Brooklyn and across the North and East rivers by means of pneumatic tubes, to be constructed beneath the surface of the streets and public places in said cities and under the waters of said rivers." The first section of the act authorized and empowered Alfred E. Beach and other persons named, and their assigns, "to lay down, construct and maintain one or more pneumatic tubes in the soil beneath the surface, squares, avenues and public places, in the cities of New York and Brooklyn and under the bed of the waters of the East river between the said cities, and also under the bed of the waters of the North river from the city of New York to the shore of New Jersey, but at such depth as not to interfere with navigation; and to convey letters, parcels, packages, mails, merchandise and property in and through said tubes for compensation, by means of vehicles to be run and operated therein by the pneumatic system of propulsion; and to the end that the public convenience may be promoted in the operation of said vehicles, the said persons and their assigns are also hereby authorized and required to erect upon the sidewalks of the said streets, squares, avenues and public places suitable ornamental lamp-posts, boxes, pillars or receptacles, not exceeding thirty inches in diameter, connected with said pneumatic tubes for the deposit of letters, packages and property to be transmitted therein." And it provided that the tubes should not extend through any vault, nor under any sidewalk fronting on private property, without the consent of the owners of such private property, and compensation to them, which should be ascertained and determined, in case the parties could not agree, in the manner provided in the general railroad act of 1850. Section 2 provided that the pneumatic tubes should be so constructed as to have a mean interior diamter of not exceeding fifty-four inches.

Section 5 authorized the persons named in the act to hold a meeting and determine the terms and conditions upon which the powers, privileges and franchises conferred by the act might be transferred to a corporation to be organized as provided in the next section, and section 6 provided that in case the persons attending the meeting named in the prior section should so determine, they might organize themselves into a corporation in the manner specified in the general manufacturing act of 1848, and the acts amendatory thereof, "for the purpose of constructing and maintaining the pneumatic tubes afore-

said and using and operating the same as hereinbefore authorized," and that the corporation so organized shall "possess all the powers and privileges conferred by said acts and be subject to all the duties and obligations imposed therein, not inconsistent with the provisions of this act."

In August, 1868, in pursuance of the powers conferred by the act, the persons therein named organized themselves into a corporation by the name of "The Beach Pneumatic Transit Company," and in the certificate executed and filed by them, they declared that the object of the corporation was "to construct and operate pneumatic railroads in the cities of New York and Brooklyn and under the waters of the North and East rivers, and to exercise all the powers, privileges and franchises conferred upon said corporation by the act" of 1868, that the capital stock should be $5,000,000 and that the corporation should continue in existence for the term of fifty years. The certificate could give the corporation no greater powers than were conferred by the act of 1868, and to that act we must look for the scope and measure of its powers.

The act did not confer railroad powers upon the corporation, and did not subject it to any of the railroad acts, except for the purpose of ascertaining the compensation to be paid to the owners of property interests in the streets. It authorized the formation of a manufacturing corporation, with the incidents, powers and duties of such a corporation, so far as they were consistent with the purposes of the act. The corporation formed was, in fact, a manufacturing corporation, not, however, with the general power to engage in any manufacturing business, but for the sole purpose of constructing, maintaining, using and operating the pneumatic tubes. The formation of such a corporation was a matter fairly embraced within the title of the act. It was an appropriate instrumentality to accomplish the purposes of the act, and in no sense a new and independent subject. The legislature, having authorized the construction and operation of the pneumatic tubes, could, in the act itself, have created the corporation, or could have authorized its organization under any of the general laws of the state adapted to the formation of any business corporation; and the formation of such a corporation would be germane to the main purpose of the act as indicated by its title. While the general manufacturing laws regulated the corporation as to its mode of existence, its manner of action and its corporate life and being generally, yet all its powers and duties related and were confined to the construction, maintenance, use and operation of the pneumatic tubes; and, therefore, *section 16 of article 3 of the constitution, which provides that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title,"* was not, as contended on behalf of the plaintiffs, violated.

What do the words pneumatic tubes mean? They convey to our minds no other meaning than that of tubes for the transmission of parcels operated by atmospheric pressure applied within the tubes.

The parcels may be transmitted outside the tubes upon vehicles attached to a piston operated within the tubes by atmospheric pressure, or they may be transmitted within the tubes by atmospheric pressure applied behind them. But they are in no sense railways. Such a tube may contain vehicles placed upon wheels, and the wheels may run upon rails or in grooves, and yet the structure could not, according to the popular sense, or in any legal sense, be what is generally known as a railway. The tubes may be so constructed that in a technical or scientific sense the structure might be called a railway; and so, too, any structure upon which vehicles may be moved upon rails, however peculiar or small, may in some limited sense be called a railway, and yet it may not be a railway within the meaning of the constitution and the general laws of the state. When they speak of railways they always mean railways either for the general carriage of property or of passengers, or of both, and a railway which may be operated in small pneumatic tubes by atmospheric pressure for the transmission of small packages is not within such meaning.

Such was the character and status of the corporation organized under the act of 1868. That act was amended by the act, chapter 512, of the laws of 1869, entitled "An act supplementary to chapter 842, of the laws of 1868, in relation to carrying letters, packages and merchandise by means of pneumatic tubes in New York and Brooklyn," but there is nothing in that act pertinent to the present discussion.

From 1868 to the commencement of this action in 1886, so far as this record discloses, nothing whatever was done by the corporation except to change its name several times and to procure acts of the legislature purporting to enlarge its powers and extend its corporate life. No pneumatic tubes have been constructed, and it is a fair inference from the admitted facts that the system for the pneumatic transmission of property was before the year 1873 found to be impracticable. It had been tried in various parts of Europe, but had proved a failure, and for the general transmission of property or passengers was in the year 1873 nowhere in use. (Chamber's Encyclopedia, titles, "Atmospheric Railway" and "Pneumatic Dispatch," Encyclopedia Britannica, title "Atmospheric Railway," Appleton's Cyclopedia, title "Atmospheric Railway," Johnson's Cyclopedia, title, "Pneumatic Transmission.")

In 1873 the persons interested in the corporation, as we may infer, being aware of its insufficiency for any practical purpose, concluded to procure an enlargement of its powers, and a radical change in its character and purposes, and, therefore, they obtained the passage of the act (chapter 185), entitled "an act supplemental to and amendatory of chapter 842 of the laws of 1868, an act entitled 'an act to provide for the transmission of letters, packages and merchandise in the cities of New York and Brooklyn, and across the North and East rivers by means of pneumatic tubes, to be constructed beneath the surface of the streets, squares, avenues and public places, in said cities, and under the waters of said rivers,' passed June 1, 1868, and of chapter 512 of the laws of 1869, entitled 'an act supplementary to chapter

842 of the laws of 1868 in relation to carrying letters, packages and merchandise by means of pneumatic tubes in New York and Brooklyn, and to provide for the transportation of passengers in said tubes.'" The last phrase of this title "and to provide for the transportation of passengers in said tubes" did not appear in the title of the act of 1869, and yet in the act in all its stages through the legislature, as approved by the governor, filed in the office of the secretary of state and printed in the session laws, the quotation marks are so placed as to make the phrase appear to be a part of that title. The title of the act, therefore, was well calculated to deceive any persons to whose attention it came while the act was under consideration in the legislature. But we will assume that this title is to have the same force and effect as if that of the act of 1869 had been properly quoted, and then the only addition to the titles of the prior acts is the final phrase above quoted, and the only subject expressed in the title is the transportation of property and passengers in pneumatic tubes.

This title is assailed by the plaintiffs as not in compliance with section 16 of article 3 of the constitution above quoted. A particular examination of the provisions of the act is, therefore, necessary. The first section provides that it shall be lawful for the Beach Pneumatic Transit Company "to construct, maintain and operate an underground railway for the transportation of passengers and property," under Broadway and Madison avenue, "by means of tubes of enlarged interior diameters sufficient for the construction of a railway or railways therein, and for the running of cars and the carrying of passengers therein, and also to construct, in connection with said tubes, two or more tracks of railway with the necessary turnouts and stations for the ingress and egress and accommodation of the passengers, and for the receipt and discharge of packages and freight and said company shall have the right and privilege, subject to the approval of the board of engineer commissioners hereinafter provided for, to make connection with the Harlem and connecting railroads at any point deemed best, at or above Forty-second street, and also to make connection with the Hudson River Railroad at any point northerly of Fifty-ninth street."

Section 2 provides that the passenger tubes shall, as far as practicable, follow the center line of the streets, and shall not occupy in the aggregate a greater space than thirty-one feet in width by eighteen feet in height, exterior measurement, and that they shall be laid and constructed under the supervision of a board of three engineer commissioners, whose duty it is to see that the "passenger tubes and railways" are constructed in a thorough and workmanlike manner; and that they shall constitute a board of commissioners, a majority of whom "shall determine whether the pneumatic system or other motive power shall be adopted by said corporation for the propulsion of the cars running within said passenger tubes."

Section 4 authorizes the corporation to acquire the title to such real estate or interest therein as may be necessary to enable it to construct, operate and maintain "said tubes and railways," and to construct and maintain the proper platforms, stations and buildings at such points

along the route of its tubes as may be convenient and suitable for the ingress and egress of its passengers and for the receipt and discharge of freight and packages, and necessary for the successful operation of "said tubes and railway, and for the proper connections between said tubes and railways, platform, stations and buildings;" and in case the corporation is unable to agree with the owners of real estate for the purchase and use thereof, it is authorized to acquire the title to the same in the manner provided in the general railroad act of 1850; and in all cases the use of the streets, avenues, squares, grounds and public places, and the right of way under the same for the purpose of "said tubes and railway or railways therein," shall be considered and is declared to be a public use.

Section 5 provides that "it shall be lawful for said corporation to convey passengers on said railway or railways through said tubes for hire," and regulates the rate of fare that may be charged.

Section 6 provides that the corporation shall commence active operations in the construction of its works within six months after the passage of the act, and shall complete the section of passenger tubes with two railway tracks from Bowling Green to Fourteenth street within three years, and shall complete the remainder of the passenger tubes, as authorized, within five years thereafter.

Section 7 provides that the corporation shall not construct any station, depot or other building, or work above the surface of any land belonging to the city of New York, either in its own right or as a trustee, without the consent of the mayor and aldermen, but that nothing in the act shall be construed to authorize the mayor and aldermen to donate, lease or sell any portion of any of the ground surface of any public park in the city beyond what may be absolutely necessary for the exit from and entrance to the railroad.

Section 9 provides that the corporation shall possess "all the powers and be subjected to all the duties and liabilities imposed on railroad corporations by the laws of this state not inconsistent with the charter of this company or the purposes of its incorporation."

Here we read nothing of pneumatic tubes or of propulsion by atmospheric pressure, or even pneumatic railways. We read of passenger tubes, but we must not be deceived by the juggle of words. We find authorized a grand underground railway, not less than fifteen miles long, with two or more tracks, turn-outs, platforms, stations, buildings and other appurtenances, with power to connect with surface steam railroad, to be operated through passage-ways called tubes, eighteen feet in height and thirty-one feet in width, exterior measurements; in fact, tunnels which could not be operated by atmospheric pressure. What was before a manufacturing corporation was converted into a railroad corporation, or, at least, had superadded the powers, privileges, duties and liabilities of railroad corporations under the general laws of the state, with authority, by the consent of the engineer—commissioners, to use, for the movement of its cars, horses, steam or any other motive power. The construction of such a railway by such a corporation is certainly a subject not expressed in the title of the

act. The only subject there indicated is the transportation of passengers and property through pneumatic tubes by atmospheric pressure. A title purporting that an act provides for pneumatic transportation would not be sufficient for an act authorizing the construction and operation of a horse railway or a steam railway, as a title purporting that an act authorizes a line of omnibuses for the transportation of passengers would not be sufficient for an act authorizing the construction of a railway for the same purpose.

The constitutional provision referred to has been deemed by statesmen and jurists, conditores legum, of so much importance that it is found in the fundamental laws of most of the states. Its purpose is to prevent fraud and deception by concealment, in the body of acts, subjects not by their titles disclosed to the general public and to legislators who may rely upon them for information as to pending legislation. When the subject is expressed, all matters fairly and reasonably connected with it, and all measures which will or may facilitate its accomplishment, are proper to be incorporated in the act and are germane to the title. The title must be such, at least, as fairly to suggest or give a clue to the subject dealt with in the act, and unless it comes up to this standard it falls below the constitutional requirement. (Mayor, etc., v. Colgate, 12 N. Y. 146; People v. Hills, 35 N. Y. 449, 452; Matter of New York, etc., Bridge, 72 N. Y. 527; Matter of Application of Department of Public Parks, 86 N. Y. 439; People v. Whitlock, 92 N. Y. 191; Matter of Knaust, 101 N. Y. 188; Cooley's Constitutional Limitations 141.) Here the only subject suggested by the title is the transportation of passengers and property through pneumatic tubes, by atmospheric pressure, and everything appropriate and germane to that subject could be provided for in the act.

But a person reading the title alone would have no clue whatever to the great railway scheme actually authorized by the act; and so the corporators themselves evidently regarded the act, for, finding that the corporation had outgrown its name, "The Beach Pneumatic Transit Company," they, by the act, chapter 503 of the laws of 1874, had it changed to "The Broadway Underground Railway Company," and in that act what were before called "tubes" are called "tunnels;" and ten years later, by an order of the proper court, the name was again changed to the "New York Arcade Railway Company." While by the acts of 1874, chapter 454 of 1881 and chapter 312 of 1886, the charter of the corporation was amended and its powers greatly enlarged, pneumatic tubes, propulsion by atmospheric pressure and pneumatic railways are nowhere mentioned, and all that is left as a result of all the legislation is a grand scheme for underground railways operated by any motive power except such as shall emit "smoke, gas or cinders" which, if carried into effect, would, doubtless, be one of the marvels of the world. But if it is as desirable and safe as it is marvelous, it should be placed upon a constitutional basis and make an undisguised appeal upon its merits for the public sanction.

Our conclusion, therefore, is that the act of 1873 for the insufficiency

of its title is unconstitutional and void, and hence all subsequent legislation based upon that act must fall with it. When the act of 1886 was passed, under which the defendant proposes to lay down its tracks and to construct its underground railways, it had no power to construct an underground railway for the transportation of passengers and general freight through tunnels, and, therefore, that act is in conflict with section 18 of article 3 of the constitution, which forbids the legislature to pass a private or local bill granting to any corporation the right to lay down railroad tracks or to construct a street railroad, except upon conditions mentioned in that section. (Matter of N. Y. District R. Co., 107 N. Y. 42.)

We need go no further. The conclusion already reached renders it unnecessary to solve the various other questions argued with much ability and learning by the able counsel who appeared before us.

The judgment should be affirmed with costs.

GRAY, J. I concur with EARL, J., in his opinion that the act of 1873 was unconstitutional and void, in that it failed to comply with section 16 of article 3 of the constitution. But I am further of the opinion, assuming that the act of 1873 was valid, and that there was an acceptance of and a valid compliance with its conditions, and that there was a waiver of causes of forfeiture by the passage of the act of 1886, that the latter act was in violation of the provisions of the constitutional amendment, which went into effect on January 1, 1875. By that amendment *the legislature was inhibited from passing a private or local bill, granting to any corporation the right to lay down railroad tracks, or any exclusive privilege, immunity or franchise whatever.* The act of 1886, under which the appellant claims to have acquired its present rights, can not, in my view of what it grants, be upheld as legislation which merely regulates the exercise of powers formerly granted to and possessed by an existing corporation. It went far beyond that. It was, in fact, a new grant of substantive rights, in addition to and differing from what might have been claimed under the act of 1873. By the act of 1873 the company would have had a right to construct a railway in tubes, which should not occupy a greater space than thirty-one feet in width, by eighteen feet in height, exterior measurements. The company could not have approached within two feet of the curb line, nor within eighteen feet of the building line. These restrictions must be deemed to be important limitations and wholesome provisions, designed for the protection of the rights of the abutting property-owners and to secure to the public the rightful enjoyment of the streets as such. By the act of 1886 they would possess the right to excavate for their railways a space of forty-four feet, inside measurements, in width, and without any limitation as to depth. They might construct railways without the use of tubes or tunnels, and use any motive power which would not permit of the emission of smoke, gas or cinders.

I think we have here a pretty wide departure from the rights and powers to be enjoyed under the act of 1873. The pneumatic tube of a diameter of fifty-four inches, for the transportation of packages

and merchandise, authorized under the original charter of 1868, and which was transmuted by the act of 1873 into a tubular passenger and freight railway, has now wholly disappeared, and in its place appears a scheme for what amounts to a complete occupation of the street for railway purposes, except so far as it leaves a roof over the excavation to take the place of the street surface. This grant of right to excavate the street to an extent practically unlimited, and the permission to abandon tubes and to construct railways in the excavations are matters of grant too serious in their nature and consequences, under the circumstances of the case, to be passed over as in mere regulation of an existing franchise. To allow such legislation is, in my opinion, to nullify the beneficial and protective objects aimed at by the constitutional amendment of 1875.

Under the guise of an amendment, there was a legislative grant to this company of franchises and privileges beyond any naturally following upon, or flowing from, those granted under the act of 1873, not in harmony with the spirit of that grant, and of necessity, exclusive in their nature. It, therefore, fell within the prohibition of the constitutional amendment.

When the people have, by amending the constitution, restricted the powers of their respresentatives in the legislature to pass private or local bills, which grant the right to lay down railroad tracks, or any exclusive privileges or franchises to a corporation, the courts should see to it that the constitutional limitation is not evaded, under the pretense of an amendment of the charter. They should scrutinize the legislative act complained of, not with the idea of seeking the way to a construction adverse to its constitutionality, but rather to uphold it, if possible. But if the scrutiny reveals a real and serious violation of the constitutional provisions, they must condemn the act as invalid.

It is said, however, that a scope of action is offered for the legislature, with respect to corporations already in the possession of corporate rights, acquired under statutes passed before the adoption of the constitutional amendment. As a general proposition this is true. *Conceding to the legislature its full measure of authority to legislate, under the general grant of power by the constitution of the state, we hold that such authority, when now exercised by a private bill in behalf of a corporation, can not, under the guise of measures for the regulation of the exercise of the corporate powers and franchises, be upheld by the court, when, by a practical construction, the act permits what the amendment to the constitution prohibits. A regulation of these powers and franchises, when the act touches them so as to alter them, means their restriction rather than their enlargement. If enlargement of powers may be sometimes consistent with the constitutional limitations, it may not go to the extent of trenching on the territory of private and public rights, over which the constitution was plainly intended to operate in its limitations.* When enlargement of corporate powers becomes indistinguishable from a grant of new substantive rights, within the purview of the section in question,

then the mischief is accomplished, to prevent which the constitutional amendment was designed.

In the Matter of the Gilbert Elevated Railway Company (70 N. Y. 361), Church, Ch. J., in discussing the changes of structure, etc., made by the commissioners under the provisions of the rapid transit act, said the changes were restrictive in their character. "By the charter the whole street was to be covered by the structure; by the conditions imposed only a portion of some streets could be occupied." And he says in that connection: "I can not accede to the proposition that any change in the structure and in the manner of occupying the streets, however restrictive upon the company, or beneficial to the public in the use of the streets, constitutes a fresh grant of the right to lay down railroad tracks. It is a misnomer to call such restrictions *grants* of any *right* whatever. As well might the cutting down of a fee to a life estate be termed a grant of land." Again he says: "No exclusive right or franchise was granted to the respondent corporation upon any construction of the clause. Every substantial right existed before the passage of the act, and the conditions imposed, embracing changes of structure and manner of occupying streets, should be regarded as restrictive of existing rights, and not *grants*, of rights or franchises within the constitutional sense. * * * This series of amendments designed to restrict the powers of the legislature in matters of detail, under general phrases and undefined words, is experimental in this state. They must be sustained and applied by a rational and practical construction, so as to subserve the purposes intended, and prevent the evils designed to be remedied; but not, by an artificial and technical construction, to extend their application to cases never contemplated."

I think the meaning of the decision is clear. If the legislative act operates upon a charter in the direction of a regulation, an adjustment or a restriction of powers possessed, it could not be objectionable. Within its reserved powers the legislature may, at all times, amend or alter the charter, but the constitutional amendment will not permit it by a private bill to make any new grant of rights, comprehended within those specified by the amendment. I do not think that it can be said, in the present case, that every substantial right given by the act of 1886 existed previously.

For the reasons I have briefly given, I think the act of 1886 practically gave to this corporation a right to lay down railroad tracks, which it could not have exercised under the act of 1873, and, also, gave what are practically exclusive privileges. I think it contravened the constitution, in the letter and in the spirit, and is therefore void.

All concur with EARL, J.; RUGER, Ch. J., DANFORTH and PECKHAM, JJ., concur with GRAY, J.

Judgment affirmed.

Sec. 75. (5) Two-thirds vote required.

"The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill creating, continuing, altering or renewing any body politic or corporate."

Note. See Warner v. Beers, Thomas v. Dakin, Falconer v. Campbell and Green v. Graves, *supra*, pp. 2, 19, 287, 292, and notes there given.

SUBDIVISION II. THE BODY CORPORATE, ITS PARENTAGE—THE PROMOTERS.[1]

CHAPTER 4.

FUNCTIONS AND CLASSES OF PROMOTERS.

Sec. 76. Definitions.

In the English Companies Act, 7 and 8 Vict., c. 120 (1844), the expression "promoter" or "promoter of a company" (is declared) to apply to every person acting by whatever name in the forming and establishing of a company at any period prior to the company obtaining a certificate of complete registration provided for. The same act provided that before proceeding to make public, either by prospectus, hand-bill or advertisement, any intention or proposal to form any company, it should be the duty of the *promoters* to make to the registration office returns as to the name of the proposed company, its purpose and the names, occupation, place of business and place of residence of the promoters; the promoters were also to file a written statement consenting to become such promoter, and a written contract entered into with some one or more persons as trustees for the company, to take one or more shares; also, afterward to file a statement as to provisional place of meeting, names of members of the committee in the formation of the company, names of the officers of the company, names of subscribers, copy of prospectus, etc.

The method of formation of English companies now, under the companies act of 1862 (25 and 26 Vict., c. 89), is much the same as was provided by the act of 1844, although "promoter" is not defined or used in the act of 1862. See, also, Directors' Liability act of 1890, 53 and 54 Vic., c. 64, § 3, ch. 2.

1892. In 2 Stimson's American Statute Law, art. 802, § 8021, it is said "the petition for incorporation or articles may be made by a number of persons. * * * Such persons are in this work termed *the promoters;* in some states they are called *petitioners*, in other *commissioners.*"

"A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the

[1] Upon the subject of promoters generally, their relation to each other, to the corporation, to the members and to third parties, see *infra*, pp. 1546–1558, 1767–1769.

corporation itself." 2 Cook Stock and Stockholders, § 651, 3d ed., p. 910.

"The constitution of a company is merely a means to an end,—the carrying on by the company of some business, the building of a pier or a railway. * * * It is the person called a promoter who determines what this end shall be, and who sets the statutory machinery of formation in motion. Promoter is a term not of law, but of business, summing up a number of business operations familiar to the commercial world by which a company is generally brought into existence. * * * Preparing or settling the prospectus, forming the company, negotiating agreements between vendors and a proposed company, providing directors, making contracts for the company or otherwise actively engaging either alone or in co-operation with others in the formation of a joint stock company will make a man a promoter. * * * The promoter has in his hands the creation and moulding of the company. He has the power of defining how and when, and in what shape and under what supervision it shall start into existence and begin to act as a trading corporation." 3 Ency. of the Laws of England, p. 182.

See 4 Am. and Eng. Ency., 201; Beach, §§ 269, 270; Clark, ch. iv; Cook, §§ 650, 705; Elliott, §§ 51–62; Morawetz, §§ 234, 291, 545; Taylor, ch. v; 1 Thompson, §§ 415–490, vii *Ib.*, §§ 8282–8291; 1828, Frankfort S. T. Co. v. Churchill, 6 T. B. Mon. (Ky.) 427, 17 Am. D. 159; 1846, Reynell v. Lewis, 15 Mees. & W. 517; 1877, Bagnall v. Carlton, 6 Ch. D. 371; 1877, Erlanger v. New Sombrero P. C., 5 Ch. D. 73, 3 App. C. 1218; 1878, Emma Silver Mining Co. v. Grant, 11 Ch. D. 918; 1879, Emma Silver Mining Co. v. Lewis, L. R. 4 C. P. D. 396; 1884, Perry v. Little Rock, etc., R., 44 Ark. 383; 1891, South Joplin L. Co. v. Case, 104 Mo. 572; 1892, Bosher v. Richmond, etc., Co., 89 Va. 455, 37 Am. St. R. 879; 1894, Yale Gas S. Co. v. Wilcox, 64 Conn. 101, 25 L. R. A. 90; 1895, Whetstone v. Crane Bro., 1 Kan. App. 320, 41 Pac. 211; 1896, Fountain Spring Park Co. v. Roberts, 92 Wis. 345, 53 Am. St. R. 917; 1898, Gaines v. McAlister, 122 N. C. 340; 1898, Milwaukee Cold S. Co. v. Dexter, 99 Wis. 214; 1898, Benton v. Minneapolis T., etc., Co., 73 Minn. 498, 76 N. W. 265; 1898, Exter v. Sawyer, 146 Mo. 302, 47 S. W. 951; 1898, Loudenslager v. Woodbury H. L. Co., 56 N. J. Eq. 411, 41 Atl. 1115; 1899, Hudson v. West, 189 Pa. St. 491, 42 Atl. 190; 1899, Honsucle v. Ruppin, 172 Mass. 420, 52 N. E. 538; 1900, Hayward v. Leeson, 176 Mass. 310, 49 L. R. A. 725.

Sec. 77. Self-constituted. Functions generally. Illustration.

THE ST. LOUIS, FORT SCOTT AND WICHITA RAILROAD COMPANY v. FRANCIS TIERNAN.[1]

1887. IN THE SUPREME COURT OF KANSAS. 37 Kansas Reports 606–636.

[Error from district court. Action by Tiernan against the corporation on a note for $10,000, and an account for $4,600, all for salary as president and general manager of the railroad company. Judgment

[1] Statement of facts abridged. Only that part of opinion relating to promoters given.

in the lower court for plaintiff. Motion for new trial overruled, and defendent brings error.]

Opinion by SIMPSON, J. * * * Condensing the documentary and oral evidence into a brief summary, and reciting both in chronological order, the material facts are as follows: The note sued upon by the plaintiff below was executed by the president of the railroad company, and it was claimed that this was done in pursuance of a resolution of the board of directors, adopted at a meeting held on the 10th day of March, 1882. The authority of the president to execute the note is denied by a verified answer. As this is one of the most vigorously contested questions in the case, we pass it for the present. The residue of the plaintiff's demand against the railroad company consisted of a claim for salary as president and general manager from March 7, 1882, to March 7, 1884, at an established rate of $5,000 per year; and about this part of the claim there does not seem to be much controversy. The answer of the defendant below alleges that Tiernan and Ayers were promoters, incorporators and directors of the railroad company, and that Tiernan was its president and active manager; that while acting in that capacity, he and Ayers, on the 12th of January, 1881, purchased from one M. S. Carter, a road-bed of a defunct railroad corporation extending from Fort Scott to Humboldt, at its full value for $15,000, and then, in collusion with other certain officers and directors of the St. Louis, Fort Scott and Wichita Railroad Company, sold it to that company for the sum of $200,000 cash or its equivalent, and $3,600,000 of the capital stock of said company; that this was done in violation of their obligations and duties as officers of said railroad company, and that the stock was of par value, and defendant prays for a judgment against Tiernan for $3,804,600.95.

For some years before the organization of the St. Louis, Fort Scott and Wichita Railroad Company, there had been graded a road-bed with some bridges built on it from Fort Scott to a little distance beyond Humboldt, by an organization known as the Fort Scott, Humboldt and Western Railroad Company. The length of this road-bed was about forty-four miles. The company which had graded the road-bed and built the bridges had failed, and one M. S. Carter had foreclosed the mortgage against it, and bid in its property, consisting of the road-bed and bridges, and had become the absolute owner thereof. On the 17th of February, 1880, Carter sold this road-bed to Francis Tiernan and Alexander M. Ayers, together with all maps and profiles in the possession or in the control of Carter, of said line of road between Fort Scott and Humbolt, and thence westward or southwestward through the state of Kansas. The consideration of this sale was the sum of $15,000 to be paid as follows: One thousand dollars within ninety days, and $14,000 within one year, and the additional agreement that the said Tiernan and Ayers were to commence within thirty days to procure the unsecured right of way over which the said road-bed or line of railroad was originally surveyed, established and partially graded, and all deeds

and contracts for the right of way, side tracks and switches, depot grounds, tanks and stock yards were to be taken in the name of M. S. Carter, and were to inure to his benefit and to be absolutely his until Tiernan and Ayers paid in accordance with the terms herein specified, and Tiernan and Ayers agreed that within ninety days they would use their best endeavors to secure aid to said road, by procuring bonds to be voted by the various municipalities through which said line would pass in Bourbon and Allen counties, and that all such aid procured in the construction of a railroad from Fort Scott to Humboldt should accrue to the benefit of Carter and become his property if they should fail to pay him as specified. The terms of this agreement were reduced to writing and signed by the parties on the 17th day of February, 1880. The first $1,000 was paid on the 14th of May following. On the 23 day of February, 1880, the charter of the St. Louis, Fort Scott and Wichita Railroad Company was filed in the office of the secretary of state. It was signed and acknowledged by Francis Tiernan and Alexander M. Ayers in Champaign county, Illinois, on the 20th day of January, 1880. On the 20th day of February, 1880, the company was organized at Fort Scott by the election of Francis Tiernan as president, Alexander M. Ayers as vice-president and Ira D. Bronson as secretary.

On the 17th day of April, 1880, Tiernan and Ayers sold to John J. Franklin, of Philadelphia, one-third interest in the road-bed known and called the Fort Scott, Humboldt and Western Railroad, commencing at Fort Scott and running to Humboldt, the estimated distance being forty-four miles, for the consideration of $25,000. Of that amount $5,000 was to be paid as soon as Franklin could examine the title and approve it, and the sum of $20,000 was to be paid within eight months. When Franklin paid the $5,000 he was to be elected treasurer of the St. Louis, Fort Scott and Wichita Railroad Company. Some time during the month of May, 1880, the St. Louis, Fort Scott and Wichita Railroad Company made an agreement to purchase the old road-bed of the Fort Scott, Humboldt and Western Company, and it is this agreement which is hereafter referred to in the minutes of the meeting of the directors of the St. Louis, Fort Scott and Wichita Railroad, held on November 12, 1880. On the 12th day of November, 1880, the directors of the St. Louis, Fort Scott and Wichita Railroad adopted a resolution approving and confirming the contract of Tiernan, Ayers and Franklin, of the sale by them, and the purchase by the company, of the road-bed, etc., ordering the issue and delivery of the stock, and the execution and delivery of orders for cash or first mortgage bonds, as provided in the agreement of sale. On the 3d day of December, 1880, Franklin sold to Ira J. Bronson all his right, title, interest and claim in and to the St. Louis, Fort Scott and Wichita Railroad Company, and the old road-bed, etc. On the 6th day of March, 1881, at a meeting of the stockholders of the St. Louis, Fort Scott and Wichita Railroad Company, the following resolution was adopted, by a vote of all the stockholders present, in its favor:

"Be it resolved, That all actions of the board of directors of the

St. Louis, Fort Scott and Wichita Railroad Company, in relation to selling and disposing of the capital stock of said railroad, and receiving payment therefor in the manner and kind in which such payments were made, be and they are hereby approved and ratified."

The road-bed was paid for by issuing to Francis Tiernan, Alexander M. Ayers and Ira J. Bronson, or his assignee, each $1,200,000 of paid-up capital stock, and an order on the railroad company in favor of each one of these persons for $66,666.66⅔ in cash, or first mortgage bonds, but the order for cash or bonds was in no manner to become a lien on that part of the road running from Fort Scott to a point where it crosses the Kansas City, Lawrence and Southern Kansas Railroad in Allen county. At the time of these various transactions about the old road-bed there had been no amount of the capital stock of the railroad company issued, the first being issued to one L. M. Bates, of New York, in December, 1880. Bates was an assignee of Ira J. Bronson for a part of Bronson's share of the stock of the purchase of the road-bed. * * *

Plaintiff in error contends (*inter alia*):

Fourth. Tiernan and Ayers, occupying the positions hereinbefore recited, bought an old road-bed which the company needed, for $15,000, and for the purpose and with the intention of selling it to the company, with an agreement among themselves, Bronson and Hill, divided the profits of the transactions, sold it to the company for $200,000 cash and $3,600,000 of the company's capital stock, and then carried out their agreement about the division of profits. The company is entitled to recover of Tiernan the difference between the price paid by him and Ayers for the road-bed and that at which they sold it to the company,

Fifth. Tiernan and Ayers did not disclose to any of their associate directors, except Bronson and Hill, the price paid by them for the road-bed, and the other five directors had no knowledge on that subject. Such a transaction will not be upheld when it is challenged in a proper action by the company.

Sixth. Tiernan took $3,600,000 of the company's capital stock in the manner above set forth, and in a proper action by the company he is answerable to it for the par value of the stock, and judgment should be rendered against him accordingly.

Seventh. Tiernan was a director from the time of the organization of the company down to the time of the commencement of the action to recover for the matters hereinbefore referred to, and, as, during all that time he was trustee for the company, statutes of limitation did not commence to run as long as that relation continued. * * *

1. Some very important questions grow out of the purchase of the road-bed by Tiernan and his associates, and their sale of it to the railroad company. It is alleged in the answer of the railroad company, that at the time the purchase was made Tiernan was one of the incorporators and directors of the company, and occupied such a position toward the company that whatever dealings he had respecting the road-bed resulted to the benefit of the corporation, or that, if this is

not so, then if he made the sale to the company while acting in the capacity of president and director, he was bound to disclose the price he paid, the profit he was making and that the whole transaction must be characterized by fair, open and unmistakable candor in all its features. The first question we shall discuss is were the defendants in error, Tiernan and Ayers, corporate fiduciaries at the time they purchased the road-bed? They signed and acknowledged the charter of the St. Louis, Fort Scott and Wichita Railroad Company on the 20th day of January, 1880, at Champaign county, state of Illinois. It was filed with the secretary of state on the 23d day of February, 1880. The contract of purchase of the road-bed was made on the 17th day of February, 1880. It thus appears that the road-bed was purchased before the railroad company had any existence. Section 10, chapter 23, of the Compiled Laws of Kansas, 1885, being the act concerning private corporations, is as follows: "Section 10. The existence of the corporation shall date from the time of filing the charter, and the certificate of the secretary of state shall be evidence of the time of such filing." This express statutory declaration determines the fact that the railroad company had no existence prior to the 23d day of February. Important legal consequences flow from this determination. The legislature has prescribed the act that gives life to a corporation, and the date of the performance of that act is the birthday of its creation. From the moment of the filing of the charter with the secretary of state, the duties and obligations of those named as its first directors began. There would not have existed any fiduciary relations before that time, because there was no corporation in existence to create them. It is clear, then, that at the time they made the purchase of the road-bed they were not directors, and did not occupy such a relation of confidence and trust to this railroad company that this purchase was presumably for its benefit, or by operation of law resulted in its favor. All such theories and considerations are swept out of our pathway by the vigorous terms of the statute.

It is sometimes the case that parties who are dealing with each other about the organization of a corporation make such declarations or give such pledges respecting its future creation that causes of action arise between them which must be settled in accordance with the recognized rules of law with reference to contracts, agency or partnership. There is nothing developed in the record which justifies the assertion that such causes of action arose against Tiernan and his associates on behalf of others who participated in the organization. We do not believe that any one would seriously contend for a single moment that there is such a statement of facts in the record that, if Tiernan had refused to sell his road-bed to the railroad company, it could have enforced the sale. To make him responsible in this action there must be an affirmative showing that at the time he made the purchase he was either acting for and on behalf of the company, or that he so assumed to act, or that he occupied such a relation of trust and confidence with respect to the company that his purchase resulted to its benefit, and

not to his own profit. The first we regard as impossible, because at that time the company had no existence, and hence he could not have acted on its behalf or authority, and for the same reason he could not have assumed to act for a corporation when there was none in being.

2. It is alleged in the answer of the railroad company that Tiernan was a promoter of the railroad company, and the same statement is repeated in the briefs with italicized vigor, and great stress seems to be laid upon the assumed fact. *This word promoter had its origin in the methods by which joint-stock companies were formed in England, where, by law, they were declared partnerships. Subsequently, when the era of railroad building began in that country, the business of promoting the organization of such companies assumed definite form. The ordinary proceeding was this: The promoter introduced the enterprise to the notice of persons of wealth in the locality through which the line of the road was proposed to be located, informing them of its nature and prospects, and furnishing an estimate of its probable cost. These persons were solicited to aid by their influence, or subscriptions, or both. Enough persons were secured to constitute a provisional committee, and then this committee appointed from their number a managing committee, which issued a prospectus, announcing the nature and probable profits of the scheme, the proposed means to carry it out, the amount of capital required, the number and price of shares and other details to which were generally attached the names of the promoters, with references to the names of those persons constituting the provisional committees. If all this resulted in fair probabilities of success, application was then made to parliament for a bill of incorporation. If the scheme failed, the expenses incurred gave rise to litigation, and many questions as to the liability of these committees and of the promoters were determined. If the incorporation was secured by the action of parliament, then another class of questions arose as to what acts of the promoters could be ratified by, and what acts resulted to the benefit of, the incorporation, and many others growing out of the condition of affairs; that that has no resemblance to our method of organizing corporations. It is true that the word has been found to have its uses in our jurisprudence, but in a much more restricted sense than that used in the English reports.*

The American cases upon this subject are not very numerous, and most all of them will be found in the 16 American Law Review, and in Morawetz on Corporations, vol. 1, p. 545. Assuming that a promoter is a person who organizes a corporation, and that he intends to sell it property, or to subscribe for its stock, or to take an active part in its management, and business, let us inquire whether there are sufficient facts recited in this record to determine that the fiduciary relation of promoter of this corporation was ever assumed by Tiernan, or whether his acts in respect to its organization were such that a relation of this character could fairly be inferred. To start on, there is not one single word of parol testimony which can be fairly said to authorize an inference that Tiernan was the promoter of the corpora-

tion. It does not appear that he ever advised or suggested the organization of the company. In the next place, there is nothing in very many voluminous written instruments in the record that justifies any such inference. The charter itself would seem to rebut any such conclusion so far as Tiernan was concerned, as it was signed and acknowledged by him in the state of Illinois. There is nothing to justify the allegation in the answer of the railroad company, or the assumption of its counsel in their briefs, that Tiernan was a promoter of the company.

There is in the written agreement between Tiernan, Ayers and Franklin, whereby a one-third interest in the road-bed purchased by them from Carter was sold to Franklin, an understanding on the part of Franklin that if Tiernan and Ayers wish to sell the road-bed to the St. Louis, Fort Scott, and Wichita Railroad Company, Franklin will join in the conveyance of it to the company, if his share of the purchase-money is not less than $40,000, but this agreement was made on the 7th day of April, 1880, after the purchase by Tiernan and Ayers, and after the organization of the company; so that we can not utilize this fact to establish a relation as existing before the railroad company had any corporate life. There is no evidence that Tiernan was a promoter.

3. At the time of the sale of the road-bed to the railroad company Tiernan was part owner of the road-bed, and was a director and president of the railroad company, and hence it is very properly said that the sale must be a fair, open one in all respects, the price paid by Tiernan and his associates must have been disclosed to the directors of the company, and the whole transaction must not only be for the evident interests of the company, but it must have been conducted in all its stages in the utmost good faith on the part of the directors, and with a complete knowledge of the time when, the circumstances under which, and the exact amount paid by Tiernan at the date of his purchase, to be relieved of that suspicion with which courts of justice universally regard a transaction in which the seller and the buyer are represented by one and the same person. It has been decided that a director is not prohibited from dealing with his company; he can sell it real estate or any other kind of property, but there are certain rules strictly applicable to him that do not operate upon a person entirely disconnected with the corporation, and these he must faithfully observe to make his contract of sale one that the law will uphold. (Hotel Company v. Wade, 97 U. S. 13; Morawetz on Corporations, §§ 297, 521, 545; Simmons v. Vulcan Oil Co., 61 Pa. St. 202; Van Cott v. Van Brunt, 82 N. Y. 535; Parker v. Nickerson, 137 Mass. 487.)

It has been decided, time and time again, that the owner of a mine, an oil well or a valuable patent, can organize a corporate company to develop mineral or oil, or to manufacture the patented article, take a very large amount of stock in payment of his mine, oil well or patent, and trust to the value given the stock by the success of the corporation for payment of his labor and discovery. In this class of cases there is a mere transfer of the status of the mine, oil well or patent. It

ceases to be personal property, and becomes corporate property, and each individual interest, as well that of the owner, discoverer or patentee, is represented by shares of stock.

It is now decided in this case that the owners of a graded railroad-bed can sell the same to a railroad company whose officers and directors are composed of the same identical persons who own the road-bed, and issue the capital stock of the railroad company in payment thereof, at a time when those who sell the road-bed and own and control the railroad corporation are the absolute owners of all the stock issued by the railroad company, and when the terms of sale and the issue of stock are matters of record on the books of the railroad company, and when this transaction occurs months before any other or additional stock is issued by the company, that parties owning an old railroad grade with culverts and some bridges erected thereon, and who organize, control, manage and own a railroad company, whose stock at the time of the issue has no market but only a nominal value, can transfer the railroad grade to the railroad company and issue the stock of the company in the payment therefor, they, and they alone, at that time being the only persons interested in the road-bed and in the railroad company. At the time of the sale of the railroad grade or old road-bed it was owned by Tiernan, Ayers, Bronson and Hill, and they in fact constituted the railroad company. There were some other directors, but the evidence is that just sufficient stock was placed in the name of the other directors to authorize them to act as such, and this transfer was but temporary, and for that sole purpose. This sale was ratified by the directors of the railroad company, and subsequently by the stockholders, but the directors, stockholders and owners of the road-bed were one and the same persons. By this transaction the value of the road-bed was represented by the stock of the railroad company, instead of remaining as the personal estate of the owners.

At the time of the sale, and when the board of directors ordered the issue of the obligations and stock of the company in payment of the purchase-price of the road-bed, the record affirmatively shows that all the persons who had any interest of any kind or character whatever in the railroad company, except Bates, the assignee of part of Bronson's stock, were Tiernan, Ayers, Bronson and Hill. They owned the road-bed, they constituted the railroad company, they sold the road-bed to the railroad company and took the stock of the railroad company in payment, at a time when witnesses on both sides concede that the stock had only a nominal value. The developments in this record abundantly show that the title to and possession of the road-bed were of great pecuniary benefit to the railroad company. It alone enabled the company to construct the first fifty miles of its road, and to make such a beginning that its future success and final accomplishment were assured. The record does not show that there has ever been any other stock issued by the railroad company, except small amounts to municipalities through whose territory the line was built, and that it is owned, managed and controlled to-day by the amount of stock issued to pay for this road-bed. Tiernan and his associates sold their

stock to Gould, in August, 1882, for a consideration of $100,000, so that now, so far as it appears, the value of the stock issued representing a completed road one hundred and fifty miles in length, is much less than the actual cost of the road-bed. The railroad company, in this action, represents this stock, and it seeks to retain it. It has the use and enjoyment of the road-bed, and wants to recover from Tiernan the par value of the stock, being the sum of $3,600,000.

It is useless to pursue the discussion further, as it is not controlled, or governed, or affected in any degree by those self-evident, equitable principles and unyielding rules of law that govern in all cases where persons sustain fiduciary relations to corporations, or to other persons, by reason of their being representatives of their pecuniary interests. This case involves the proposition as to whether or not the absolute owners of property can, when it seems to them to be to their profit, so change the relation of their property as to make it stock in a corporation. Whoever succeeded to the rights of Tiernan and his associates as the holders of the stock, did so with all the facts showing the sale and purchase of the road-bed and the issue of the obligations and stock of the railroad company spread upon its record, and have now no right to complain, however different the case may be if they had then an interest in the corporation. This same issue in its most important features has very recently been tried and decided by the circuit court of the United States for the district of Kansas, in the action of E. R. Stewart v. The St. Louis, Fort Scott and Wichita Railroad Company, a manuscript opinion of Judge Foster's having been furnished us. Stewart brought his action to recover on several promissory notes issued by the railroad company, aggregating $85,000. These notes constituted a part of the $200,000 that was to be paid in cash, or its equivalent, for the road-bed, and a $5,000 note issued to Hill for salary as general manager. The same defenses which are made here were set up in that action. The circuit court rendered judgment for the full amount claimed by Stewart, overruled all the defenses and discussed very many of the questions alluded to in this opinion, with the same result.

We see no material error in the record, and recommend that the judgment of the district court be affirmed.

By the Court: It is so ordered. All the justices concurring.

See note *supra*, p. 375.

Sec. 78. Same.

MARCHAND v. THE LOAN AND PLEDGE ASSOCIATION.

1874. In the Supreme Court of Louisiana. 26 La. Ann. Reports 389–90.

Appeal from the fifth district, parish of Orleans.

Wyly, J. Plaintiff sued defendant for the sum of $4,000 for services, etc., as alleged, viz:

"That, as a preliminary to the formation of said corporation, your petitioner, at the instance of the stockholders and members thereof, visited the cities of New York, Philadelphia and Boston for the purpose of acquainting himself with the proper formation and efficient management and practical operation of similar institutions in said cities, and that in order to do so he was compelled to expend for his traveling expenses, for consultation with counsel and for obtaining information considerable sums of money, and that he is entitled to be paid for the value of his time and services expended during said visit, which consumed some eight weeks, and that said expenses and said loss of time and services amount to the sum of $1,000.

"That petitioner furnished the charter for said corporation and gave zealous and efficient aid in presenting the same to the legislature, in obtaining subscribers to the capital stock thereof, in organizing said corporation, in putting it in successful operation, in fitting up its place of business, in the purchase and erection of fixtures therefor, and in the performance of its business and management of its affairs for one month after it commenced operations, and that his services in that behalf are well worth the further sum of $3,000."

The answer is a general denial, and the averment that the association is not liable for services rendered before it went into operation as a corporation.

The court gave judgment for the plaintiff for $208.33, the value of one month's service as president in organizing the company. From this judgment plaintiff appeals.

We see no error in the judgment. A claim for money expended and time employed, before the incorporation of the Loan and Pledge Association, can not be regarded as a debt of the institution.

How the defendant, a juridical person, incurred a debt before its existence we can not imagine.

Besides, it is shown that $1,000 of the plaintiff's claim was for cash advanced to S. F. Casanave for the purpose of influencing legislation; that is, bribing the legislature to pass the act incorporating the Loan and Pledge Association.

For the recovery of money thus expended this court can give no relief. The guilty suitor must be left where his immorality has placed him.

Judgment affirmed.

Note. See, also, 1889, Minneapolis T. M. Co. v. Davis, 40 Minn. 110, 41 N. W. 1026, 12 Am. St. Rep. 701, 3 L. R. A. 796, *infra*, p. 492, and note, *supra*, p. 375.

Sec. 79. Statutory. Commissioners.

WALKER v. DEVEREAUX ET AL.[1]

1833. IN THE COURT OF CHANCERY OF NEW YORK. 4 Paige's Chancery (New York) Reports 229–257.

[Application for an injunction to restrain defendants from holding an election of directors of the Utica and Schenectady Railroad Company, and also from disposing of stock which had been apportioned to them, or in which they were interested. The defendants were commissioners named in the act to incorporate the railroad company, to open books, receive subscriptions to the stock, distribute the same, and call a meeting for the election of directors, the act providing that: All persons who shall become stockholders pursuant to this act shall be and they are hereby constituted a body corporate by the name, etc. (Laws of 1833, p. 462, *et seq.*) There were, within the time limited, 2909 subscriptions received, and the stock was distributed to only 1423 of those who subscribed, and the others were notified to receive back the preliminary deposit paid. Plaintiff had received his money back. Some of the shares that had been distributed had been sold to *bona fide* purchasers. The complaint was that the commissioners had wrongfully recognized themselves as subscribers and had arbitrarily distributed the stock to themselves and their friends.]

THE CHANCELLOR (WALWORTH). The act under which the commissioners opened books of subscription to the capital stock of the Utica and Schenectady Railroad Company did not create a corporation, *eo instanti*, when that act took effect as a law. It only constituted such persons a body corporate as should thereafter become stockholders in the manner prescribed in the act. If the whole corporate stock, and no more, had been subscribed within the three days during which the commissioners were bound to keep the books open, then those persons who had thus subscribed and paid their money to the commissioners would have acquired legal rights as corporators. And they would also have had the right to call upon the commissioners, not as their agents or trustees, but as agents or officers of the public, to notify an election of directors, and to preside as inspectors thereof, by a committee of their body, as directed by the act. But in the event which has happened, of an excess of subscriptions, no person can be a stockholder of the corporation, neither does any corporation exist, nor has any person any interest in the stock, as the legal owner thereof, so as to authorize him to vote upon it, or to transfer it as stock, until a majority of the commissioners have proceeded to apportion the same, and to designate the persons who are to be the stockholders, and the amount which each is to receive. It is evident, therefore, if the counsel for the complainant are right in supposing

[1] Statement of facts abridged. Arguments and part of opinion omitted.

that the distribution in this case was absolutely void, and not merely voidable, that the election of directors, which they now seek to restrain by injunction, can not possibly affect the rights of their client. As there could be neither a corporation nor stockholders in existence until after the stock was apportioned, the commissioners did not hold the stock, nor did they act in the character of officers, servants, agents or trustees of the corporation or of the subscribers. But they acted merely as officers or agents of the government, appointed by the legislature to assist in the organization of a corporation and to create a stock in the same. The legislature might, by law, have designated the stockholders, as they had done in the case of other corporations, or they might have delegated that portion of their authority to others. But as they did not delegate that power to the courts, neither this or any other court has the power to create a corporation by designating who shall be the persons to hold stock in the same.

The appropriate tribunal, however, upon a proper application, may compel the commissioners to open books, to apportion the stock in the manner prescribed by law, and to notify and, by a committee of their body, preside at the election of the directors. Such a tribunal may also decide as to the proper construction of the act of incorporation, and can enforce a compliance with such decision. If the apportionment of the stock in this case was absolutely void, as the complainant insists it was, he has mistaken his remedy. He should, in that case, have applied to the supreme court for a mandamus to compel these public officers, or agents of the legislature, to distribute the stock, as required by the statute. And if it was necessary to apply to this court, either for a discovery or an injunction, in aid of, or as ancillary to his remedy at law, he should have stated in the bill either that he had applied, or that he intended to apply to the legal tribunal for relief. (Jones v. Jones, 3 Meriv. Rep. 173.)

I apprehend, however, the complainant is under a mistake in supposing that the apportionment of stock in this case was absolutely void. It was, at the most, voidable, even upon the principles upon which the complainant supposes it was absolutely void. And if any portion of the stock has been apportioned to persons who ought not to hold it, or if any one has received more than his share, under circumstances which would amount to a fraud upon the commissioners, or upon the law, such persons must be deemed to hold it for the benefit of all or some of the subscribers who have received no stock, or who have not received stock to the extent of their subscriptions. * * *

It was not necessary in this case that the commissioners should give to each subscriber an equal or any other amount of stock. Where a distribution or apportionment is to be made between or among any number of persons, or a class of individuals, and no discretion is vested in those who are to execute the power of making the distribution or apportionment, each individual of the whole number, or class of persons named, is entitled to an equal share. But if the designation of a class or number of persons is made merely for the purpose of

pointing out those from whom the selection is to be made, giving to the person intrusted with the power a discretionary right of distributing among that particular class as he shall think proper, then the whole may be allotted to one or more of that class, to the exclusion of the others. Formerly the question as to the right of the person intrusted with the power to exclude any one of the class designated, by giving what was called an illusory portion, was frequently agitated in the courts, and produced much litigation. But the Revised Statutes have forever put that question at rest in this state.

By the 98th and 99th sections of the article relative to powers, it is declared, that where a disposition under a power is directed to be made to, or among, or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal portion. But when the terms of the power import that the estate or fund is to be distributed between the persons so designated *in such manner or proportions as the trustee of the power shall think proper*, the trustee may allot the whole to any one or more of such persons, in exclusion of the others. (1 R. S. 774, and Revisors' Report on ch. 1, pt. 2, p. 61.) Although the power in the present case was to be exercised by these commissioners as the officers or agents of the public, and not strictly in the character of mere trustees of a power in trust, yet, as the legislature had established this general principle as one of the fundamental rules of construction in reference to powers, I must presume they meant the same rule of construction should be adopted in relation to the power granted to or conferred upon these commissioners. The only restriction imposed upon them, therefore, was that they should exercise the power according to the best of their judgment, and apportion the stock to such of the subscribers, and in such proportions, as a majority of them should deem most advantageous to the interests of the corporation. And there is no allegation in this bill from which I have a right to infer that the complainant believes they have not distributed the stock in this manner. Although it is alleged that the complainant is informed, and believes, they have distributed the stock principally among themselves and their relatives and friends, it would only be in accordance with the principles of human nature, were we to conclude, from that circumstance alone, they honestly believed that they and their friends would be more likely to appoint directors who would manage the concerns of the corporation well, than others would if the control of the corporation should be given to their opponents. In this, perhaps, they may have acted under a mistake, but that alone is not sufficient to authorize an interference with their distribution. Where a discretion is to be exercised according to certain fixed legal principles, especially when that discretion is to be exercised by a person or body acting as a court of justice, if the person or body intrusted with the power has mistaken the law, or violated such fixed legal principles, it may be a proper case for review and correction by the appropriate tribunal.

But if the legislature has intrusted the exercise of the power to the sole judgment and discretion of a particular person or body of individuals, no court is authorized to interfere with or control that discretion, provided it is exercised in good faith. In the recent case of The King, *ex rel.* Scales, v. The Mayor and Aldermen of London (3 Barn. & Adolph. Rep. 271), the late Lord Tenterden says, "if a matter is left to the discretion of any individual or body of men, who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether they have exercised their discretion properly or not." The same principle is recognized in the case of The King v. The Justices of Norfolk (1 Neville & Man. Rep. 67), and in a variety of cases in our own courts. This point was also expressly decided by the vice-chancellor of the first circuit in the case of The Brooklyn Bank (1 Edwards' Ch. Rep. 371) where the powers of the commissioners were the same, substantially, as in the present case. Chancellor Sanford also admitted the correctness of this principle in the case which was before him relative to the distribution of the stock in the Commercial Bank of Albany; although he very properly decided that it was not applicable to the case then under consideration. (Meades v. Walker, 1 Hopkins' Rep. 591.) It is not necessary for the decision of the present motion that I should consider the question whether the commissioners could themselves become subscribers for the stock of the corporation. But as that question has been fully argued, it may save expense to the parties, and prevent further litigation in this case, if I proceed to dispose of that objection to the distribution at this time.

The general principles, that a trustee can not traffic in the subject of his trust, that no person shall be a judge in his own cause, and that a public officer can not do an act which is inconsistent with the duty he owes to another, or to the public, are well understood. And it certainly does seem to be inconsistent with these principles that the legislature should, in any case, permit commissioners for the distribution of stocks to decide between themselves and others what portion of such stock shall belong to the commissioners and what part they shall award to other subscribers. It certainly would better accord with these leading principles of law were the legislature to state, in express terms, what portion of the whole stock each commissioner should be permitted to take, and to prohibit him from taking, either directly or indirectly, any greater share, except in a case of deficiency in the amount subscribed. But where it was in the power of the legislature to give all the stock to certain individuals who had already become subscribers therefor, as was the case in relation to many of the early acts creating joint-stock companies, the legislature might unquestionably confer the power upon such individuals of deciding how much of such stock they would keep themselves and how much they would apportion to others. The question here is, whether the legislature, in the case now under consideration, expected or intended that

these twenty-one commissioners named in the act of incorporation should be permitted to subscribe for and receive a part of the stock of this company.

The fundamental principle to be observed in the construction of statutes, is to discover, if possible, the true intention of the law-giver. And when that intention is ascertained, the court is bound to give effect to such intention, whatever opinion the judge may entertain as to the wisdom or policy of the law; provided such intention does not contravene any principle of the constitution or transcend the powers of the legislature. * * * It is therefore proper to refer to the provisions of the several acts authorizing commissioners and others to receive subscriptions for and to distribute the stock of moneyed and other corporations, and to the known usage under such statutes, for the purpose of ascertaining whether the legislature intended that the commissioners in this case should be excluded from subscribing or receiving any portion of the stock, on account of the peculiar nature of their official duties in the distribution of the stock in case of an excess. The case of Haight et al. v. Day et al. (1 Johns. Ch. Rep. 18), came before this court, in 1814, upon a complaint against the commissioners for the distribution of the stock in the Catskill Bank, under a provision in the act of incorporation very similar to that which is now under consideration. The complaint in that case was that there was a gross inequality in the apportionment among the subscribers; and that the distribution was principally confined to the commissioners themselves, their relations and favorites. The bill also charged that the apportionment was unjust, fraudulent and corrupt. Yet, upon the answer of the defendants merely denying that they were governed by any improper motive in the execution of their trust, and alleging that they had apportioned the stock as they deemed discreet and proper, Chancellor Kent dissolved the injunction and permitted them to proceed, and to elect themselves directors to control and manage the institution.

It is suggested by the complainant's counsel that it does not appear by the report of that case that the objection was there raised that it was inconsistent with their character as commissioners to distribute the stock—to subscribe for and apportion a part thereof to themselves. It appears to me, however, impossible to suppose the chancellor could have overlooked this general principle, if he had considered it as applicable to the case, for, upon looking into the pleadings in that cause, on file in the register's office, a more appropriate case for the enforcement of that principle can hardly be conceived. The whole stock to be distributed was 6,000 shares; and more than six times that amount was actually subscribed by one hundred and twenty-three persons, including the twenty-two complainants, who subscribed between five and six thousand shares. Yet the four commissioners took about one-half of the stock to themselves, and gave all the residue, except 108 shares, to nine of their nearest relatives by blood and marriage, and to two or three other persons connected with them in business. And they dis-

tributed the 108 shares among the complainants and others, by giving one share to each. In a case so glaring, I can not believe my learned and now venerable predecessor would have forgotton or have hesitated to apply this principle, if he had not been satisfied from the course of legislation which had been adopted in relation to the distribution of the stocks of incorporated companies, that there was something which took the case of commissioners and trustees for the distribution of such stocks out of the operation of the general rule. Whether he was right in his construction of the law as to the powers of the commissioners in such a case, it is useless now to inquire, as his decision has been received and acted on as law ever since that time. And the numerous prohibitions contained in subsequent acts of incorporations, restricting the commissioners as to the number of shares they shall be permitted to distribute to themselves, but without giving them in terms the power to take any, show the understanding of the legislature that such was the established law.

I must, therefore, conclude, from these circumstances, and also from the fact, of public notoriety, that commissioners have always been in the habit of apportioning a part of the stock to themselves; that the legislature did not intend the commissioners in this case should be excluded from a participation in the stock of the company. As to the amount taken by them, they have restricted themselves far below the smallest maximum which has ever been adopted by the legislature in a similar case. I can not, therefore, say they have abused the right of appropriating a portion of the capital stock of the company to themselves. * * *

Injunction denied.

Note. See particularly: 1839, Crocker v. Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; Beach, § 519; Cook, § 57; Elliott, § 363; Morawetz, §§ 64–68; Taylor, § 91; 1 Thompson, §§ 1204–1250; 2 Thompson, §§ 1368, 1540; 5 Thompson, §§ 5908, 6570.

Authority and functions of commissioners.—1. *Their functions* are of a public character, and action will be compelled by mandamus. 1833, Walker v. Devereaux, 4 Paige Ch. (N. Y.) 229, *supra*; 1851, *In re*, White River Bank, 23 Vt. 478.

2. *As to those dealing* with them, their authority is similar to that of an agent with a special power of attorney. 1871, Nippenose Mfg. Co. v. Stadon, 68 Pa. St. 256.

3. *As to the corporation*, and subscribers, they are trustees, subject to control by courts of equity. 1831, Attorney-General v. Stevens, 1 N. J. Eq. (Saxt.) 369, 22 Am. Dec. 526.

4. *Their power is usually of a discretionary character.* 1858, Thomas v. Citizens' Pass. R. Co., 15 Leg. Int. (Pa.) 189; 1858, Brower v. Pass. R. Co., 3 Phil. (Pa.) 161; generally so, in apportioning or allotting excessive subscriptions. 1814, Haight v. Day, 1 Johns. Ch. (N. Y.) 18; 1832, Clarke v. Brooklyn Bank, 1 Edw. Ch. (N. Y.) 361; but sometimes it is not so: 1850, Van Dyke v. Stout, 8 N. J. Eq. (4 Halst.) 333; 1856, Buffalo & N. Y. C. R. v. Dudley, 14 N. Y. (4 Kern.) 336. When ministerial it can be delegated: 1848, Lohman v. N. Y. & E. R., 2 Sandf. (N. Y.) 39; 1872, Saugatuck Bridge Co. v. Westport, 39 Conn. 337, but see 1861, Shurtz v. Schoolcraft, etc., R., 9 Mich. 269, *contra*.

5. *They usually act as a board, and a majority controls.* 1839, Crocker v.

Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; 1856, Penobscot R. Co. v. White, 41 Maine 512, 66 Am. Dec. 257. Acts of *de facto* boards, however, making allotment to themselves only, have been held to be void. 1895, Shellenberger v. Patterson, 168 Pa. St. 30, 31 Atl. 943.

6. *Their authority continues till the subscription is completed.* 1836, Lallande v. Louisiana State Ins. Co., 9 La. 326. But ceases as soon as the subscription is completed and organization takes place. 1854, Smith v. Bangs, 15 Ill. 399; 1858, Ellison v. Mobile & O. R. Co., 36 Miss. 572; 1858, James v. C., H. & D. R. Co., 2 Disney (Ohio) 261.

7. *In some states it is held the commissioners have exclusive authority to receive subscriptions.* 1811, Essex Turnpike Corp. v. Collins, 8 Mass. 292; 1861, Shurtz v. Schoolcraft & T. R. Co., 9 Mich., 269; 1875, Parker v. Northern Cent. M. R. Co., 33 Mich 23. But in other states it is held that any one may take a subscription, provided it is accepted by the corporation. 1857, Northeastern R. Co. v. Rodrigues, 10 Rich. Law (S. C.) 278; 1857, Walker v. Mobile & O. R. Co., 34 Miss. 245; 1876, Scarlett v. Academy of Music, etc., 46 Md. 132.

Sec. 80. Incorporators under general statutes.

NICKUM v. BURCKHARDT.[1]

1897. In the Supreme Court of Oregon. 30 Oregon Reports 464–477, 60 Am. St. R. 822, 47 Pac. R. 888.

Opinion by Mr. Justice Wolverton.

This is an action to recover for assessments levied upon unpaid capital stock of a private corporation. About June 18, 1893, some thirteen persons, among whom were Guy Posson, who signed for two shares; J. E. Juston, for four; F. C. Barnes, for ten; and H. Pease, for three—subscribed the following agreement, each placing opposite his name the number of shares presumably intended to be taken: "We, the undersigned, each in consideration of the promise of the other, agree to subscribe for and take the number of shares of the capital stock set opposite our respective names of a company to be incorporated for the purpose of operating a fertilizer, feeding and fattening stock and poultry, and if obtainable, collecting and disposing of swill, and other purposes of like nature; said company to be incorporated in accordance with the laws of the state of Oregon, with a capital stock of $15,000, divided into 150 shares of the value of $100 each." There were seventy-eight shares subscribed for upon this paper, representing $7,800. On the 7th day of October, 1893, three of the subscribers executed, duly acknowledged, and caused to be filed and recorded in the proper offices, articles of incorporation, in-

[1] Opinion on rehearing upon the point as to estoppel omitted.

corporating the Oregon Fertilizing Company specifying the object and business thereof to be "to transport wood, produce and garbage and to cremate such garbage, or to use the same for feed or fertilizing purposes." A little later, all the subscribers to said instrument, except the four above named, signed with others the following writing, which is contained in a minute book kept for the purpose of recording the proceedings of the corporation to wit: "We, the undersigned, hereby subscribe for the number of shares of capital stock of the Oregon Fertilizing Company set opposite our respective names, and agree to pay for the same at such time or times as may be ordered by the board of directors hereafter to be elected." Only sixty-nine shares of the capital stock were subscribed for upon this latter instrument. Subsequently all the subscribers to this instrument, together with Posson and Juston, signed an agreement to hold the first meeting of the stockholders on October 14, 1893, waiving the thirty days' notice required by law, and in pursuance thereof the meeting was held, all said signers being present, either in person or by proxy, but no others, and participated in the election of directors and other business. The corporators having certified to the result of the election, the directors elected took the oath of office, and at once organized by electing the officers of the board. To abate the action, the defendants plead that the plaintiff company is not an incorporation.

It was urged at the hearing that the defendants ought to be estopped from alleging that the Oregon Fertilizing Company is not a corporation duly incorporated and organized in all respects as contemplated by law, inasmuch as they are subscribers or purchasers of stock subsequent to the alleged completed organization of the company; that having dealt with the company in its corporate capacity, and having entered into contractual relations with it, they have recognized its existence as a body corporate, and that now, when sued upon their obligation to it as such a body, they should not be permitted to deny its legal existence. The doctrine here contended for is undoubtedly well grounded in the law, but it can not be invoked in this case because not pleaded. The opportunity was afforded for setting up the supposed estoppel in the reply, but it was not done, and it is now too late to assert it. It is said that "if a party who has an opportunity to plead an estoppel upon which he relies fails to do so, but goes to issue on the fact, he thereby waives the estoppel, puts the matter at large, and the jury may disregard the estoppel, and are at liberty to find the truth." Note to Tyler v. Hall, 106 Mo. 313, 27 Am. St. Rep. 337–346, 15 S. W. 319. To the same effect are Bruce v. Phœnix Ins. Co., 24 Ore. 486, 34 Pac. 16; and Bays v. Trulson, 25 Ore. 109, 46 Am. & Eng. Corp. Cas. 386, 35 Pac. 26.

This question disposed of, we come to another, more complex in its nature, and that is whether there has been an organization of the plaintiff corporation under and in pursuance of the general statutes providing therefor. The regularity of the execution and filing of the articles of incorporation is conceded. *The persons subscribing the*

articles are known as the incorporators, and their powers and duties are purely statutory. They may open books and receive subscriptions to the capital stock; "they shall give notice to the subscribers to meet" at such time and place as they may designate for the purpose of electing directors; they shall act as inspectors at the first meeting for that purpose, certify who are elected, and appoint the time and place of their first meeting. This enumeration comprises the substance of their powers (See section 3222, Hill's Code). These are all acts necessary to and in furtherance of the completion of the organization. The organization is completed only when directors have been elected, and they have elected a president and secretary; which it is contemplated they shall do at their first meeting. From the time of the first meeting of the directors, that is to say, from the time of the organization of the board, "the powers vested in the corporation are exercised by them, or by their officers or agents under their direction" (Hill's Code, sec. 3225), thus relieving the incorporators of further duty or power in the premises, or, rather, their functions then cease, because their duties have been fulfilled and their powers executed. From the date of its completed organization the incorporation may begin the prosecution of its enterprise or business. It may then sue and be sued, contract and be contracted with, and exercise any of the other statutory powers incident to its organization and the enterprise, business, pursuit or occupation adopted. The corporation may elect its board of directors when one-half of the capital stock has been subscribed. Hill's Code, § 3222; Fairview R. Co. v. Spillman, 23 Ore. 587, 32 Pac. 688. And one question here is, whether one-half of the capital stock had been subscribed when the board was elected.

It seems to be supposed that in order to constitute a person a subscriber to the capital stock of a corporation he must have subscribed to the stock books of the concern after its articles of incorporation have been perfected and filed, and Coyote Mining Co. v. Ruble, 8 Or. 284, is cited as authority. Boise, J., at page 294, says, in effect, that to put a person in the position of a subscriber to the capital stock it must be shown by the stock book signed by him, or evidence equivalent to such signing. This would seem to support the proposition, but at another place (page 298) he says: "It is necessary for the corporation to prove the subscription by producing the supscription signed by Ruble, either by himself or by another for him with his authority, or by some acts of his which are equivalent to a subscription." So that the case does not decide either that the primary subscription must be made upon the stock book, or that it shall have been made subsequent to the execution of the articles of incorporation. In a late case (Balfour v. Baker City Gas Co., 27 Ore. 307, 41 Pac. 165), Bean, C. J., speaking for this court, says: "From an extended examination of the authorities we take the law to be that when the proposed corporation is formed as contemplated in the preliminary subscription, and within a reasonable time thereafter, the subscription, unless revoked in the manner authorized by law, becomes irrevocable,

the subscriber becomes a shareholder, and liable as such without any further act on his part." And this seems to be so, although the statute may provide for the opening of stock books by designated persons after the articles are filed. Balfour v. Baker City Gas Co., 27 Ore. 307, 41 Pac. 165; 1 Thompson on Corporations, §§ 1152, 1166; Buffalo R. Co. v. Gifford, 87 N. Y. 294. Nor is the distinction taken in some of the cases between a present subscription and an agreement to subscribe to the stock of a corporation thereafter to be created thought to be sound. 1 Cook on Stocks and Stockholders, § 75; Knox against Childersburg Land Co., 86 Ala. 180–184, 5 South. 578; Athol Music Hall Co. v. Carey, 116 Mass. 471.

Now, it appears that by the preliminary subscription seventy-eight shares of the capital stock were signed for, three more than was necessary for the completion of the organization by the election of directors. Four of the individuals signing this paper, representing nineteen shares, did not sign the later agreement, to which sixty-nine shares only were subscribed. All those subscribing the latter paper, together with Guy Posson and J. E. Juston, who signed the preliminary subscription, signed the consent agreement, for holding the first meeting, and participated therein, and Juston was elected a director. So it will be seen that if the two shares of Posson and the four of Juston are added to the sixty-nine shares signed to the second paper, one-half of the capital stock was represented at such meeting. But the question arises, Were they subscribers to the capital stock? We think that, having signed the preliminary subscription and the consent agreement for the first meeting, and having participated therein, they became bound in that capacity, and must be so considered. They certainly are estopped by their acts from denying that they are subscribers, and, this being so, the law requiring a subscription of one-half of the capital stock before organization was substantially complied with.

Incidental to this question, it is argued that the purposes designated in the articles of incorporation do not correspond with those set forth in the preliminary subscription, and, therefore, that Posson and Juston can not be held to be subscribers. We presume that ordinarily a material departure in this respect will avoid the original agreement, but in this case the persons named have construed the purposes to be one and the same by participation in the organization under the articles of incorporation, or, rather, to speak more concisely, they have assented to the departure, if such it may be termed. Knox v. Childersburg Land Co., 86 Ala. 180, 5 So. Rep. 578.

Again it is urged that if the primary subscription is sufficient to bind the subscribers to the capital stock of the concern, then Barnes and Pease not being present, and having no notice of the first meeting, and not having waived the same by writing or otherwise, the election of directors was irregular and void. We are not to be understood as passing upon the sufficiency of this paper within itself, but that, considering the subscription thereto of Posson and Juston,

in connection with their subsequent acts they were properly recognized as stockholders, and hence, that one-half of the capital stock was represented at the organization of the company. The fact that Barnes and Pease had not been notified of the meeting could not furnish grounds for objection by those subscribers present and participating therein, they have not suffered by the omission, and are not in a position to object as to others: Schenectady R. Co. v. Thatcher, 11 N. Y. 102. See, also, Handley v. Stutz, 139 U. S. 422, 11 Sup. Ct. 530; Morawetz on Private Corporations, § 399. Thus we have an organization perfected by persons bound as subscribers, and representing fully one-half of the capital stock as fixed by the articles of incorporation, and all bound by its proceedings. We think the organization valid, although Barnes and Pease were not notified. As to how they would be affected by want of notice it is not for us to determine at this time; it is sufficient to say that those subscribers participating can not object on that account.

The defendants, if subscribers to the capital stock, became such after the organization, and the want of notice to Barnes and Pease could not affect them; so that they are in no better position to object to the regularity of the organization on that account than those participating in the first meeting. The result is that, in so far as they are concerned, the company was duly incorporated, and this result is reached, not because they are estopped by having dealt with it, but because it was legally organized prior to their subscription to the capital stock. For the purpose of estopping the plaintiff from asserting its due and legal organization, it is alleged in the answer in abatement that plaintiff had, theretofore, instituted an action in a justice's court against Guy Posson for assessments made by the company upon his alleged subscription to the capital stock; that a trial was had upon the sole issue whether Posson was a subscriber at the date of the attempted organization; and that it was determined by the judgment that he was not. It is claimed that, as the same question is necessarily involved in determining in this action whether the plaintiff was duly organized, the plaintiff is estopped to assert its truth, the judgment having gone against him in the justice's court. The plea is argumentative, and avers in effect that, as the judgment in the justice's court estops the plaintiff to now assert that Posson is a subscriber, therefore it can not be affirmed that the corporation is duly organized. That this is an action upon a different cause from the one against Posson can not be gainsaid; the inquiry, therefore, to which the estoppel is pertinent must be confined to the point or question actually determined in the Posson case. Cromwell v. County of Sac, 94 U. S. 353. Thus far, the plea is apparently within the rule. But a very important essential to the estoppel is wanting in that this cause and the one adjudicated in the justice's court are not between the same parties in the same right or capacity, or their privies claiming under them. This objection is fatal to the plea. 1 Freeman on Judgments, § 252. The judgment of the court below must, therefore be reversed, and the cause re-

manded for such further proceedings as may be deemed proper not inconsistent with this opinion.

Reversed.

Note. See schemes of organization, *infra*, pp. 426, 560; In *In re* Lady Bryan Co., 1 Sawyer (U. S. C. C.) 349, 14 Fed. Cas. 926 (1870), it was said that "corporators" in the Bankrupt Act, meant the stockholders. But so far as organization is concerned "corporators exist before stockholders, and do not exist with them. When stockholders come in, corporators cease to be." Chase v. Lord, 77 N. Y. 1, 11 (1879). Corporators or incorporators need not become members of the corporation by subscribing for stock, unless the law expressly so provides: 1870, Densmore Oil Co. v. Densmore, 64 Pa. St. 43; 1890, Welch v. Importers', etc., Bank, 122 N. Y. 177; 1898, Bristol Bank & T. Co. v. Jonesboro B. & T. Co., 101 Tenn. 545, 48 S. W. 228.

TITLE II. THE BODY CORPORATE: ITS FORMATION, OR ITS CONCEPTION AND INCUBATION.

CHAPTER 5.

THE CORPORATE CHARTER.[1]

ARTICLE I. NATURE AND PURPOSE OF THE CHARTER.

Sec. 81. *In general.* The conception of a corporation consists in the offer and acceptance of a charter, wherein are set forth the terms and conditions upon which the state will permit an individual or association of individuals to exercise a part of the sovereign franchises of the state. When the offer is made and accepted there results a contract between the state, the corporation, and those who accept it, authorizing them to convert themselves, or others, or an association of other persons, by organization, into a body corporate, having the powers and privileges set forth expressly, or necessarily implied from those set forth, in the charter.

Sec. 82. *More particularly, the charter is both a law and a contract.*

"A charter of incorporation is the written instrument by which the crown institutes the body politic, and conveys to it its peculiar constitution, its rights, privileges, powers or estates, etc., imposes a name upon the corporation, defines its objects and purposes, and assigns such conditions and limitations upon the exercise of the powers, privileges, etc., conferred, as to the crown seems fit." Grant, Corporation, *13 [Am. ed. p. 25, 1854].

"The charter of a corporation serves a twofold purpose; it operates as a law conferring upon the corporators the right or franchise of acting in a corporate capacity, and, furthermore, it contains the terms of the fundamental agreement between the corporators themselves." Morawetz, Private Corporations, § 316.

"The charter of a private business corporation or incorporated company operates primarily as a law repealing the common law prohibi-

[1] See, generally, 1 Abbott's Digest, 146; 4 Am. & Eng. Enc., 193–4; Angell & Ames, ch. ii, iii; Beach, §§ 11, 13, 15, 17–36; Boone, ch. ii; Clark, ch. ii; Cook, §§ 2, 3, 492–503, 640; Elliott, §§ 21–50, 89–120; Field, §§ 9–36; Grant, pp. *9–*47; Morawetz, §§ 8–27, 38, 39, 318–759, 760, 1046–1050; Taylor, §§ 118, 147, 195, 227, 264, 438, 448, 496–504; 1 Thompson, §§ 35–218.

tion against the formation of corporate associations, and enabling the members of the company legally to accomplish the purposes for which they have associated. * * * After the corporation has been formed pursuant to such a charter or incorporation law, it fulfills a second equally important function. It contains, in whole, or in part, the terms of the contract, or articles of agreement, by which the shareholders or members of the corporation are bound together, and indicates the purposes for which they have contributed or agreed to contribute the company's capital." Morawetz, Private Corporations, § 1046.

"The constitution of a corporation is of a dual nature; it is law in that it consists of rules for conduct set by a political superior to political inferiors, and it embodies a contract the obligation of which is the selfsame constitution regarded as law. The contract embodied in the constitution always subsists among the corporators as parties thereto, and it may subsist between the corporation and the state, for the state is sometimes a party to it." Taylor, Private Corporations, § 438.

Sec. 83. Same. The charter as a law and as a contract.

FLINT AND FENTONVILLE PLANK-ROAD v. WOODHULL.

1872. IN THE SUPREME COURT OF MICHIGAN. 25 Mich. Rep. 99–113.

COOLEY, J. The legislature of 1848 passed an act incorporating the Flint and Fentonville Plank-road Company, with power to lay out, establish and construct a plank-road, and all necessary buildings, from the village of Flint to the village of Fentonville. The act was to remain in force sixty years from and after its passage, but the fourth section provided that "the legislature may at any time alter, amend, or repeal this act by a vote of two-thirds of each branch thereof; but such alteration, amendment, or repeal shall not be made within thirty years of the passage of this act, unless it shall be made to appear to the legislature that there has been a violation by the company of some of the provisions of this act." The fifth section made the general plank-road act of 1848 a part of this special charter. Laws 1848, p. 404.

The corporators appear to have organized under their charter, and to have constructed the road provided for by it, a part of which they now keep up and maintain. In 1871, the legislature passed an act to repeal this charter. This act is very brief, has no preamble, contains no recitals, and simply declares that the act first above named "be and the same is hereby repealed." Sess. L. 1871, vol. iii, p. 167. No notice was given to the company or to any of its officers, of the intention to adopt or to propose any such repeal, or to enter upon any investigation of a violation by the company of any of the provisions

of its charter; neither the journals of the legislature, nor the files or records in the office of the secretary of state, show that any investigation was ever had, nor is it claimed or suggested that there is evidence anywhere that any tribunal, legislative or judicial, has passed upon the question of such a violation, and adjudged it to have taken place, unless the repealing act itself affords such evidence. The company denies the validity of this act, and the defendant, having treated it as valid, and acted upon it adversely to their interests, an issue has been made, which is now before us for decision.

It is not disputed on the part of the defendant that the charter of a private corporation is to be regarded as a contract, whose provisions are binding upon the state, and can not be set aside at the will of the legislature. *Such a charter is a law, but it is also something more than a law, in that it contains stipulations which are terms of compact between the state as the one party, and the corporators as the other, which neither party is at liberty to disregard or repudiate, and which are as much removed from the modifying and controlling power of legislation as would be the contracts of private parties.* But the defendant insists that the repealing act in this case is one contemplated and justified by the contract itself; and no attempt is made to defend it, except upon what the defendant regards as a just construction of the original charter. The positions taken by the defendant may be succinctly stated as follows:

1. The legislature had a right to repeal the charter whenever the fact should be made to appear that a violation of the charter had taken place.

2. The inquiry into the fact of violation would be an inquiry for the purpose of enabling the legislature to exercise its legitimate powers, and would, therefore, be legislative in character, and might be entered upon in any manner and through any channels the legislative wisdom might devise or see fit to employ, untrammeled by any of the rules which govern the action of judicial tribunals.

3. The repealing act is not only of itself a determination that the violation of charter has taken place, but it is evidence, also, that the legislature has first informed itself of the facts; and no court or other authority is at liberty to assume that it has acted improvidently or without due inquiry.

4. But, although all presumptions favor the legislative action, it is conceded that the parties concerned are entitled to a judicial investigation afterwards, and, upon an issue properly framed for that purpose, may show the act invalid by establishing the fact that no violation of the charter has taken place, and that the legislature must have acted under mistake or in misapprehension of the facts.

The first of these positions must be conceded. The right of the legislature to repeal, when it was properly made to appear that a breach of the charter had taken place, can not be questioned.

The second will be equally indisputable, if the main point be established, that the inquiry to determine the violation of the charter is legislative in character. The legislature will not only choose its own

modes of collecting information to guide its legislative discretion, but from due courtesy to a co-ordinate department of the government, we must assume that those methods were the suitable and proper ones, and that they led to correct results. And if the records show no investigation, we must still presume the proper information was obtained; for we must not suppose the legislature to have acted improperly, unadvisedly, or from any other than public motives, under any circumstances, when acting within the limits of its authority. Baltimore v. State, 15 Md. 376; Lusher v. Scites, 4 W. Va. 11; People v. Draper, 15 N. Y. 545, 555; Wright v. Defrees, 8 Ind. 302; *Ex Parte* McCardle, 7 Wall. 514; Bradshaw v. Omaha, 1 Neb. 16; Humboldt Co. v. Churchill Co. Com'rs, 6 Nev. 30.

The third point must also be conceded to this extent; that the legislative act, not violative of any constitutional principle, must be its own sufficient and conclusive evidence, when assailed, of the justice, propriety, and policy of its passage. We ourselves acted upon this principle in People v. Mahaney, 13 Mich. 484, and it is not disputed anywhere so far as we are aware.

But there lies at the basis of all these propositions the question whether the determination that the charter has been violated is in truth legislative in character. The defendant affirms that it is; the plaintiff insists that it is properly and essentially judicial. This point decided one way, disposes of the case; decided the other, it is followed by other of a difficult and somewhat delicate nature, which would necessarily be considered before a conclusion could be reached on the merits.

Now it must be conceded that, if the act in question is not judicial in character, it is at least strikingly analogous. There is a question which is or may be disputed, there are adverse parties, there are private interests involved, there is evidence to be received, there is the fact to be found, there is punishment to be inflicted, there is a forfeiture to be enforced. Legislative action does not often, to say the least, include all or many of these elements. It may affect private rights incidentally, but it does not often proceed to pass directly upon the controversies between the state and individuals. In some cases the legislature has judicial power, because it is incident and essential to the discharge of legislative functions. Such is the power to determine upon the election and qualification of its members and the powers to punish for contempts of its authority. In these cases it is entitled to all the presumptions which support the action of courts, and having no authority set over it, to review its determinations, they must be accepted everywhere as correct and conclusive. People v. Mahaney, 13 Mich. 481; Anderson v. Dunn, 6 Wheat. 204; Hiss v. Bartlett, 3 Gray, 468; Burnham v. Morrissey, 14 Gray, 226; State v. Matthews, 37 N. H. 450; State v. Jarrett, 17 Md. 309; Lamb v. Lynd, 44 Pa. St. 336. But every judgment must have something preceding it to put the judicial body in motion; the sentence, by any authority pronounced, however august or powerful, will be a mere idle fulmination if there was no *lis mota* to base it upon. The order of a legislative body for the punishment of an individual would be merely idle and void, un-

less somewhere in the record there appeared a cause alleged which subjected him to its jurisdiction for such punishment.

It is conceded in the present case that the fact of corporate abuse was to be found before the charter could be taken away. The repealing act, however, is only a sentence. It inflicts the penalty of corporate death, without in any way declaring or intimating, except by the penalty, that the corporation has been found worthy of death. It is precisely such an act as might have been passed had the legislative power been unlimited and untrammeled. The legislature had power to repeal for cause, and was prohibited from repealing without cause; it repeals, expressing no cause, and it is said the cause must be inferred. Then comes what is to have the effect of punishment, though it does not purport to be such, and only on its face appears to be the withdrawal of a privilege; and yet, as there was a right assured and no mere privilege to be withdrawn, it is supposed, we must infer, *first*, that a punishment was designed, and then, from the punishment infer the guilt, the accusation, the trial, and the conviction. Having thus assumed the conclusion to begin with, we must next, from the conclusion, assume that the premises existed to deduce it from. This is certainly much more than can be assumed in support of the action of any court. In the courts, there must at least be an accusation and a condemnation, before there can be the infliction of any penalty. To infer cause where none is assigned in the taking away of private rights, is to take up and adopt the arguments in favor of the arbitrary arrests under the command of Charles I. His warrants assigned no cause, and, therefore, it was argued sufficient cause must be presumed. If this repealing act is good as a judgment of abuse of corporate privileges, then Sir Nicholas Hyde was correct in holding that he could not release on *habeas corpus* the parties committed to prison by the special command of the king for refusing to submit to his illegal exactions. The king had power to order a committal for cause; no cause was expressed; therefore a sufficient cause was to be assumed. Darnel's Case, 3 State Trials 1; Broom's Const. L., 162.

The defendant refers to certain cases in support of his positions, of which The Miner's Bank v. The United States, Morris, 482, s. c., 1 Greene (Iowa) 553, goes to the full extent of holding that such a legislative act is not only valid, but is conclusive that cause existed for its passage. This case, however, stands alone, and was not very much insisted upon on the argument. The cases of Crease v. Babcock, 23 Pick. 334, and Erie & N. E. R. R. Co. v. Casey, 26 Penn. St. 287, are more relied upon as laying down the correct rule. The Pennsylvania case is most directly in point, and as it appears to have been carefully considered, the conclusion is entitled to great respect, notwithstanding those eminent jurists, Mr. Chief Justice Lewis and Mr. Justice Woodward dissented. In that case, the corporation was protected by a clause in its charter, similar to the one under consideration here, and the legislature had thought proper to act upon it by repealing the charter, without any preliminary judicial investigation. In

stating the position assumed in support of the repealing act, Mr. Justice Black says: "For the defendant, it is insisted that the repealing act is itself not only evidence, but conclusive evidence, that the company had previously committed some abuse or misuse which justified the repeal. No case has been cited which denies this doctrine in terms; and it was held for the true rule by the supreme courts of Iowa (1 Greene 561) and of New York (19 Barb. 81). But I do not see clearly the principle on which it can stand. A legislative body in a matter like this is known to proceed without formal notice, without specific accusation, and without opportunity to answer. There is no confronting of the parties with the witnesses, nor anything that can be called a hearing or trial. It would, therefore, seem unjust to hold that a legislative act is, like a judicial sentence, conclusive of every fact which ought to have been found before it was passed. It might more plausibly be likened to an award made by an umpire to whom both parties have agreed that the subject should be referred." "For myself," he says, "I incline to the opinion that, when the constitutional power of the legislature to pass a law depends on matter of fact, the party to be affected by it ought to have an opportunity afterward of showing how the fact is." E. & N. E. R. R. Co. v. Casey, 26 Penn. St. 316.

Having thus expressed the opinion that legislative conclusions on questions of fact were subject to review in the courts, the learned judge goes further, and proceeds to lay down rules for the legislative guidance in determining the causes which are to justify the legislature in acting at all. The legislature is not to judge finally for itself what is abuse or misuse of corporate privileges by a company; but,

1. The illegal act must be *positive*. A mere omission, like the failure of a bank to make its annual returns, is not enough.

2. A disregard of the charter, which is injurious only to *private* interests, and which, therefore, admits of *private* compensation, is not, he thinks, within the fair meaning of the words. It must be some conduct which infringes upon a right reserved by a state for the benefit of the public.

3. It must be *willful;* that is, not involuntary, accidental, or the consequence of mere mistake of fact.

4. It must not be the mere transgression of the act of incorporation by a subordinate officer, or agent without authority, express or implied, from the board of directors. E. & N. E. R. Co. v. Casey, 26 Pa. St. 319.

Thus the majority of the supreme court of Pennsylvania lays down the rules of law which are to control the legislature in the exercise of its legislative authority, and at the same time declares the right of the court to review the conclusions of the legislative body in matters of fact. With great respect to the eminent tribunal we are unable to understand why this is not a setting of the court above the legislature, as an appellate tribunal in matters both of law and of fact, in a manner which wholly ignores the divisions of the powers in the constitution, and is quite inconsistent with the harmonious operation of the

machinery of government. It is not consistent with legislative independence and dignity, that the court should assert a right to sit in judgment upon legislative action, or to attribute to the legislature erroneous or oppressive conduct in the exercise of any of its proper and legitimate functions. These two departments of the government being co-ordinate, and neither of them occupying a position subordinate to the other, the conclusions of each must be accepted by the other as proceeding from good motives, and as warranted by the proper information. It could only be productive of endless discord and confusion, not to say of jealousies and conflicts of authority, if the legislature was to review and set aside the judgments of the courts, or the courts to allow parties to appeal to them from the conclusions the legislature had reached in determining upon the propriety of passing or declining to pass a proposed law. Careful endeavor has been made to prevent any such jealousies and conflicts when, in framing our constitutions, a line of distinction has been drawn between the legislative and judicial functions, and the departments to which these functions respectively have been confided have been entrusted with no power to pass that line. It is, therefore, in the highest degree impertinent and obtrusive, when either department undertakes to advise the other, that in the exercise of its proper functions, it has acted unwisely and indiscreetly, has misjudged the facts or perverted the law; and its action must be still more offensive if it entertains the appeal of parties from the decisions of the other, when acting within a province which was set apart to be peculiarly under its jurisdiction and control.

Moreover, there is, in the nature of the case, and the difference in the manner in which legislative and judicial functions are performed, reason sufficient to demonstrate the impossibility of a proper review by one department of the decisions the other has made. Legislators have a right to act upon their own knowledge and observation, upon hearsay, upon information derived from the public press, upon the *ex parte* petitions of interested parties, upon anything, in short, which satisfies their judgment; and public opinion is one of the most important facts to be considered in determining upon the propriety or advisability of a proposed law. Even an unreasonable prejudice, if general or widespread, may sometimes very properly be a controlling consideration when the case is such that to the enforcement of the law a strong supporting public sentiment would be a necessity. But these are things the courts must not allow to influence their action. With them the question must simply be, *first*, what is the law; and *second*, what are the facts; and the facts they must reach through inflexible rules of evidence laid down for their guidance. A review of a legislative determination by the courts would, therefore, not only be highly indecorous and objectionable, for the reasons already stated, but it would be eminently improper also, for the further reason, that it could not possibly be had upon the same evidence. It is wholly foreign to any proper administration of law or justice, that the decision of the proper authority upon any subject should be liable to review by an-

other tribunal, which in such review is shut off from the sources of information to which the other had access. So far, therefore, from the different ways the legislature and the judiciary have of reaching the facts being a reason why the latter should give parties who have been decided against by the former a rehearing, they constitute with us a very conclusive reason for holding that those cases in which there is a hearing to be had on questions of private right and private property, are, and must in their very nature be, regarded as exclusively of judicial cognizance.

But there are still further reasons why the doctrine declared in the Pennsylvania case can not, we think, be sound. That doctrine is, to state it more fully, that though the legislature may repeal the corporate charter, on the ground of abuse or misuse, thereby taking away from the corporators the franchise of greater or less property value, yet the legislative decision is only *prima facie* correct, and the parties are entitled to have it set aside in the courts afterward, on showing by evidence that they have not been guilty of such abuse or misuse. In other words, the legislative act, which may perhaps be passed without any notice, is to stand as a conviction of guilt until the parties charged can prove their innocence. But their innocence of what? In other cases it would be thought the grossest perversion of right and justice if, in any proceeding in court, the party was to be presumed guilty of any one specific charge until he proved himself innocent; but that case would be a much less serious departure from the rules of justice than this. The general plank-road act of 1848 was made a part of this company's charter, and it contained a great many provisions to be observed by it, and for a violation of some of them specific penalties were imposed. The company has been in operation upward of twenty years, when its franchise is taken away on a presumption of guilt, which is only to be removed by the corporators proving that in all that time they have observed every provision of their charter and been guilty of no default. It is safe to say that what is required of them is, and would be in any such case, a simple impossibility. It is as if an individual should be charged generally, and without further specification, with an offense against the criminal laws, and the trial-court should say to him: "You are charged, and *prima facie* convicted, of crime, but you shall be relieved of the conviction on making proof that you have never disobeyed the law. Meantime, and until you do so, the state will take from you your property in punishment for your presumed guilt."

Now, it is simply impossible that any doctrine which leads to such results can be sound. But the illustrations of its anomalous and unjust character might be multiplied indefinitely, and if it were possible for the question of corporate default to be fairly tried under it, it must be remembered, also, that as the question would or might arise between individuals and the company, as it has in this instance, there might be repeated trials of the same question, none of which would be conclusive in a new suit. The question involved in each suit would be the validity of a statute, dependent upon the facts, and,

therefore, submitted to a jury, and while the jury in one cause might hold it valid, another in a different case, acting upon somewhat different evidence, or influenced by more persuasive advocates, might declare it void, and thus it would be a law to-day as to one party and no law to-morrow as to another, and so on indefinitely, according to the varying views which different panels of jurymen might take of disputed facts, until, perhaps, the state would be compelled to interfere by *quo warranto*, and have, after all these proceedings, the authoritative adjudication which sound policy, not less than correct principle, demanded at the beginning. But we need hardly say that a law, if valid at all, must be valid from its enactment, and can not be made to depend upon the opinion of a jury as to the sufficiency of the reasons for its being passed.

We are constrained, therefore, from all these considerations, to say that the determination whether a corporation has violated its charter is judicial in its nature. It requires the action of those tribunals which must hear before they condemn, and must proceed upon inquiry. If it were properly legislative, it may be that the legislature must be presumed to have given a hearing, but the fact, as we have seen in this case, is otherwise, and the cases in which presumptions are to be indulged against the facts, ought not to be multiplied. It is sufficient to say that, in our opinion, the case is one in which the party is entitled to a trial of right *in fact*, and can not be put off with one which rests exclusively in a presumption of law, indulged against the fact. The violation of the charter can not be legally made to appear, except on trial in a tribunal whose course of proceeding is devised for the determination of questions of this nature.

We think this the fair construction of that clause of the charter which is in question. It is not to be presumed that the legislature designed to take upon itself judicial powers, and as the act does not necessarily require that construction, it should not be given it. We must suppose that an inquiry in some proper form was contemplated by means of which on fair trial it should be made to appear to the legislature that a cause existed justifying repeal. Any other view renders the stipulation worthless as a protection, but this view protects the interests of corporators, and at the same time enables the legislature to exercise its power of taking away the charter, even though the violation of corporate duty might not be of that serious character which would seem to justify declaring a forfeiture on judicial proceedings instituted, independent of this clause. The repealing act, it must be assumed, was passed through inadvertence, and probably under the impression that the charter, like many others in this state, was subject to repeal in the legislative discretion.

This being our view, it follows that the judgment of the circuit court must be reversed, with costs, and a new trial granted.

CHRISTIANCY, Ch. J., and CAMPBELL, J., concurred.

GRAVES, J., did not sit in the case.

Note. **The charter as a law.**

1. *The courts take judicial notice of general incorporation laws.* 1861, Heaston v. Cincinnati, etc., R. Co., 16 Ind. 275.

And even of special acts incorporating state banks. 1850, Jemison v. Planters', etc., Bank, 17 Ala. 754; 1860, Davis v. Fulton Bank, 31 Ga. 69; 1861, Buell v. Warner, 33 Vt. 570; 1862, Gordon v. Montgomery, 19 Ind. 110; Compare Kelly v. Alabama & Cin. R. Co., 58 Ala. 489.

Or municipal corporations. 1860, Payne v. Treadwell, 16 Cal. 220; 1862, Macey v. Titcombe, 19 Ind. 135; 1864, Swain v. Comstock, 18 Wis. 463; 1875, Stier v. Oscaloosa, 41 Iowa 353; 1877, Albrittin v. Huntsville, 60 Ala. 486; 1894, Jones v. Lake View, 151 Ill. 663.

And sometimes railroad companies. 1866, Wright v. Hawkins, 28 Tex. 452; 1898, Miller v. Matthews, 87 Md. 464, 41 Atl. Rep. 176. But not always or generally. 1872, A., T. & S. F. R. Co. v. Blackshire, 10 Kan. 477; 1876, Perry v. N. O., etc., R. Co., 55 Ala. 413.

2. The charter, even though a special act, is a law of the state creating the corporation, in the sense that "*ignorance of the law excuses no one;*" hence all persons are supposed to take notice of its contents. 1859, Hoyt v. Thompson, 19 N. Y. 207; 1879, Thomas v. R. Co., 101 U. S. 71; 1881, Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. R. 221; 1887, Bocock v. Allegheny, etc., Co., 82 Va. 913, 3 Am. St. R. 128; 1887, Elevator Co. v. Memphis, etc., R. Co., 85 Tenn. 703, 4 Am. St. R. 798; 1890, Jemison v. Citizens' Sav. Bank, 122 N. Y. 135, 19 Am. St. R. 482; 1893, Franco-Texan Land Co. v. McCormick, 85 Texas 416, 34 Am. St. R. 815; 1895, Durkee v. People, 155 Ill. 354, 46 Am. St. R. 340; 1897, Franklin Nat'l Bank v. Whitehead, 149 Ind. 560, 63 Am. St. R. 302. See particularly Elliott, §§ 212, 213; Morawetz, §§ 591, 592; Taylor, § 264; V. Thompson, § 5973, *et seq.*; VII. Thompson, § 8309, *et seq.*

3. The charter, as a law, is conclusive evidence of its validity, even though obtained by fraud; yet it will not protect those who obtained it by fraud, or fraudulently organize under it. 1863, Paterson v. Arnold, 45 Pa. St. 410; 1865, Booth v. Bunce, 33 N. Y. 139, 88 Am, Dec. 372; 1894, Davidson v. Hobson, 59 Mo. App. 130. But see Morawetz, § 769; and Taylor, § 147.

4. **The charter as a contract,** see, *infra*, pp. 707–760.

Sec. 84. Same. The charter, or articles of incorporation or association under a general law, is a *license* of authority for the persons named, or the promoters, to convert persons or an association of persons into the designated corporation in accordance with the terms indicated in the charter, or general law.

STATE, EX REL., v. INSURANCE COMPANY.[1]

1892. IN THE SUPREME COURT OF OHIO. 49 Ohio State Reports 440–447, 16 L. R. A. 611, 37 A. & E. C. C. 583.

SYLLABUS: 5. *The making and filing, for the purpose of profit, of articles of incorporation in the office of the secretary of state, do not make an incorporated company; such articles are simply authority to*

[1] Only the opinion on the point as to authority to form corporations is given.

do so. No company exists within the meaning of the statute until the requisite stock has been subscribed and paid in, and the directors chosen.

In *quo warranto.*

MINSHALL, J. 1. The defendant is a fidelity and casualty insurance company, organized under the laws of the state of New York, and doing, in this state, what by the laws of New York is authorized and known as four lines of such insurance, to wit: *First*, against injury, disablement or death, of persons resulting from traveling, or general accidents by land or water; *second*, guaranteeing the fidelity of persons holding places of public or private trust; *third*, upon plate glass against breakage; *fourth*, upon steam boilers against explosion, and against loss or damage to life or property resulting therefrom. Its right to do more than one of such lines of business in this state is challenged by the attorney-general on the ground that, by the laws of New York, no company incorporated in this state can transact in that state more than one of such lines of insurance, and, therefore, under the provisions of section 282, Revised Statutes, of this state, it has no right to make in this state more than one of the lines of insurance it is doing. That section reads as follows:

"When, by the laws of any other state or nation, any taxes, fines, penalties, license fees, deposits of money, or of securities, or other obligations or prohibitions are imposed on insurance companies of this state, doing business in such state or nation, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state or nation doing business within this state, and upon their agents here."

A demurrer to the petition, objecting to the jurisdiction of the court, as well as to the sufficiency of the pleading, having been overruled, the defendant, as a third defense to the petition, answered: "That under the laws of New York, it is legally authorized and empowered to do, and is now doing, the four lines of insurance in that state, which the petition charges it with illegally doing in Ohio; and that under the laws of Ohio, a corporation could be legally incorporated and organized, with power to do the same four lines of insurance, or any one or more of them therein, but that no such company has yet been organized to do said four lines of insurance in Ohio, and hence no such company has yet made, or could make, application to the proper officers in New York for a license to do said four lines of insurance in the state of New York." A demurrer to this defense having been overruled, the plaintiff asked leave to reply in substance as follows: That on January 13, 1887, the requisite number of persons, citizens of Cuyahoga county, "subscribed and acknowledged articles of incorporation," stating therein the name, place of business, and capital stock of the proposed corporation and its object, to wit: Under paragraph 2, § 3641, Revised Statutes, to do the four kinds of insurance now being done by the defendant in this state; and

the same having been approved by the attorney-general, as in conformity to the laws of the state, were then filed and recorded in the office of the secretary of state of Ohio, "whereby" it is averred, "an Ohio corporation was duly and legally formed for the purpose of doing the lines of insurance mentioned in the articles of incorporation."

[The court, after holding it had jurisdiction to oust the corporation from exercising its franchises in Ohio, but that the third defense was sufficient, because there was no Ohio company to do business in New York, proceeded]:

The next question is, should leave be given to file the proposed reply to the third defense? We think not, for the reason that it does not show that an Ohio company has been formed to do the four lines of insurance in which the defendant is engaged. It will be observed that it does not aver that any officers or directors have been chosen, or that any of the stock has been subscribed, or that any organization whatever has been effected. It is simply that "articles of incorporation" have been made, and filed and recorded in the office of the secretary of state.[1] *Articles of incorporation do not make an incorporated company, they are simply authority to do so.*

Before disposing of the case, it may be well enough to notice another defense relied on in the answer, and to which a demurrer has been sustained, and that is, the license granted the defendant to do business in this state by the superintendent of insurance. We are all of the opinion that the issuing of a license to a foreign insurance company to do business in this state is a ministerial and not a judicial act, and, whilst it will protect the company in the transaction of its business during its continuance, is not a bar to a proceeding against it in *quo warranto*, where it is found to be exercising any of the franchises of the state without authority of law. State v. Fidelity and Casualty Ins. Co., 39 Min. 538, and cases cited in brief of counsel for relator.

Application for leave to reply to the third defense of the answer overruled and petition dismissed.

[1] The Revised Statutes of Ohio, § 3236, provides that "any number of persons, not less than five * * * desiring to become incorporated shall subscribe * * * articles of incorporation * * * which must contain [certain enumerated things]." Section 3238 provides that "the articles shall be filed in the office of the secretary of state." Section 3239 provides that "upon the filing of the articles of incorporation, the persons who subscribed the same, their associates, successors and assigns, by the name and style provided therein, shall thereafter be deemed a body corporate, with succession and power to sue and be sued, contract and be contracted with," etc. It will be noticed that the statute seems to make the subscribers a corporation, before any stock is subscribed, or any organization had, yet the supreme court holds that in fact the subscribing and filing articles of incorporation only results in a license to obtain subscription to stock and organize a corporation in accordance with the further provisions of the general law.

See, also, Walton v. Oliver, 49 Kan. 107, *infra*, p. 565; 1895, Whetstone v. Crane Bros., 1 Kan. App. 320, and cases given under §§ 144–148, *infra*.

ARTICLE II. ITS GENERAL FORM—AN OFFER AND ACCEPTANCE.

Sec. 85. The offer may be by parties, and an acceptance by the state; or it may be a special or general offer by the state, and an acceptance by individuals, or an association of individuals.

PERKINS v. SANDERS.[1]

1879. IN THE SUPREME COURT OF MISSISSIPPI. 56 Miss. Rep. 733–743.

GEORGE, C. J. * * * The appellant is a stockholder in the Perkinsville Manufacturing Company, and he also claims to be its creditor; and by his bill he seeks to recover from the other stockholders, under a provision of the charter of that company, hereinafter to be set out, the amount of his debt. This bill is filed also in behalf of all of the creditors of the company, and is against all the stockholders. The company itself is not made a party, which would have been the regular course in a bill of this character (a creditor's bill), since it is not clear, from the allegations of the bill, that the company is either dissolved or entirely without assets.

The main point raised by the demurrer denied the right of the complainant, upon the ground that he was not a creditor of the company, because he did not show in his bill that the company was sufficiently organized under its charter to make the contract sued on, at the time it was made. This position is founded on the second section of the charter (Sess. Laws 1870, p. 194), which provides "that the capital stock of the said company shall amount to $60,000, and may be increased, at the option of the stockholders, to $500,000, and that it shall be divided into shares of $100 each."

The obligation sued on is dated in September, 1872, and is signed by the president and secretary of the company. The authority shown for the action of these officers, is a resolution and a by-law passed by the stockholders, dated in December, 1871.

The bill alleges that $60,000 of stock was subscribed before the execution of this obligation, but it does not aver that this subscription was made before the date of the resolution and by-law, which constitute the authority for making the contract. The chancellor sustained the objection, but in this we are unable to agree with him.

It will be here noticed that this is not a bill by a creditor to collect the unpaid balance of stock due by a stockholder to the company, as was the case of Vick v. Lane,[2] but a suit to enforce a personal liability of the stockholders for all the debts of the company. So that the only points to be decided are, *first*, whether the obligation which the complainant sued on is a valid debt of the company; and, *second*, whether the circumstances exist which, under the pro-

[1] Only that part of the opinion relating to acceptance of charter given.
[2] 56 Miss. 681.

visions of the charter, make the stockholders liable for the debts of the company. It is, therefore, wholly immaterial whether the stockholders were liable to assessments on their stock, in virtue of the failure of the subscriptions to amount to $60,000, except so far as such failure may, in law, be an obstacle to the due organization of the company, and the creation by it of the debt sought to be enforced.

In charters which are mere propositions for the organization of a corporation, and which require certain acts to be performed precedent to the existence of the corporation, no corporation can exist, and of course, no corporate act can be performed till these conditions have been complied with. In all such cases, where a certain amount is named in the charter as necessary to be subscribed as the capital stock of the company, such subscription is regarded as a condition precedent to the existence of the corporation, unless otherwise provided in the charter. Persons, therefore, who subscribe for stock under such a charter have a right to assume that they will not be called upon to pay until the amount named in the charter shall be subscribed, and, accordingly, in that class of charters it has been held that subscribers for the stock are not liable to assessments on their stock until the full amount of the subscription has been made. But this rule does not apply if there be anything in the charter which shows a right in the corporation to make the assessments before the full amount of the stock is subscribed, as was decided in Selma and Marion Railroad Company v. Anderson, 51 Miss. 829.

The charter of this company is not of that character. By the first section of it, it is provided that the twenty-one persons named in it, "and all others who are now or hereafter become associated with them and their successors and assigns, be, and they are hereby, created a body politic and corporate under the name and style of the Perkinsville Manufacturing Company," etc. *This was no proposition to create a corporation upon the performance of precedent conditions, but it was itself the creation of a corporation, requiring no other act to be performed by the corporators than their acceptance of the charter, and this even was unnecessary, if, as it is probable, the corporators had applied for the grant of the charter, and thus accepted it in advance. Action under the charter would be an acceptance of it. and hence, there never could be any question as to the existence and due organization of the corporation, when determining upon the validity of a corporate act done within its charter powers, for the performance of the act itself would be an acceptance of the charter.*

The distinction between the two classes of charters is thus seen to be, that in the first-class the charter is a mere permission on the part of the legislature for the formation of a corporation, upon the doing of certain acts prescribed in the charter as precedent conditions, and, as a necessary result, no corporate act can be done until these conditions have been performed, except such as may be expressly permitted by the charter; and as to those acts, it would be considered that the corporation had an existence before its full investiture with its corporate franchises. In the latter class, in which is this company,

the corporation is in existence, for all the purposes of its creation, from the beginning, except so far as there may be restraints placed on it by the charter, either expressly or by plain implication.

As the bill alleges that the $60,000 of stock was subscribed before the execution of the obligation sued on, it is unnecessary for us to decide whether the charter so far restricts the power of the corporation to make contracts within the scope and purpose for which the charter was granted, as to prohibit the making of this contract until such subscription is made. But it is insisted that the corporation could not elect a president or a board of directors, nor confer the power on them, when elected, to make contracts until after the subscription of $60,000 of stock should be made, and for this reason it is urged that the obligation sued on, and which was made by the president and secretary on behalf of the company, should be held as made without the proper authority of the corporation.

We do not consider the position a sound one. There is no restriction in the charter upon the exercise, by the corporation, from the moment of its creation, of any of its corporate powers, unless it can be implied from the terms of the second section, fixing the amount of the capital stock, as hereinbefore quoted.

It has been seen that the subscription of the prescribed amount of capital stock is not a precedent condition to the organization of the corporation,—that the corporation was created by the very terms of the charter, *eo instanti* with its acceptance by the corporators. The charter does not prescribe how nor when the subscription is to be made, nor the time at which the subscription is to be made payable, nor does it attach any disability to the corporation prior to the subscription. It makes no provision as to how the stock shall be divided among the corporators named, nor as to the terms on which new corporators should be admitted. All these were necessarily left to the discretion of the corporation, and the power to regulate those matters was also expressly granted to the corporation as it was created by the charter, by the provision contained in the first section of that instrument, that the corporation might, "make all by-laws, rules and regulations for the management of its business, property and effects, and the transfer of its stock, as to them may seem best."

See notes to State v. Dawson, and Benbow v. Cook, *infra*, pp. 413, 416. See, also, Angell & Ames, §§ 81-95; Beach, § 15; Boone, §§ 23, 24; Clark, §§ 23, 24; Cook, §§ 499, 640; Elliott, §§ 23-25; Field, §§ 23-26; Grant, pp. *18-*24; Morawetz, §§ 21-23, 25, 26, 40; Taylor, § 449; 1 Thompson, §§ 52, *et seq.*; VII Thompson, § 8160.

Sec. 86. The offer may be withdrawn before acceptance. Acceptance is essential.

THE STATE, EX REL., v. DAWSON.

1861. IN THE SUPREME COURT OF INDIANA. 16 Ind. Rep. 40–43.

Appeal from the Clark circuit court.

PERKINS, J. Information against the defendants, charging that they are pretending to be a corporation, and to act as such, when they are not a corporation. It charges that in *January*, 1849, the legislature of the state of *Indiana* enacted a special charter of incorporation (which is set out at length) for a railroad from *Fort Wayne*, *Indiana*, to *Jeffersonville*, to be called the *Fort Wayne and Southern Railroad*; that the persons named in the charter as directors did not accept said charter till *June* 2, 1852, when they did meet and accept the same, and organized under it. It is alleged that the defendants are assuming to act under said charter, never having organized under any other. The court below sustained a demurrer to the information, thus holding the defendants to be a legal corporation.

The present constitution of *Indiana* took effect on *November* 1, 1851. It contains these provisions:

"All laws now in force, and not inconsistent with this constitution, shall remain in force, until they shall expire or be repealed." Sched. (1 sub. sec.) of Constitution.

"Corporations, other than banking, shall not be created by special act, but may be formed under general laws." Art. xi, § 13.

"All acts of incorporation for municipal purposes shall continue in force under this constitution, until such time as the general assembly shall, in its discretion, modify or repeal the same." Sched., *supra*, sub. § 4.

The charter for the Fort Wayne and Southern Railroad was not a charter for municipal purposes, and hence was not specially continued in existence. Article 11, § 13, above quoted, prohibits the creation of a corporation by special act or charter, that is, as we construe the prohibition, through or by virtue of, such special act or charter, after November 1, 1851. The policy that induced the prohibition, as well as its literal import, demands this construction. It is necessary for us to ascertain, then, when the defendants, if ever, were created a corporation. The simple enactment of the charter for the corporation by the legislature, did not create the corporation. It required one act on the part of the persons named in the charter to do that, viz.: acceptance of the charter enacted.

Says Grant in his work on corporations, *vide*, p. 13 "Nor can a charter be forced on any body of persons who do not choose to accept it." And again at p. 18, he says, "The fundamental rule is this: no charter of incorporation is of any effect until it is accepted by a majority of the grantees, or persons who are to be the corporators under

it. Bagge's case, 2 Brownl. & G. 100, s. c. 1 Roll. Rep. 224; Dr. Askew's case, 4 Burr. 2200; Rutter v. Chapman, 8 M. & W. 25; per Wilmot, J., Rex v. Vice-Chancellor of Cambridge, 3 Burr. 1661. This is analogous to the general rule that a man can not be obliged to accept the grant or devise of an estate. Townson v. Tickell, 3 B. & Ald. 31." See, also, Ang. & Am., § 83, where it is said, if a charter is granted to those who do not apply for it, the grant is said to be *in fieri* till acceptance. We need not inquire whether this rule extends to municipal corporations in this country. As to what may constitute an acceptance we are not here called on to decide, as the information expressly shows that there was none in this case till June, 1852, which fact is admitted by the demurrer.

The grant of the charter in question, then, to those who had not applied for it, was but an offer, on the part of the state; a consent that the persons named in the charter might become a corporation, might be created such an artificial being by accepting the charter offered. But an offer, till accepted, may be withdrawn. In this case, the offer made by the state in 1849 was withdrawn by the state November 1, 1851, by then declaring that no corporation, after that date, should be created except pursuant to regulations which she, in future, through her legislature would prescribe.

This pretended corporation, then, was not created before November 1, 1851, and it could be created afterward only by the concurrent consent of the state and the corporators. But, at that date, the constitution prohibited both the state and corporators from giving consent to such a corporation, to wit: One coming into existence through a special charter; and hence necessarily prohibited the creation thereof. This decision accords with that of the supreme court of the United States in Aspinwall v. Daviess County, 22 How., p. 364, where it was held that the new constitution prohibited a subscription of stock to the Ohio and Mississippi Railroad Company, authorized by the charter of the corporation, granted under the former constitution and actually voted by the people of the county under that constitution.

Whether, as a matter of fact, the charter in this case was accepted under the old constitution, must be determined on a trial of the cause below.

Had the provision in our constitution, like that on this subject in the constitution of Ohio, ordained that the legislature should "pass no special act conferring powers," the restraint would clearly have been imposed alone upon future legislative action; but, in our constitution, the restraint is plainly imposed upon the creation, the organization of the corporation itself. See The State v. Roosa, 11 Ohio St. Rep. 16.

Per Curiam.—The judgment is reversed with costs. Cause remanded for further proceedings in accordance with this opinion.

Note. The original act provided that Allen Hamilton and others named "*are hereby* constituted a body corporate," etc. In the later case, State v. Dawson, 22 Ind. 272 (1864), it appeared that the charter had been applied for by the corporators; this was held to be an acceptance. See 1807, Ellis v. Marshall, 2 Mass. 269, 3 Am. Dec. 49, *supra*, p. 306; 1820, Lincoln & K. B. v. Richardson, 1 Maine (1 Greenl.) 79, 10 Am. Dec. 34; 1839, Thomas v. Dakin,

22 Wend, 9, *supra*, p. 19; 1842, State v. B. & O. R. R., 12 Gill & J. (Md.) 399, 38 Am. Dec. 317; 1847, Haslett v. Wotherspoon, 1 Strob. Eq. (S. C.) 209; 1859, Cypress Pond Draining Co. v. Hooper, 2 Metc. (Ky.) 350; 1870, Lyons v. Orange, A. & M. R. Co., 32 Md. 18; 1872, Mason v. Finch, 28 Mich. 282; 1875, P. W. & B. R. Co. v. Kent Co. R. Co., 5 Houst. (Del.) 127; 1885, Smith v. Silver Valley M. Co., 64 Md. 85, 54 Am. Rep. 760, 20 Atl. 1032; 1893, Atkinson v. Fennill, 14 Ky. Law Rep. 922. See references to text-books, *supra*, p. 411.

Sec. 87. Acceptance may be inferred from signing articles, holding meetings, organizing and acting as a corporation.

BENBOW v. COOK.[1]

1894. IN THE SUPREME COURT OF NORTH CAROLINA. 115 N. C. Rep. 324–334, 44 Am. St. Rep. 454.

["Plaintiff sued to recover possession or damages for non-delivery of cotton mills machinery claimed under a mortgage from the Crown Mills corporation, and which defendant had seized as sheriff and sold under executions against the corporation."]

AVERY, J. If the corporation never had any lawful existence, as the defendant contends, of course it did not authorize the execution of a mortgage some months after it is claimed that it was duly organized. The statute, The Code, § 677, provides that "Any number of persons, not less than three, who may be desirous of engaging in any business not unlawful, except building railroads or banking or insurance, at any place within the state, may, if it please them, *become incorporated* in the manner following," etc. It seems that three persons, Amos Ragan, O. S. Causey and R. E. Causey, as the sole corporators of a manufacturing company, having ten shares each, signed articles of agreement before the clerk of the superior court of Guilford county, which were duly recorded. Having complied with the requirements as to the form of the articles of agreement and caused the proper record to be made, the three persons named as sole corporators became a body politic for the purposes set forth in the agreement. The Code, §§ 678, 679. When corporate powers are granted by a special instead of a general act of the legislature, there must be evidence of acceptance by the corporators and compliance with all conditions precedent prescribed by law, in order to show affirmatively that the corporation is lawfully organized. But in our case every corporator affixed his hand and seal to the articles of agreement recorded, and by such signature and the recording of the instrument, became invested with all the powers which it was contemplated by law to confer in such cases. The Code, § 679. Private corporations are formed when the necessary contractual relations are created between the persons clothed by law with the powers of a body politic. 1 Morawetz 24. The existence of the company depends upon the fact of the acceptance of the privilege (1 Morawetz 26), and it was evidently

[1] Only the part of the decision relating to acceptance of charter is given.

the intent of the legislature that the signature to the articles should be deemed an acceptance, leaving no other condition precedent to be performed, except the recording, this being a substantial compliance with the requirements of the law. 1 Morawetz, 32, 33, 27 *et seq.* In such cases the corporators are usually constituted only a *quasi*-corporation, "whose sole function is to bring into existence the corporations consisting of the real body of stockholders." But in our case the signers of the certificate, as appears from the recorded articles of agreement, were not only the sole corporators, but the only stockholders, and, as between themselves, constituted a corporate body, wanting only formal organization in order to transact business with the public.

The law, intending to protect the rights of minorities, requires that notice of the meetings of the stockholders of a corporation shall be given to every person who holds a share of the stock, and, if no other mode of notification be provided in the charter or by-laws of a company, or by statute, express notice must be given. The owner of every unit of interest constituting a part of the aggregate body of stock is entitled to the opportunity which due notice affords him of protecting it, by being present and participating in meetings. 1 Cook on Stockholders, § 574. The reason for this rule is plainly met, so far as the organization of the company is concerned, when it appears that all the stockholders assented to the call of the meeting, participated in it, and acquiesced in its consequences afterwards. The state has not complained or taken any steps to question its rights or annul its powers as a body politic. If we concede that section 665 of *The Code* was intended to apply in such a case as this, the only purpose of the legislature in enacting it was to provide that every corporator should have notice of the time and place of a meeting for organization. There was no necessity for proving a compliance with the statute, when every person interested had express notice and participated in the meeting. Angell & Ames on Corporation, § 492. The strict requirements as to notice, being intended to protect stockholders, may be waived by them, and when they do waive it, "the meeting and all proceedings are as valid as they would be had the full statutory notice been given." 1 Cook, *supra*, § 599.

It is always presumed that notice is given, and that any meeting of which a minute is found in the proceedings of the stockholders of a corporation, was regularly and lawfully held. Cook, § 600. When a party assumes the burden of showing irregularity, and actually shows that the meeting for organization, or any subsequent one, was not called in the manner prescribed by law or the by-laws of the company, the action of the meeting will nevertheless be declared valid when it appears that every stockholder who did not participate in the meeting ratified its action afterward. Stutz v. Handly, 41 Fed. Rep. 531; Nelson v. Hubbard, 96 Ala. 238; Campbell v. Argenta, etc., Co., 51 Fed. Rep. 1.

If the three directors, Amos Ragan, O. S. Causey and R. E. Causey, met at High Point without notice, they being also the holders of

all the stock, it was a waiver of the requirements of the by-laws that such meeting should be called by the president or a majority of the directors. Nelson v. Hubbard, *supra;* Jones v. Turnpike Co., 7 Ind. 547. Whether the directors met at Greensboro or High Point, and whether in pursuance of previous notice or not, is immaterial, if in fact they met together and agreed to create the indebtedness and authorize the execution of the mortgage to secure it, they, as stockholders and directors, constituting, as they did, the whole of each body, waived objection to the want of the notice prescribed by the by-laws, and the failure to make a record of their proceedings at that time does not affect the validity of their action. Handly v. Stutz, 139 U. S. 417. The signing of the minutes at another time would not affect the validity of the action of the board, if in fact all three met, discussed the question of executing the mortgage and agreed to what was afterward entered on the minutes and signed by them. It is true that the assent of each of the three, obtained at different times or places, to a certain course of proceedings, would not bind them, because it would not be the action of the directors as a collective body; but if, as a body, they assemble together and conferred in taking certain action they waived all objection to irregularities, though the meeting may have been informal and the minutes may not have been then recorded. The case of Duke v. Markham, 105 N. C. 131, is clearly distinguishable in that there the stockholders at no time assembled as a body, but the assent of each individual was asked and obtained, separately. It is not contended that the consent of each individual has the same force as the concurrence of all assembled together, given after an opportunity to discuss their proceedings, interchange views and acquire benefit of such consultation. * * *

New trial granted.

Note. See 1833, Russell v. McLellan, 14 Pick. (Mass.) 63; 1839, Penobscot Boom Corp. v. Lamson, 16 Maine 224, *supra*, p. 283; 1840, Newton v. Carbery, 5 Cranch C. C. 632, Fed. Cas. 10,190; 1848, Blandford Third School Dist. v. Gibbs, 2 Cush. (56 Mass.) 39; 1852, Baldwin v. Hillsboro & C. R. Co., 1 Ohio Dec. 532; 1855, Taylor v. Newberne, 2 Jones Eq. (N. C.) 141; 1864, State v. Dawson, 22 Ind. 272; 1872, Lycoming Fire Ins. Co. v. Buck, 1 Luz. Leg. Reg. (Pa.) 357; 1875, Heath v. Silverthorn Lead M. Co., 39 Wis. 146; 1883, McKay v. Band, 20 S. C. 156; 1894, Glymont Imp. Co. v. Toller, 80 Md. 278, 30 Atl. 651; 1896, Quinlan v. Houston & T. Ry. 89 Tex. 356, 34 S. W. 738. See, also, I Thompson, §§ 60, 61; III Thompson, § 3652; IV Thompson, §§ 5266, 5388. 5416; VI Thompson, § 7703, *et seq.*; VII Thompson, § 8161. And other text books cited, *supra*, p. 397.

Sec. 88. Acceptance must be within the state offering the charter.

MILLER v. EWER, 27 Maine 509, 46 Am. Dec. 619, *infra*, p. 841.

Sec. 89. Renewals, extensions and amendments, must also be accepted, to make them effective.

COMMONWEALTH, EX REL. CLAGHORN ET AL. v. CULLEN.[1]

1850. IN THE SUPREME COURT OF PENNSYLVANIA. 13 Pa. St. Rep. 133–145, 53 Am. Dec. 450.

Error to the Common Pleas of Philadelphia county.

An information in the nature of a *quo warranto* was filed in the court below on the 19th of May, 1849, by John W. Claghorn and others, to show cause why Peter Cullen and others claimed to enjoy the franchises, etc., of The Equitable Life Insurance Company, of Philadelphia. It set forth that a charter was granted in May, 1848, which provided that the corporate powers of the company should be exercised by a board of trustees, to consist of six persons and a secretary, to be elected on the second Monday in December, annually, or within forty days thereafter. Until the first election the board of trustees was to consist of the seventeen persons named as commissioners to receive subscriptions, and that thereupon the company went into corporation, and Claghorn was elected president; that on the 18th of January, 1849, within the forty days after the first election should have been held, a supplement to the charter was passed, which provided that the board of trustees should thereafter consist of seventeen persons and secretary, to be elected by the stockholders in the manner prescribed by the charter, and that the board as it consisted on the 1st of January immediately preceding, should be continued in office until the next annual election thereafter; that while the company were in operation under these two acts, the passage of another supplement was by some persons obtained on the 9th of April, 1849, which declared that the board of trustees should thereafter consist of seventeen persons, to be elected in May, annually, the first election to be held in May, 1849, and repealed the supplement of January; that the act last mentioned had been obtained without the assent of the board of trustees or of the company, and that although certain of the stockholders might have assented to it, such assent had not been given by the trustees nor by the company in meeting duly convened, and that said act was in no way binding; that nevertheless Peter Cullen, vice-president of the company, called a general meeting of stockholders, to elect seventeen trustees on the 7th of May; that the board

[1] Arguments omitted.

of trustees, before the day of election so named, passed resolutions refusing to accept the last supplement declaring the call for the meeting unauthorized, and appointing a committee to attend at the meeting of stockholders, to protest against any proceedings under that call; that the said Cullen, with others, still persisted in convening the meeting of stockholders at which the defendants were elected trustees, and the parties so elected thereupon ejected the old board of trustees, and usurped the franchises of the company.

The answer, after admitting the incorporation of the company and its going into operation, set forth that certain of the defendants who were of the number of commissioners and, therefore, of the first board of trustees, were not informed by the other members of the board of the intended passage of the supplement of January, 1849, in manner and form as set forth, yet that it was produced by Mr. Claghorn at a meeting of the board on the 24th of January, 1849, and that, although no acceptance thereof was ever made, either by the board or the stockholders, that the trustees continued to hold their offices under it; that while thus in office the supplement of April was passed, which was not only done with the knowledge of a large number of the trustees, but that the majority in value of the stockholders signed an acceptance of it and held an election in pursuance of its provisions. The answer set forth at length the proceedings of this election. To this the relators demurred.

The court below decided that there had been no such acceptance of either supplement as to render it binding on the corporation, and made the following decree:

This cause came on to be heard at the June term, and was argued by counsel, and thereupon, upon consideration thereof, the court do order, decree and adjudge as follows, this twenty-ninth day of September, A. D. 1849, to wit:

That judgment of ouster be entered against the defendants, and forasmuch, as in the opinion of the court, the relators are not entitled to possess and enjoy the offices and franchises of the said "Equitable Life Insurance Company," the court do order an election to be held for trustees of said company at a general meeting of the stockholders convened for that purpose by ten days' public notice in two or more of the daily papers of the city of Philadelphia, on Thursday, the eleventh day of October, A. D. 1849, between the hours of ten A. M. and two P. M., and the court do appoint Frederick Fraley, Charles F. Lex and William G. Alexander, Esqs., trustees to take charge of said corporation until others shall be elected in their stead, pursuant to the laws of this commonwealth, regulating said corporation and this order of court; and the court do direct that the trustees appointed as aforesaid by this decree, shall give the public notice aforesaid, and shall be the judges at said election and shall receive the votes of said stockholders duly qualified to vote, and shall make return to the court on Saturday, October 13, 1849, of the proceedings to be had by virtue of this decree.

The relators objected to this decree being entered on the ground

that the argument had been directed to the validity of the April supplement, and not to that of January. An argument was then ordered by the court as to the efficacy of the January supplement, and in the meantime no decree was entered. After this argument the decree was entered as above.

The relators took out a writ of error, of which they notified the three trustees appointed by the court, and warned them not to proceed with the election. The court below, under the 15th section of the act of 13th of June 1836 (Pur. 990, *quo warranto*), then made a decree awarding execution of their former decree, notwithstanding the writ of error. The election was held and six of the defendants elected trustees. These proceedings the court confirmed and authorized the delivery of the property of the corporation by the three trustees appointed by the court, to the trustees thus elected.

The relators assigned for error:

1. "That the court below erred in deciding that the relators were not entitled to possess and enjoy the offices and franchises of the Equitable Life Insurance Company.

2. "That said court erred in ordering that an election for trustees of said company be held on October 11, 1849, and in appointing Frederick Fraley, and others, trustees to take charge of the corporation in the interim."

BELL, J. So far as we may judge from the pleadings and accompanying exhibits, under which the cause is brought before us, it presents the history of a struggle between rival parties for the government of a private corporation, pending which, each has sought the aid of special legislation, apparently too hastily accorded to both. Such a course is usually detrimental to the best interests of companies entrusted with the management of capital; and, it is to be feared, the present instance can not be esteemed an exception. Both the supplemental acts, here in question, propose to graft upon the original act of incorporation, some very material alterations. Each provides for an increase in the number of trustees and for changing the time of their election. The earlier of them continued in office for an additional year the first board of managers, and directs the election of a secretary by the whole body of corporators. If, under the facts developed, this is to be regarded as a valid amendment of the charter, the second supplement of April, 1849, becomes of decisive importance, not only because it fixes a new time for the annual election, and restores the appointment of secretary to the board of trustees, but by force also of its repealing clause, is destructive of the first supplement. Should, however, this be decreed invalid, then the changes proposed by the younger enactment, in the organization of the board, as originally designed, and the time of the election of its members, must be deemed radical in their character.

Of the numerous decisions that have been pronounced on this subject, it is unnecessary to bring to view other than the case of Dartmouth College v. Woodward, 4 Wheat. 518, and our recent determination of in Brown v. Hummell, 6 Barr. 86, to prove that sub-

stantive alterations, such as those proposed by each of these supplementary acts, are not to be taken as parcel of a private charter, without the previous concurrence of the corporators, manifested in some way recognized by the law. Unless so sanctioned they are esteemed as unauthorized interferences with a solemn compact between the public and the individuals composing the corporation, and, therefore, obnoxious to the constitutional prohibition touching the obligation of contracts. Whether this sanction has been extended to both, or either of the supplements of January and April, are the leading questions presented for decision. Each of the contending parties claim this advantage for the enactment of their own procurement, and deny it to the antagonist statute. Neither of them, however, pretend that there was any express, formal and recorded act of acceptance, either by the corporators at large or the board of trustees, nor, as will be presently seen, was this absolutely necessary. That the then board of trustees tacitly gave their assent to the older supplement is not to be denied, for, while the petition in effect asserts this, the answer admits it was produced as a recognized act by the president of the board, at a meeting held on the 24th of January, 1849, and that the trustees, including several of the defendants, continued to hold their offices by virtue of the supplement after the period for which they were first appointed.

Had these officers been clothed with power to accept or reject this statute, it is not to be doubted, their silent acquiescence in its provisions and continued exercise of authority by virtue of it, would have been sufficient to establish their assent.

Anciently, indeed, it was supposed that from the very nature of an artificial corporate body, it could legally manifest its acts and conclusions only by the use of its corporate seal, affixed to a deed in pursuance of authority previously given. But this idea has long since given way to the more reasonable doctrine that the act of assent of a corporation may be inferred from such circumstances of commission or omission as would raise a similar presumption in favor of or against a natural person. *Corporations, it is now held, may be affected by implication, just as individuals are*, and where its action or acquiescence are the natural result, or necessary accompaniment of some other supposed precedent fact, the existence of that fact will be assumed, both for purpose of charge and discharge. In the leading case of the Bank of the United States v. Dandridge, 11 Wheat. 70, Mr. Justice STORY stated the principles thus: "Acts done by corporation, which pre-suppose the existence of other acts to make them legally operative, are presumptive proof of the latter," and this is true, though no minute of them can be found among the records of the corporation. By way of illustration, he instanced the case of one notoriously acting as cashier of a bank, and so recognized by the directors, which is sufficient of itself to raise a presumption of his due appointment, and his acts as cashier will bind the institution, though no written proof of the appointment can be produced. Both in England and with us, this principle has been liberally extended and applied, where the questions were of the acceptance of a charter. In

this country, where private corporations are very numerous, and constant use of their privileges naturally engenders indolence in the creation of regular evidence of corporate acts, and negligence in its preservation, the recognition of presumptions, as legitimate sources of proof, was a legal necessity. While, therefore, *a charter granted to persons who have not solicited it, is said to be in fieri until after acceptance, yet it is not indispensable to show a written instrument, or even a vote acceding to the grant, unless the charter expressly prohibit it; every formality may be presumed, from a continual exercise of the corporate powers.*

This is also true of assent to a new or additional charter by an existing corporation, which may, in like manner, be inferred from acts or omissions inconsistent with any other hypothesis; and where the new grant is beneficial in its aspect, it is thought very little is required to found a presumption of acceptance. Bank v. Dandridge, 12 Wheat. 71; The Charles River Bridge v. Essex Bridge, 7 Pick. 334; Trott v. Warren, 2 Fair'd 227; Bridge Co. v. Bragg, 2 N. H. Rep. 102; Riddle v. Proprietors of Canals, 7 Mass. 184; Penobscot Co. v. Lawson, 4 Shep. 924; Kings v. Avery, 1 Term Rep. 575; s. c. 2 Term Rep. 515; Newling v. Francis, 3 Term Rep. 189.

Nay, a single unequivocal act may be potent enough conclusively to establish assent; as, for instance, if a suit be brought and persisted in, where it could be sustained only under the provisions of the amended charter. A similar observation was made in deciding the Lincoln and Kentucky Bank v. Richardson, 1 Greenl. Rep. 460, and the court added that the stockholders of the bank are bound by every act, which amounts to an acceptance on the part of the directors. But if by this was meant that the whole body of the corporation may generally be so bound by the acts of their agents, selected to administer the affairs of the corporation, the proposition can not be acceded to.

As is well remarked of this proposition in another place, it is founded upon the consideration that certain persons have been invested with sufficient power to bind the whole body by their acceptance, for where it is otherwise the charter must be accepted by a majority of the whole number of the company. Angell & Ames on Corporations, 53. *Corporate powers are usually distinguished into legislative, electoral and administrative; in private corporations aggregate, though sometimes all the members act immediately in the administration of its affairs, usually, for the sake of convenience, the direct management is entrusted by the charter to certain officers, or board of managers, elected by the members at large, though deriving their ordinary powers from the act of incorporation. These officers exercise the legislative and administrative functions—the former in the institution of by-laws for the general government of the company, the latter in the superintendence and execution of its general business.* Union Turnpike Company v. Jenkins, 1 Caine 381.

In other instances, a select few, representing all those interested in the object of the association, are erected into and vested with all the powers of a corporation, and sometimes the selected branches are divided into

distinct classes, as is the case in the corporation of St. Mary's Church, in this city. When the corporate existence is devolved on a board of officers, they not only wield the whole corporate authority, but may apply for and agree to radical changes in the instrument to which they owe their corporate being. When such a board is separated into intregal parts, occupying distinct positions, both must concur in any act, having for its object an alteration of the fundamental law, though in the exercise of the ordinary powers of a corporation, they act jointly, and are governed by a majority of the united bodies. Case of St. Mary's Church, 8 S. & R. 517. *But these and other authorities evidence that where the whole body of stockholders, or other persons in interest, compose the corporation, the right of assenting to any proposed change in the charter resides in them, though ordinarily represented by a board of directors charged with the exercise of the corporate powers. These in their capacity of managers have no authority, either to call for or assent to a change of the corporate constitution, but by the agreement of a majority of the corporators. Being neither legislative nor administrative, the express assumption of such authority by the servants of the corporation would be an usurpation, for it is paramount not only to every corporate function, but the constitution itself, and as it may touch the very existence of the body, it can only be exerted by that body.* It can not then be said that the assent of the original trustees to the January supplement is such an act of acceptance as will bind the corporation. Yet, as we have seen, a long acquiescence by the members of the company in acts and declarations of the trustees, recognizing the supplement as part of the charter, might constitute conclusive evidence of assent to it. Was there here any such acquiescence? Is there anything shown from which we can safely draw the inference that the company, knowing of the supplement, agreed to it as a portion of their constitution?

Perhaps it may be said that as the terms of the additional grant were favorable to the company, slight circumstances would justify a presumption of acceptance. But is there any ground, however narrow, upon which we can safely erect such an hypothesis? I have looked with some solicitude, but in vain, for a precedent that might justify an affirmative answer to this proposition, to which my judgment refuses its assent.

It does not appear that the company was ever officially notified of the enactment. The defendants swear it was first produced at a meeting of the board by Mr. Claghorn, then president, on the 24th of January. By the provisions of the original charter, the trustees then in office might legally continue until about that time. From thence until the enactment of the second supplement, was a little over two months. During this interval we are not informed that the trustees or their agents performed any official act, or distinctly exerted the corporate power with the knowledge of their constituents. For aught the pleadings show, they sat still with folded arms, doing nothing, and requiring nothing. Now it seems to me, that the mere omission of the stockholders to assemble in formal meeting within that period,

for the purpose of electing other trustees, affords no presumption of assent sufficient to fasten upon them radical changes of their charter. Mere non-action for so brief a time ought not to draw after it a consequence so serious, particularly when it is recollected that the call of such a meeting would come most appropriately from the board itself. In answer to this it is not sufficient to suggest that a failure to elect trustees ought to be received as strong proof of acceptance; since, without this, a dissolution of the corporation must ensue. Perhaps, anciently, such would have been the result; but the present doctrine is, that a corporation does not become defunct from a simple neglect to elect officers, while the capacity to elect remains in the members. Lehigh Bridge Co. v. Lehigh C. & N. Co., 4 Rawle 24; Slee v. Bloom, 5 John. Ch. Rep. 336. It is said a corporation possesses a strong and tenacious principle of vitality (Corp. of Colchester v. Seaber, 3 Burr. 1816), and it therefore requires a long *non-user* of franchises to induce the courts to presume a surrender of corporate rights. Briggs v. Penniman, 1 Hopk. Ch. Rep. 300.

It follows the argument derives no aid from this source to establish a presumption of assent. But is there not evidence of positive dissent? We find that very shortly after its passage a sentiment of active hostility to the first supplement is manifested by a majority in number and value of the stockholders. When this began, we are not precisely informed, but we know that in less than three months after the date of the objectionable enactment, the feeling of opposition led to its repeal. It is fair, therefore, to infer it commenced at the moment the law was communicated to the board of trustees. How, then, with a knowledge of this important fact, can we regard the assertion that a majority of the company had agreed to accept it as an approved amendment of the first act of incorporation? It is, however, claimed that the supplement of April recognizes that of January to be in full force, because the latter repeals the former. The position is that if invalid, a formal repeal of the unaccepted act was unnecessary. Admitting this, I am at a loss to perceive how mere supererogation can derive an unintended positive effect from its non-usefulness. Besides, the repealing clause is not the work of the dissenting members of this corporation. Their rights are consequently unaffected by it. But the argument in favor of the first supplement is chiefly founded upon certain passages in the answer of the defendants, by which it is said they concede the first board of trustees were continued rightfully in office by virtue of this supplement. It is obvious, however, these passages are but echoes of the relator's petition, introduced, not in confirmation of it, but with reference to the immediately preceding denial of acceptance formally averred, and thus putting in issue the title of the relators. It is replied, this denial is not responsive to the bill, which does not distinctly aver acceptance. I think this is a mistake. Although in this part of the complaint there is no direct assertion of the assent of the company to the January supplement, the act is distinctly referred to as an operative portion of the charter, which it could not be without acceptance. But

were this not so, the counter allegation would be by no means valueless. In equity proceedings, the distinction seems to be that an answer, if responsive, is evidence of the fact it alleges, requiring testimony to rebut it, but if the matter set forth be not responsive, it is not evidence of that matter at all, but must be proved. 1 Smith's Ch. Pr. 272, in note; Clark's Executors v. Van Ramsdyk, 9 Cranch 160; Hart v. Ten Eyk, 2 Johnson's Ch. Rep. 90. But this is in fact a proceeding at common law. Under its system, a new defensive averment, if it answers the plaintiff's case, is admissible. As, under our act of 1840, to be presently more particularly noticed, the relator's title may be put in issue under the *quo warranto*, any allegation affecting it may be material, and its truth will be conceded by a demurrer. If, therefore, in this instance, we adhered strictly to technical rule, we might, perhaps, be compelled to say that the plaintiffs, by their demurrer, admitted the non-acceptance of the first settlement and are thus concluded now to deny it. But as we think neither party contemplated this, when framing their pleadings, we prefer to rest our conclusions, as to this part of the case, on the absence of reliable proof of assent, either direct or inferential.

This brings us to the second question, whether there is an evidence of the acceptance of the April supplement? Our own determination in Shortz v. Unangst, 3 Watts & Serg. 45, following earlier decisions, settles, *that to make a vote of acceptance valid, as the act of a corporation, it should be passed at a meeting duly convened, after notice to all the members. In such cases, congregated deliberation is deemed essential, and where an opportunity for this is afforded, the decision of a majority is binding, if no other mode be prescribed by the charter. The private procurement of a written assent, signed by the majority of the members, will not supply the want of a meeting. Such an expedient deprives those interested of the benefit of mutual discussion, and subjects them to the hazard of fraudulent representation and undue influence. Notwithstanding the objection, however, it seems to be agreed that a written acceptance, though not executed at a meeting, may be sufficient, if signed by all the stockholders or parties in interest.* Davies v. Hawkins, 3 Maul. & Selw. 488; Stow v. Wyse, 7 Conn. Rep. 214; Livingston v. Lynch, 4 John. Ch. Rep. 573; St. Mary's Church, 6 Serg. & Rawle 498. As this is not true of the paper of the 9th of April, 1849, the defendants very properly disclaim it, as furnishing evidence of acceptance. But they rely on the unanimous act of the majority of stockholders at a meeting convened by public advertisement, for the purpose of electing trustees, at which those now exercising that office received the whole number of votes of those in attendance. I concede there can scarcely be stronger evidence of acceptance than that furnished by an election of corporate officers in pursuance of a new, or the alteration of an old charter. King v. Larwoad, 1 Lord Raym. 32; Lewling v. Francis, 3 Term Rep. 189. Yet, like other corporate acts, it is but presumptive evidence of the prior assent of the company, by a vote of its members, at some supposed meeting, or at least of a

deliberate waiver of a vote by all in the corporation having that right. But how can such a presumption be entertained, in the face of a remonstrance against the proposed election, made by some of the members on the ground of non-acceptance of the younger supplement? This is obviously out of the question. The record shows that the same persons who signed the written acceptance, also signed the requisition for a new election of trustees, claiming to be a majority of the stockholders; and that the votes subsequently cast were by the same individuals.

All this was done in disregard of a formal resolution, adopted by those then claiming to be trustees, repudiating the last supplement, and denouncing as illegal the election proposed to be held under it. This resolution was communicated by a committee appointed for that purpose, to the subsequent electoral meeting, but without effect. It will not do to say the resolution, as the act of a defunct body, was naught. It, at least, served to express dissent, entertained and expressed by a portion of the members—a dissent that could only be legally overcome at a meeting regularly convened to consider the proposed amendment. The opportunity to deliberate, and, if possible, to convince their fellows, is the right of the minority, of which they can not be deprived by the arbitrary will of the majority. That the call for an election, and the subsequent steps were in contempt of this right, is manifest. The attempt consequently defeats itself. We have, therefore, no hesitancy in holding there is an entire want of proof of the acceptance of either supplement.

Was the court of common pleas authorized so to declare in this proceeding, and so decree a new election? The relators insist the only question before that court was as to the binding efficacy of the April supplement; and that their title as trustees under the act of January was not in issue. But this objection proceeds from too narrow an estimate of the act of the 13th of April, 1840; though the 12th section of that statute speaks only of disputes between persons claiming to be duly *elected* to fill any office, its purview is broad enough to cover all questions arising on writs of *quo warranto*, between rival claimants of elective offices, though some of them may, as here, claim to hold by temporary legislative appointment. The object of the statute is to invest the court with power to settle the pretensions of all the claimants in the same proceeding, whether they be complainants or defendants, and whether in or out of possession. To exclude from its operation corporate officers, who, like these plaintiffs, derived their first appointment from the act of incorporation, in anticipation of a regular election, would be to sacrifice to literal interpretation, the plain intent of the law-givers. The act speaks of disputed elections between persons claiming to be duly elected, and these, doubtless, were principally regarded in passing its provisions. But cases like ours are within the mischief intended to be remedied, and so questionless within the equity of the statute, which, being highly remedial, ought to be so literally construed as to secure the attainment of substantial justice. Here, then, is a case of contested election, intimately con-

nected with the title set up by the plaintiff and almost necessarily involving an investigation of it. Being within the object of the act, which was to end disputes at a blow, that title was as open to inquiry as the defendants. The result shows that neither party was entitled to enjoy, and this put it within the authority of the court to order a new election. This conclusion leaves to the company the right of determining, in an orderly way, whether it will accept of either supplement as an amendment of its charter, and if so, which of them? The dispute now existing may be so settled as to leave no room for future contest—a consummation much to be desired by a business corporation situate as this is. It is gratifying to find that the conclusions of the law are thus in harmony with the best interests of the corporators, and we accordingly recommend that steps be taken as soon as practicable to determine this unhappy disagreement.

Proceedings affirmed.

Note. See 1854, Troy and R. Co. v. Kerr, 17 Barb. (N. Y.) 581; 1859, Bangor, O. & M. R. Co. v. Smith, 47 Maine 34; 1866, City of San Antonio v. Jones, 28 Tex. 19; 1874, Kenton County Court v. B. L. T. Co., 10 Bush (73 Ky.) 529; 1876, Cincinnati, H. & D. R. Co. v. Cole, 29 Ohio St. 126; 1879, State v. Sibley, 25 Minn. 387; 1889, Gibbs v. Baltimore C. G. Co., 130 U. S. 396, 9 Sup. Ct. 553; 1892, Miller v. Am. Mut. Acc. Ins. Co., 92 Tenn. 167, 20 L. R. A. 765; 1896, State v. Taylor, 55 Ohio St. 61, 44 N. E. Rep. 513.

ARTICLE III. THE CHARTER—ITS CONTENTS.

Sec. 90. *In general.* The "means and instruments effecting incorporation may be numerous, consisting of statutes, articles of association, deeds of settlement, by-laws and notices, some of which are usually required to be recorded and others published. The convenience of using some short term to express all of these fundamental acts and instruments has led to the adoption of '*constating instruments.*'" Field on Corporations, § 28.

Note. See *supra*, p. 133.

Sec. 91. *Under special charter from the king, illustration:*

1769. The Dartmouth College Charter.

After a preamble setting forth the circumstances and reasons for granting a charter, it proceeds: "Know ye, therefore, that we * * * do of our special grace, certain knowledge, and mere motion, by and with the advice of our counsel for said province, by these presents, will, ordain, grant and constitute that there be a college erected in our said province of New Hampshire by the name of Dartmouth College, for the education and instruction of youth

Note. See the full charter of Dartmouth College, given in 4 Wheat. (U. S.) Reports, pp. *519–538.

of the Indian tribes in this land, in reading, writing and all parts of learning which shall appear necessary and expedient for civilizing and Christianizing children of pagans, as well as in all liberal arts and sciences, and also of English youth and any others. And the trustees of said college may and shall be one body corporate and politic, in deed, act and name, and shall be called, named and distinguished by the name of the Trustees of Dartmouth College. * * * And for the more full and perfect erection of said corporation and body politic * * * we do by these presents, for us, our heirs and successors, make, ordain, constitute and appoint our trusty and well-beloved [twelve persons named, 'the whole number of said trustees consisting, and hereafter forever to consist, of twelve and no more'], to be trustees of said Dartmouth College * * * that the said trustees and their successors shall forever hereafter be, in deed, act and name, a body corporate, * * * by the name of the Trustees of Dartmouth College, * * * and by that name 'shall be able * * * to have, get, acquire, etc.,' property, etc. 'And * * * to the intent that our said corporation * * * may have perpetual succession and continuance forever, we * * * give and grant unto the Trustees of Dartmouth College, and to their successors forever, that there shall be once a year, and every year, a meeting of said trustees held at said Dartmouth College, at such time as by said trustees shall be agreed on, the first meeting to be called by the said Eleazer Wheelock,' etc., to conduct the affairs of the college; * * * 'also that the said trustees and their successors, or the major part of any seven or more of them, which shall convene for that purpose * * * as often as one or more of said trustees shall die, or by removal or otherwise shall, according to their judgment, become unfit or incapable to serve the interests of said college, do, as soon as may be after the death, etc., * * * elect and appoint such trustee or trustees as shall supply the place of him or them so dying,' etc. * * *"

Many other privileges concerning the management in detail of the college are expressly set forth.

Sec. 92. *Under a special law or act of the legislature, illustration:*

1826. An act to incorporate the Baltimore and Ohio Railroad Company.

Section 1. *Be it enacted by the General Assembly of Maryland*, That Isaac McKim (and eight others named) be, and they are hereby appointed commissioners, under the direction of a majority of whom, subscriptions may be received to the capital stock of the Baltimore and Ohio Railroad Company hereby incorporated; and they, or a majority of them, may cause books to be opened at such times and places as they may direct, for the purpose of receiving subscriptions to the capital stock of said company, after having given such notice as they may deem proper * * *

Sec. 2. That the capital stock * * * shall be $3,000,000, in shares of $100 each, 10,000 shares to be reserved for subscription to the state of Maryland, and 5,000 for the city of Baltimore * * * and the remaining 15,000 shares may be subscribed for by any other corporation, or individuals; and as soon as 10,000 shares * * * shall be subscribed, the subscribers * * * their successors and assigns shall be, and they are hereby declared to be, incorporated into a company by the name of the Baltimore and Ohio Railroad Company, and by that name shall be capable in law of purchasing * * * and conveying estates, real and personal, * * * so far as shall be necessary for purposes * * * mentioned, and no farther, and shall have perpetual succession, and by said name may sue and be sued, and may have and

use a common seal, which they shall have power to alter or renew at their pleasure, etc. * * *

Sec. 3. Provided for apportioning the stock if there were subscriptions received for more than 15,000 shares.

Sec. 4. Required one dollar on each share to be paid at the time of subscription, and the residue in such installments as may be required by the president and directors—not more than one-third in any year and only after sixty days notice; and upon failure to pay, the stock to be forfeited to the company, and may be sold by it.

Sec. 5. Provided that the charter should become forfeited if 10,000 shares were not subscribed within one year.

Sec. 6. Provided that when 10,000 shares were taken, "the said commissioners or a majority of them shall call a general meeting of the subscribers, at such time and place as they may appoint, and shall give at least twenty days' public notice thereof, and at such meeting the commissioners shall lay the subscription books before the subscribers then and there present, and thereupon the said subscribers, or a majority of them, shall elect twelve directors, by ballot to manage the affairs of said company, and these twelve directors, or a majority of them, shall have the power of electing a president of said company either from amongst the directors or others. * * * Each stockholder shall be allowed one vote for every share owned by him, * * * and he may depute any other person to vote for him as his proxy, and the commissioners, or any three or more of them, shall be judges of the first election of directors."

Sec. 7. Provided for continuing the succession of the president and directors, by requiring them to be chosen annually on the second Monday of October, the state of Maryland and the City of Baltimore to appoint one for each 2,500 shares owned by them, but not to vote for others; the president and directors to appoint judges of elections and to fill vacancies in the board.

Sec. 8. Annual meeting of stockholders to be held, or called meetings at any time upon call by president and directors, or stockholders holding one-fourth of the stock subscribed, on thirty days' notice.

Sec. 9. Statement of affairs of the company to be laid before shareholders at the annual meeting; a majority in value of stockholders may at a general meeting remove the president or any director.

Sec. 10. President and directors to take oath faithfully to discharge their duties.

Sec. 11. Reserved stock may be disposed of by directors opening books to receive subscriptions to the same.

Secs. 12–18. Directors were empowered to appoint all other officers and fix their compensation, make by-laws, increase the stock, negotiate loans, construct the road, make lateral roads, agree for land and materials, or condemn the same in the manner set forth, cross other roads, put the machinery on the road and operate it.

Sec. 18. Fixed maximum rates of transportation, forbade all persons from traveling upon the road without license of the company, and exempted shares from taxation.

Sec. 19. Provided for dividends from the net profits only.

Sec. 20. Provided for a penalty of $500 for willful injury done to the road.

Sec. 21. Provided that the act should take effect on its passage.

Sec. 22. Provided that the road should be commenced within two years and completed within ten years.

Sec. 23. Reserved a right to incorporate other companies.

Sec. 93. Under general laws. (*a*) The charter consists of (1) the provisions of the general corporation law, and (2) articles of incorporation, authorized thereby, and consistent therewith.

OREGON RAILWAY CO. v. OREGONIAN RAILWAY CO.[1]

1888. IN THE SUPREME COURT OF THE UNITED STATES. 130 U. S. 1–39.

[Error to the United States circuit court. The Oregonian Co., organized in Scotland under the English Companies Act of 1862, with authority to build and operate a railroad in Oregon, or sell or lease the same, constructed its road in Oregon, and then leased it to the Oregon Co. which was incorporated in Oregon under a general law, authorizing the formation of corporations for any lawful business, enterprise, pursuit or occupation. The articles of association provided that it might lease another railroad, and in accordance with this authority it leased, through its president and secretary, by direction of the board of trustees, the road of the Oregonian Co., which before had complied with the Oregon statutes authorizing foreign corporations to do business in the state, and providing that upon such compliance such foreign corporation should have the same rights, powers and privileges as domestic corporations. The Oregonian Co. had obtained judgment in the lower court for unpaid rentals under the lease. The Oregon Co. claimed this judgment was erroneous for the reason that the Oregonian Co. had no authority to dispose of its road in Oregon by lease, and the Oregon Co. had no authority to acquire one in that way.]

MILLER, J. * * * It may be considered as the established doctrine of this court in regard to the powers of corporations, that they are such and such only as are conferred upon them by the acts of the legislatures of the several states under which they are organized. A corporation in this country, whatever it may have been in England at a time when the crown exercised the right of creating such bodies, can only have an existence under the express law of the state or sovereignty by which it is created. And these powers, where they do not relate to municipal corporations, exercising authority conferred solely for the benefit of the public, and in some sense parts of the body politic of the state, have in this country, until within recent years, always been conferred by special acts of the legislative body under which they claim to exist. But the rapid growth of corporations, which have come to take a part in all or nearly all of the business operations of the country, and especially in enterprises requiring large aggregations of capital and individual energy, as well as their success in meeting the needs of a vast number of most important commercial relations, have

[1] Statement of facts abridged. Arguments, dissenting opinion of FIELD, J., and parts of the opinion of MILLER, J., omitted.

demanded the serious attention and consideration of lawmakers. And while valuable services have been rendered to the public by this class of organizations, which have stimulated their formation by numerous special acts, it came at last to be perceived that they were attended by many evils in their operation as well as much good, and that the hasty manner in which they were created by the legislatures, sometimes with exclusive privileges, often without due consideration and under the influence of improper motives, frequently led to bad results.

Whether it was this consideration, or mainly the desire to fix some more uniform rule by which the rights and powers of private corporations, or those of pecuniary profit, should come into existence, it is certain that not many years ago state constitutions which were formed or remodeled came to have in them a provision like that which is now to be found in the constitution of the state of Oregon, art. 11, § 2:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights."

Outside of the powers conferred and privileges granted to those organizations by the statutes under which they exist, they are in all the states of the Union, which, like Oregon, have the common law as the foundation of their jurisprudenee, governed by that common law; and it is the established doctrine of this court, and, with some exceptions, of the states in which that common law prevails, as well as of Great Britain, from which it is derived, that such a corporation can exercise no power or authority which is not granted to it by the charter under which it exists or by some other act of the legislature which granted that charter.

[After citing and discussing Thomas v. R. Co., 101 U. S. 71; The Asbury R. C. & I. Co. v. Richie, L. R. 7 H. L. 653; The East Anglian R. Co. v. Eastern Counties R., 11 C. B. 775; Green Bay & M. R. Co., 107 U. S. 98; Pennsylvania R. Co. v. St. Louis, etc., R. Co., 118 U. S. 290, 309, proceeds:]

It may be considered that this is the law of the state of Oregon, except as it has been altered or modified by its constitution and statutes.

We are here met with an embarrassment arising out of the circumstance that neither the plaintiff nor the defendant in the present case profess to exercise its powers under any special charter conferred on it by the legislature of Oregon. That state, in accordance with the principle laid down in its constitution, to which we have already referred, passed general laws for the formation of private corporations. See laws of Oregon (Deady's Comp.) ch. 8. Under title 1, § 1, reads as follows:

"Whenever three or more persons shall desire to incorporate themselves for the purposes of engaging in any lawful enterprise, business, pursuit or occupation, they may do so in the manner provided in this act."

Provision is then made for the manner in which these persons shall constitute themselves a corporation, by filing articles of association,

acknowledged before a proper officer, in the office of the secretary of state and in that of the clerk of the county where the business is to be carried on. What these articles shall contain is specified with some particularity. But title 2 of this same chapter is more important in regard to the matter at issue, because it relates, among other things, to corporations which are organized for the construction of railroads. The mode of their formation is the same as that of those coming under title 1, but the declaration of the powers which may be exercised by railroad corporations may become important in the consideration of the present case.

By the act of the legislature of October 21, 1878, Session Laws, 95, it is provided "that any foreign corporation incorporated for the purpose of constructing, or constructing and operating, or for the purposes of, or with the power of, acquiring and operating any railway, * * * shall, on compliance with the laws of this state, for the regulation of foreign corporations transacting business therein, have the same rights, powers and privileges" as a domestic corporation formed for such purpose, and no more.

When we have found, therefore, what powers were conferred by the laws of Oregon on the defendant corporation in this case we shall also have determined that the powers of the plaintiff corporation were no greater with regard to the same subject-matter, so far as the statutes are concerned, except as it may be shown that other powers are given by some express statute.

It may also be conceded, at the outset of the argument, that the memorandum made under the companies act of 1862 by the plaintiff, and the articles of association made under the laws of Oregon by the defendant, both contain declarations of the powers of these companies and of each of them to buy or sell or lease railroads. The only question, therefore, to be considered is whether this declaration of power is authorized by the laws of Oregon.

It is argued that the articles of association, under the Oregon law, and the memorandum of association, under the companies act of Great Britain, are themselves the equivalent of an act of incorporation by the legislature, and that whatever is found as a grant of power, or description of the purpose of the company, set forth in such articles or memorandum, is tantamount to a legislative act. A phrase in the opinion of the court, in Thomas v. Railroad Co., *supra*, is cited as supporting this proposition, namely: "The memorandum of association, as Lord Cairns said, stands in place of a legislative charter." But what was meant, both by Lord Cairns and by this court, was that anything not claimed, granted or described in such instrument in relation to the powers and business of the corporation could not be held to be a part of them by construction; in other words, that its powers could not exceed those enumerated therein. It was necessarily implied in such a remark that anything in such articles of memorandum not warranted by the statutes in question, authorizing the formation of corporate bodies, was void for want of authority.

Of course, any authority for the exercise of corporate powers, de-

rived from the laws of Oregon, must be in accord with the constitution of that state and its statutes upon that subject. The constitutional provisions, above quoted, that corporations shall not be created by special laws, but may be formed under general laws, implies that no private corporation could be created thereafter until such general law had been enacted, and that it thereupon became the fundamental law of the state in regard to all corporations formed under it. It is idle to say, therefore, that any corporation could assume to itself powers of action by the mere declaration in its articles or memorandum that it possessed them.

We have examined with much care the two statutes already referred to concerning incorporation, enacted in accordance with that constitutional provision, and do not find any express authority for a railroad company to lease its road for an indefinite period or for it to take such a lease; nor are we able to find any general language in those statutes, or either of them, in relation to the powers that may be conferred upon corporations which justifies a departure from the principles laid down in Thomas v. Railroad Co.

It is to be remembered that where a statute making a grant of property, or of powers, or of franchises to a private individual, or a private corporation becomes the subject of construction as regards the extent of the grant, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the government or the general public. As was said in the case of Charles River Bridge v. Warren Bridge, 11 Pet. 420: "In this court the principle is recognized that in grants by the public nothing passes by implication." See, also, Dubuque and Pacific Railroad Co. v. Litchfield, 23 How. 66; Turnpike Co. v. Illinois, 96 U. S. 63.

Therefore if the articles of association of these two corporations, instead of being the mere adoption by the corporators themselves of the declaration of their own purposes and powers, had been an act of the legislature of Oregon conferring such powers on the corporations, they would be subject to the rule above stated and to rigid construction in regard to powers granted. How much more, then, should this rule be applied, and with how much more reason should a court, called upon to determine the powers granted by these articles of association, construe them rigidly, with the stronger leaning in doubtful cases in favor of the public and against the private corporation.

We have to consider, when such articles become the subject of construction, that they are, in a sense, *ex parte*; their formation and execution—what shall be put into them as well as what shall be left out—do not take place under the supervision of any official authority whatever. They are the production of private citizens, gotten up in the interest of the parties who propose to become corporators, and stimulated by their zeal for the personal advantage of the parties concerned rather than the general good.

These articles, when signed by the corporators, acknowledged before any justice of the peace or notary public, and filed in the office of the secretary of state and the clerk of the proper county, become com-

plete and operative. They are, so far as framed in accordance with law, a substitute for legislation, put in the place of the will of the people of the state, formerly expressed by acts of the legislature. Neither the officer who takes such acknowledgment, nor those who file the articles, have any power of criticism or rejection. The duty of the first is to certify to the fact, and of the second to simply mark them filed as public documents, in their respective offices.

These articles, which necessarily assume, by the sole action of the corporators, enormous powers, many of which have been heretofore considered of a public character, sometimes affecting the interests of the public very largely and very seriously, do not commend themselves to the judicial mind as a class of instruments requiring or justifying any very liberal construction. Where the question is whether they conform to the authority given by statute in regard to corporate organizations, it is always to be determined upon just construction of the powers granted therein, with a due regard for all the other laws of the state upon that subject, and the rule stated above.

It is not urged with much apparent confidence that there is anything in the general provision of the laws of Oregon, in relation to the formation of private corporations, which are to be found in ch. 8, titles 1 and 2, Deady's Comp., which by express terms authorizes a corporation to include within the powers enumerated in its articles of association that of making such a lease as the one which is the subject of the action. Arguments based upon these laws are founded upon the implication that building railroads is, within the meaning of § 1 of title 1, a "lawful enterprise, business, pursuit or occupation;" and the further inference that the power of leasing a railroad, either as a lessor or a lessee, is one which is incident and proper to the pursuit of the lawful business of constructing and operating a railroad. The same argument is drawn from the general fact that title 2 recognizes the authority of corporations organized for the construction of railroads, macadamized roads, plank roads, clay roads, canals or bridges, to appropriate lands for their necessary uses by the exercise of the right of eminent domain, in the manner pointed out.

The language of the statute of New Jersey (quoted in Thomas v. Railroad Co., *supra*), under which it was urged that the railroad company had authority to make the lease in controversy, was quite as general and as liberal in its description of the powers which that corporation was authorized to exercise as anything to be found in the Oregon statutes. In fact, in the authority which was given to that company in regard to making contracts for the transportation of passengers and freight, and the doing of a general railroad business with other corporations and private persons, it approaches nearer the power to make leases than anything which is to be found in the laws of Oregon; yet this court held that although it was a direct authority from the legislature itself, and not subject to the restrictive criticisms above subjected, the lease made in that case was *ultra vires*, and without authority on the part of the company.

Another important consideration to be observed, peculiarly applica-

ble to the acts of corporations formed by the corporators themselves, declaring what business they are about to pursue, and the powers which they propose to exercise in carrying it on, is, that while the thing to be done may be lawful in a general way, there are and must be limitations upon the means by which it is to be done or the purpose carried out, which the articles of incorporation can not remove or violate. A company might be authorized by its articles to establish a large manufactory in a particular locality, and might be held to be a valid incorporation with sufficient powers to prosecute the business described; but such articles, although mentioning the particular place, would not empower the company, in the exercise of the power thus conferred, to carry on a business injurious to the health or comfort of those living in that vicinity.

Instances might be multiplied in which powers described in general terms as belonging to the objects of the parties who thus become incorporated would be valid, but the corporation, in carrying out this general purpose, would not be authorized to exercise the powers necessary for so doing in any mode which the law of the state would not justify in any private person or any unincorporated body. The manner in which these powers shall be exercised, and their subjection to the restraint of the general laws of the state and its general principles of public policy are not in any sense enlarged by inserting in the articles of association the authority to depart therefrom.

[The rest of the opinion considering other points raised, viz., the effect of the words "successors and assigns" in a proviso making a specific grant to the corporation—a provision in a general law authorizing a navigation company to construct a railroad where portage was necessary, but forbidding the lease of the same, and a provision in a general corporation act authorizing a corporation to dissolve itself and dispose of its property—and holding that none of them impliedly authorized the giving or taking of a lease by a railroad company, is omitted.]

Judgment below reversed.

Note. The charter under general laws, consists of the provisions of the general incorporation law, and the articles of association. 1856, The Eastern Plank R. Co. v. Vaughan, 14 N. Y. (4 Kern.) 546; 1866, Society for Visitation of Sick v. Commw., 52 Pa. St. 125, 91 Am. Dec. 139; 1869, Van Etten v. Eaton, 19 Mich. 187; 1876, Abbott v. Omaha Smelting Co., 4 Neb. 416: 1882, Grangers' Life and Health Ins. Co. v. Kemper, 73 Ala. 325; 1883, Heck v. McEwen, 12 Lea (Tenn.) 97; 1889, People v. Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319; 1891, Ellerman v. Chicago Jct., etc., Co., 49 N. J. Eq. 217; 1892, Cronin v. Potters' Co-op. Co., 29 W. L. B. (Ohio) 52; 1893, Republican Mountain Silver Mines v. Brown, 58 Fed. Rep. 644, 7 C. C. A. 412, 19 U. S. App. 203, 24 L. R. A. 776; 1895, Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279, 62 N. W. Rep. 480; 1896, Knights of Pythias v. Weller, 93 Va. 605; 1898, North, etc., R. Co. v. Utah, etc., R. Co., 16 Utah 246, 40 L. R. A. 851, 52 Pac. Rep. 168. Provisions in the articles inconsistent with the general law will be considered void or surplusage. 1856, The Eastern Plank Road Co. v. Vaughan, 14 N. Y. 546; 1883, Heck v. McEwen, 12 Lea (Tenn.) 97; 1889, People v. Chicago Gas T. Co., 130 Ill. 268, 17 Am. St. Rep. 319; 1893, Republican M. S. M. v. Brown, 58 Fed. Rep. 644, 19 U. S. App. 203, 24 L. R. A. 776. But perhaps in some cases additional powers consistent with the general law may be pro-

vided for in the articles of association. 1866, Society for Visitation of the Sick v. Commw., 52 Pa. St. 125, 91 Am. Dec. 139; 1892, Cronin v. Potters' Co-op. Co., 29 W. L. B. (Ohio) 52. See, also, text-book citations, *supra*, p. 397.

For rules of construing charters see *infra*, p. 934. See, also, 1902, Ramsey v. Tod, 95 Tex. 614, 93 Am. St. R. 875, 69 S. W. 133.

Sec. 94. (b) *Usual provisions in the general law:*

The general law usually contains provisions enumerating the *purposes* for which corporations may be formed, varying greatly in detail from "any lawful business or purpose," with a short list of exceptions, to a long list in detail, like Michigan and Texas, the latter of which sets forth a list of forty-seven classes of purposes for which private corporations may be formed, and the former has special provisions made for each of fifty-six different classes of corporations. The general law usually contains restrictions concerning the selection of the name, the duration of the corporation, the amount of stock—both a maximum and minimum limit, the maximum indebtedness allowed, location of principal office, place of keeping corporate books, number (least or greatest, or both) of directors, qualifications of the same, oath of same, other officers and qualifications, individual liability of members, annual meetings and elections, notices to be given of meetings, places of meeting, voting (number of votes, ballots, proxy, by trustees, pledges, etc.), quorum, of shareholders' and directors' meetings, power and method of adopting by-laws, with the things to be regulated thereby (such as time and places of meeting, quorums, proxy voting, number of directors, choosing officers, term of office, mode of selling stock for unpaid assessments, mode of transfer of stock, etc.), general powers of the corporation as to amount and kind of property it may own, the contracts it may make, etc., methods of dissolution, etc., reports to be made and reserving a right to repeal or amend the laws relating to corporations.

Sec. 95. (c) *Articles of incorporation, form and contents:*

General corporation laws usually provide that those desiring to form a corporation shall make an application in writing to some court or officer, who (in some cases, after a formal hearing) is to determine whether the application is according to law; and, if so, to make a record of that fact, and furnish an authenticated copy of the application, or the record made, to those applying; this authenticated copy then becomes *prima facie* evidence of their authority to organize and exist as a corporation. The statutes vary much, but the most important things to be said and done in the various states are indicated in the following table:

[The student is advised to indicate in the blank columns the various things required by the law of his state to be done in preparing articles of incorporation, by a check-mark opposite the point noted in the table.]

APPLICATION FOR INCORPORATION.

I. *How entitled:*				
1. Application				
2. Agreement				
3. Articles of association				
4. Articles of incorporation				
5. Certificate of incorporation				
6. Charter				
7. Declaration				
8. Deed of settlement				
9. License				
10. Memorandum of association				
11. Petition				
II. *By whom made:*				
1. Persons, natural				
artificial				
2. Designation, applicants				
corporators				
commissioners				
incorporators				
petitioners				
promoters				
subscribers				
3. Number				
4. Residents of the state				
5. Citizens of the state				
6. Citizens of the United States				
7. Age				
8. Sex				
9. Married women				
III. *To whom made:*				
court of record				
governor				
secretary of state				
special court or commission				
IV. *Contents:*				
1. Intention to form a corporation				
2. Purpose, generally				
specifically and definitely				
more than one				
3. Nature of the proposed business				
4. Name, any				
indicating it is a corporation				
the business				
the place				
including names of members				
not including names of members				

APPLICATION FOR INCORPORATION.

begin with				
end with				
not already in use				
5. Location of principal office or place of business:				
state				
county				
city				
termini				
counties or states, through or in which it will operate				
6. Duration or term of existence:				
perpetual				
years, number, any stated				
fixed by law				
renewals, for original period				
any period stated				
fixed period				
7. Stock, amount allowed, any				
maximum				
minimum				
to be stated				
not necessary to state				
to be subscribed				
to be paid in				
to begin business				
payment, times of				
conditions of				
8. Shares of stock, number				
amount of each				
common				
preferred				
character of preference				
9. Officers, to be designated				
president				
vice-president				
secretary				
treasurer				
manager				
names to be given for first year				
residence to be given for first year				

APPLICATION FOR INCORPORATION.

10. Directors, number allowed, any				
maximum				
minimum				
to be stated				
qualifications, shareholders				
number of shares				
citizens, number				
residents, number				
names of those for first year				
residence of those for first year				
11. Applicants, names to be given				
residence to be given				
shares of stock subscribed by				
12. Indebtedness, amount allowed any				
maximum				
minimum				
to be stated				
13. Such other matters as are deemed desirable				
V. *Execution of:*				
1. Signed by applicants, all				
majority				
number				
residents				
citizens				
subscribers for stock				
president				
directors				
2. Acknowledged by applicants, all				
majority				
certain number				
residents				
citizens				
subscribers for stock				
president				
directors				
before judge of court of record				
clerk of court of				
notary public				
justice of peace				
under seal if officer has one				
character of officer to be certified				
by judge of court of record				
clerk of court of record				
under seal				
3. Application to be sworn to by applicants, all				
majority				
certain number				

APPLICATION FOR INCORPORATION.

subscribers to stock				
president				
directors				
VI. *Hearing*, none required				
if any, before judge of court of record				
governor				
secretary of state				
attorney-general				
insurance commissioner				
special court or commission				
VII. *Finding* by said officers,				
conforms to law				
facts stated are true				
decree that parties are incorporated				
VIII. *Filing* with,				
1. Register of deeds of county where principal office is				
2. County clerk of county where principal office is				
3. Clerk of court of county where principal office is				
4. Probate judge of county where principal office is				
5. Same of each county where business is done				
6. Secretary of state				
7. Governor				
8. Two or more of those named				
IX. *Recording* by officer with whom filed,				
X. *Issue of certificate of incorporation*, by				
Register of deeds				
Judge of court				
Clerk of court				
Secretary of state				
Governor				
XI. *Publication:*				
1. Of intention to apply, necessary				
how long				
where				
in what				
proof of, affidavit of printer				
applicants				

APPLICATION FOR INCORPORATION.

2. Of application, necessary				
how long				
where				
in what				
proof of, by printer				
by applicants				
3. Of time and place of hearing, necessary				
how long				
where				
in what				
proof of, by printer				
by applicant				
4. Of result of application, necessary				
how long				
where				
in what				
proof, by printer				
by applicant				
5. Of certificate of incorporation, necessary				
how long				
where				
in what				
proof, by printer				
by applicants				

Note. See particularly the American Corporation Legal Manual for 1899 (and previous volumes of the annual publication); the Annotated Corporation Laws of all the states, 1899, by Cumming, Gilbert and Woodward, and 2 Stimson's American Statute Law. For further steps in the creation of the corporation see *infra*, the subscription to stock, p. 459, and the organization of the corporation, *infra*, p. 560.

Sec. 95a. (*d*) Deed of settlement.

The first general corporation law was 39 Eliz., ch. 5, concerning the erection of hospitals. It allowed any person seized of an estate in fee, by a deed enrolled in chancery, to erect a hospital for the poor, needy and impotent, and place therein such head, and members, and poor as he deemed convenient, the same to be incorporated with perpetual succession, under the name given, with all the usual powers of a corporation, provided it be endowed with lands of a certain yearly value by the founder at the time of its creation.

Lord Coke, in his Second Institute, p. 723, gives a proper form of deed for the formation of such corporation. The 39 Eliz. was to last for twenty years, but it was made perpetual by statute of 21 James I, ch. 1, and is still in force. 6 Enc. of Laws of Eng., 233.

Wordsworth on Joint-Stock Companies, p. *5, enumerates deeds of settlement as one of the methods of creating joint-stock companies, the deed being operative between the shareholders themselves, but not affecting strangers without notice, the ordinary rules of partnerships applying as to the relation with third parties. These deeds of

settlement were common even in the formation of corporations before the present English companies acts, and were quite similar to the memorandum and articles of association now provided for by those acts. For detailed forms see Wordsworth on Joint-Stock Companies, Part II. This method does not seem to have been used much in this country in the formation of corporations.

Sec. 95b. Interpretation of charters.

See Piscataqua Bridge Co. v. New Hampshire Bridge, 7 N. H. 35, *supra*, p. 309; Thomas v. Railroad Co., 101 U. S. 71, *infra*, p. 915; People v. Pullman's Palace Car Co., 175 Ill. 125, *infra*, 926; note, *infra*, p. 933.

CHAPTER 6.

THE ASSOCIATION—ITS NECESSITY, NATURE, FORMS AND PARTIES.

ARTICLE I. NECESSITY, NATURE, CONSIDERATION AND GENERAL FORM OF THE ASSOCIATION; SUBSCRIPTION CONTRACTS.[1]

Sec. 96. Necessity. An association of persons is necessary to, results from, or may result from the creation of a corporation aggregate.

"As the organization of individuals into that artificial being known as a business corporation is not thrust upon them by the state, but is a franchise granted to persons, who, first voluntarily combine to obtain the franchise, some contractual relation between the incorporators necessarily precedes the creation of the corporation. These contractual relations may be very simple, informal and transient. They may on the other hand involve extended negotiations, distinct agreements, complex stipulations and the creating of obligations and the securing of property as preliminaries to the final uniting of the individuals in initiating the existence of the proposed artificial person." Austin Abbott, Article on Promoter's Contracts, 1 Am. & E. C. C. (N. S.) p. 1.

Sec. 97. Same.

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"No railroad corporation shall issue any stock or bonds, except for money, labor or property actually received and applied to the purposes for which such corporation was created, and all stock-dividends and other fictitious increase of the capital stock, or indebtedness of any such corporation, shall be void. The capital stock of no railroad corporation shall be increased for any purpose, except upon giving sixty days public notice in such manner as may be provided by law."

He also relied on an act of the legislature of Illinois, passed March 26, 1872, to execute and carry out the above provision of the constitution, by which, amongst other things, it was enacted that no corporation should change its name or place of business, increase or decrease its capital stock, or the number of its directors, or consolidate with other corporations without a vote of two-thirds of the stock at a stockholders' meeting.

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"Sec. 3. The capital stock of said corporation shall be $100,000, and may be increased from time to time, at the pleasure of said corporation.

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The position of the company was that the third section conferred an unrestricted right to increase the capital stock at will, and that the fourth vested this power in the board of directors, and that the constitutional provision and act above referred to, if applied to this corporation, would impair the validity of the contract. It was further set up, however, that the said provision did not apply to railways worked by horse-power. The court below decreed in favor of the complainant, and the company took the present appeal.

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CHAPTER 6.

THE ASSOCIATION—ITS NECESSITY, NATURE, FORMS AND PARTIES.

ARTICLE I. NECESSITY, NATURE, CONSIDERATION AND GENERAL FORM OF THE ASSOCIATION; SUBSCRIPTION CONTRACTS.[1]

Sec. 96. Necessity. An association of persons is necessary to, results from, or may result from the creation of a corporation aggregate.

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Authority to increase the capital stock of a corporation may undoubtedly be conferred by a law passed subsequent to the charter; but such a law should regularly be accepted by the stockholders. Such assent might be inferred by subsequent acquiescence; but in some form or other it must be given to render the increase valid and binding on them. Changes in the purposes and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and can not, on general principles, be made without the express or implied consent of the members. The reason is obvious.

First, as it respects the purpose and object. This may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates, would be to commit them to an enterprise which they never embraced, and would be manifestly unjust.

Secondly, as it respects the constituency, or capital and membership. This is the next important and fundamental point in the constitution of a body corporate. To change it without the consent of the stockholders, would be to make them members of an association in which they never consented to become such. It would change the relative influence, control and profit of each member. If the directors alone could do it, they could always perpetuate their own power. Their agency does not extend to such an act unless so expressed in the charter, or subsequent enabling act; and such subsequent act, as before said, would not bind the stockholders without their acceptance of it, or assent to it in some form. Even when the additional stock is distributed to each stockholder *pro rata*, it would often work injustice, because many of the stockholders might be unable to take their respective shares, and might thus lose their relative interest and influence in the corporate concerns.

These conclusions flow naturally from the character of such associations. Of course, the associates themselves may adopt or assent to a different rule. If the charter provides that the capital stock may be increased, or that a new business may be adopted by the corporation, this is undoubtedly an authority for the corporation (that is, the stockholders) to make such a change by a stockholders' vote in the regular way. Perhaps a subsequent ratification or assent to a change already made, would be equally effective. It is unnecessary to decide that point at this time. But if it is desired to confer such a power on the directors, so as to make their acts binding and final, it should be expressly conferred.

Where the stock expressly allowed by a charter has not been all subscribed, the power of the directors to receive subscriptions for the balance may stand on a different footing. Such an act might, perhaps, be considered as merely getting in the capital already provided for the operations and necessities of the company, and, therefore, as belonging to the orderly and proper administration of the company's affairs. Even in such case, however, prudent and fair directors

would prefer to have the sanction of the stockholders to their acts. But that is not the present case, and need not be further considered.

Decree affirmed.

Note. See, 1899, Mosier v. Perry, 60 Ohio St. 388. Also, particularly, 23 Am. & Eng. Ency. 776, *et seq.*; Angell & Ames, §§ 517, *et seq.*, 530–1, 542–3; Cook, §§ 492–8; Elliott, §§ 95–8; Morawetz, §§ 1, 24, 227–237; Taylor, §§ 28–50; I Thompson, § 1136, III Thompson, §§ 3047, 3423; *Compare*, Clark, §§ 27, 86.

Sec. 98. *General nature of such contract:* An agreement by each associate with his fellows to organize for purposes contemplated, and contribute the funds agreed.

EDINBORO' ACADEMY v. ROBINSON.[1]

1860. IN THE SUPREME COURT OF PENNSYLVANIA. 37 Pa. St. Reports, 210–214, 78 Am. Dec. 421.

Error to the common pleas of Erie county.

This was an action brought by Prentiss Burlingham and others, "trustees of Edinboro' Academy," against Alva Robinson, to recover an installment on his subscription of $50 to the following paper:

"We, the undersigned, citizens of Edinboro' and vicinity, feeling the necessity of an institution of learning in our midst, affording greater advantages for education than common schools, do hereby agree to pay R. W. Gerrish, Prentiss Burlingham, Josiah J. Compton, Alfred Green, I. R. Taylor, William Proud and Nelson Clute, trustees, for the purpose, the sums severally subscribed by each of us, for the purpose of erecting a building in the borough of Edinboro' aforesaid, to be used as an academy or institution of learning, said trustees to act until the sum of $3,000 is subscribed for the purpose aforesaid, and when so subscribed, public notice of that fact to be given and of the time and place of organization of said stockholders, by choosing the necessary and usual officers to carry into effect the design of the subscribers. No payments to be made until the sum of $3,000 *bona fide*, subscription is made; and when paid to be in 'quarterly yearly' payments."

The $3,000 subscription was completed some time in 1856, and on the 30th of December, 1856, five of the trustees named in the paper gave notice of a meeting to be held on he 5th of January, 1857, for the purpose of choosing seven trustees to serve for the ensuing year.

On the 5th day of May, 1856, the "Edinboro' Academy" was incorporated by the court of common pleas of Erie county, which charter of incorporation directed that in all elections each share of stock ($5) should entitle the holder to a vote. The election of January 5, 1857, seems to have been held under the provisions of the act of incorporation.

[1] Arguments omitted.

There were thirty-three voters, and 163 votes cast. The election resulted in the choice of the plaintiffs in this suit. The meeting did not vote for, or in any way formally adopt the charter of incorporation.

Many of the subscribers were opposed to the charter as the basis of organization, and, on the 14th of February, 1857, three of the trustees named in the subscription paper gave notice of a meeting for organization on the 21st of February, 1857, at which meeting seven trustees were elected, who also organized and undertook to collect the subscriptions. The charter organization obtained possession of the subscription paper, collected the money, selected the site, and erected buildings, and brought this suit against the defendant after notice given.

The defense was that the incorporation of "The Edinboro' Academy" by the court, without the assent of the defendant, released him from his subscription. The evidence on the part of the plaintiff was the subscription paper with the signature of the defendant; that $3,000 was subscribed in good faith; and that a meeting of the subscribers was called on due notice, the association incorporated and trustees elected. On the part of the defendant evidence of another organization under articles of association, in which the defendant and thirty-two other subscribers participated, was given and admitted.

The court instructed the jury that the real plaintiff in the case was the "The Edinboro' Academy," in the incorporation of which the defendant did not participate, and that as, between that institution in its corporate right, and the defendant, there existed no privity of contract, the suit could not be sustained. The jury, accordingly, found for the defendant, and, judgment having been entered on the verdict, the plaintiff removed the case into this court, and assigned for error the following matters:

I. The court erred in answering the plaintiffs' first point in the negative, which was:

1. That if the jury find from the evidence that the defendant signed the subscription-paper given in evidence, and thereby promised to pay to E. W. Garrish, Prentice Burlingham, Isaac R. Taylor, William Proud, Josiah J. Compton, Alfred Green and Nelson Clute, trustees, for the purpose of erecting a building in the borough of Edinboro', to be used for an academy or institution of learning, the sum of $50; that the said trustees were to act until the sum of $3,000 was subscribed for that purpose; that that sum was subscribed; that the defendant's subscription of $50 constituted part of the $3,000; that thereafter, in pursuance of a provision in the paper so subscribed, public notice was given of the fact that $3,000 had been subscribed, and of the time and place of organization of the stockholders; that at the time and place at which such notice was given the stockholders met and organized and elected the plaintiffs in this suit trustees; then, and in that case the plaintiffs can sustain this suit, to recover an installment of the $50 due when the suit was instituted.

II. The court erred in answering the plaintiffs' second point in the negative, which was as follows:

2. That this action being in the name of the person elected trustees at a meeting of subscribers called for the purpose, in pursuance of the provisions of the subscription paper signed by the defendant, the plaintiffs are entitled to recover in this suit, and the plaintiffs, if they are not the proper persons to collect and disburse the money collected, will be trustees for those who are legally entitled to it.

III. The court erred in answering the plaintiffs' third point in the negative, which was as follows:

3. That if the defendant signed the subscription-paper given in evidence, it is no defense that the association contemplated by that paper was subsequently incorporated by the court of common pleas of Erie county after due public notice, if the defendant did not object to the incorporation of the association, and if the object of the incorporation was substantially to effect the same purpose that was contemplated by the subscription-paper signed by him, and his interests were not affected or his responsibility increased by the act of incorporation.

IV. The court erred in not giving distinct and separate answers to each of the plaintiffs' three points.

V. The court erred in charging that, "although some of the persons named as plaintiffs were made payees in the subscription-paper, yet they are not necessarily named, but are so by surplusage; that the real plaintiff is the 'Edinboro' Academy,' between whom, in its corporate right, and the defendant there exists no privity of contract, we think they can not sustain this suit."

LOWRIE, C. J. *So soon as this subscription paper became complete by the subscription of the stipulated amount of money, the subscribers to it became an association of persons united for contributing to a common fund for a common purpose, to be carried out by themselves. Then the subscription of each (at least if not withdrawn before the actual organization of the associates) became a contract by each associate with his fellows, in consideration of similar contracts by them, to contribute to the common fund the amount subscribed by him.*

Such an act of association involves an agreement to organize the associates when the subscription shall be complete, and in the present case this is expressly provided for. The duties created by the act of subscription are duties to the association, and the first of them that is to be performed is the duty of organization, and when this is complete, the duty of paying the sum subscribed is a duty to the organized association. In a legal aspect, the most perfect form of organization is by legal incorporation, and, therefore, this when regularly obtained by the common consent of the associates, must be regarded as the true organization of the association, and the corporation becomes the proper legal body to which the subscriptions are to be paid, and which is to sue for them. There can be but one true organization.

The court below was, therefore, in error in deciding that the action

was improperly brought in the name of the association in its corporate form. The decision ought to have been that if the associates did organize themselves by legal incorporation, then the corporation is the organized association, and is the proper legal party to demand and enforce the payment of the subscriptions.

The question of fact is therefore involved in the true decision: did the associates organize themselves into this corporation called "The Edinboro' Academy?"

The decision of the court below excluded this question, though it is the vital one of the cause. It may not be easily decided, because there is no complete prescribed form for the process of organization. And so it is in the original organization of states, and there we take the fact of the existing organism as proof of its legitimacy without inquiring into the regularity of the formative process. And in such a case as this, if we find the associates acting as members of the organism we assume the regularity of its formation as against them.

The only form agreed upon here for the process of organization is, that it shall be by a meeting of the associates held according to notice to be given. If such a meeting was held on reasonable notice, and if, by consent of a majority, the corporate form of organization was adopted or assented to, the corporation is the organized body contemplated by the contract of subscription, and has the right to demand and receive the sums subscribed.

The law rather pardons than approves the naming of the trustees of the corporation as plaintiffs, in such an action before a justice of the peace.

In court the form ought to be amended so as to let the plaintiff appear in its simple corporate name.

Judgment reversed, and a new trial awarded.

THOMPSON J., having been of counsel in the case, did not sit at the hearing.

See note, *infra*, p. 456.

Sec. 99. Consideration of the agreement.

STEWART v. TRUSTEES OF HAMILTON COLLEGE.[1]

1845. IN THE COURT OF CORRECTION OF ERRORS, of New York. 2 Denio's (New York) Reports 403–429.

On error from the supreme court. The trustees of Hamilton College sued Stewart in the court below in *assumpsit*, to recover a balance of $600, parcel of $800 subscribed by him towards a fund for the payment of the salaries of the officers of the college, which subscription was made at the foot of the paper in the following words:

"Fund for Hamilton College. We, the subscribers, hereby bind

[1] Only those parts of the various opinions relating to consideration are given. This case afterward came before the new court of appeals, and was decided against the trustees of the college, on the ground that there was no sufficient consideration. 1 N. Y. 581 (1848).

ourselves to pay to the trustees of Hamilton College, the sums opposite to our respective names, in four equal annual payments, the first to be made on the first day of August, 1834. The conditions of the subscription are the following:

"1. That the moneys collected on it shall be permanently invested as a productive fund, the interest of which shall be applied to the payment of the salaries of the officers.

"2. That we shall not be holden to pay the sum subscribed by us unless the aggregate of our subscriptions and of contributions to this object shall, by the first of July, 1834, amount to $50,000, nor until M. Hunt, Esq., or A. B. Johnson, Esq., of Utica, shall certify that, in his or their judgment, responsible subscriptions or contributions amounting to $50,000 shall have been made.

"Dated July 6, 1833." The trial court non-suited the plaintiff, and the supreme court set this aside.

The opinion of the supreme court was by,

NELSON, C. J. Two principal objections have been taken to the right of the plaintiffs to recover: 1. That the promise is *nudum pactum*, there being no consideration to support it; 2. That if valid, the conditions upon which it was made have not been fulfilled.

Every promise for the breach of which an action of *assumpsit* may be sustained, must be founded upon a consideration of benefit to the defendant, or to a stranger, or of damage or loss to the plaintiff at the request of the defendant; but any act of the plaintiff from which the defendant derives a benefit, or any labor, detriment, or inconvenience, sustained by the plaintiff, however small the benefit or inconvenience, is a sufficient consideration, if such act is performed, or inconvenience suffered, at the instance and request of the defendant. (1 Selw. N. P. 32, and cases cited.) It is not claimed in this case that the defendant has derived any benefit from the contract upon which the action is founded, and the inquiry will be, whether the plaintiffs have sustained any damage or detriment at the instance and request of the defendant, or directly flowing from the promise. The substance of the contract between the parties, leaving out the particulars, is this: The defendant agrees to pay the plaintiffs, for the benefit of the institution they represent, $800, in four annual payments, provided they will procure subscriptions and contributions which, with his, shall amount to $50,000 before a given time, and shall afterwards invest the same as specified. Or, putting it in another form: The defendant agrees, if the plaintiffs will procure subscriptions for the benefit of their institution to the amount of $50,000, including his, and will invest the same as therein directed, that he will pay them $800 in four annual payments. The plaintiffs consent, and perform the conditions. It seems to me that the labor and expense of procuring the subscriptions and investing the fund constitute damage and loss to the plaintiffs, which bring the case within the very definition of a good consideration for the promise. In the case of Sir Anthony Sturlyn v. Albany (Cro. Eliz. 67), the declaration set forth that the plaintiff had made a lease of land to J. S. for life rendering

rent, who granted all his estate to the defendant, the rent being behind for several years. The defendant agreed, if the plaintiff could show to him a deed that the rent was due, he would pay it. The plaintiff then averred that on such a day, etc., he showed to him the indenture of lease by which the rent was due, etc. The plaintiff recovered, and motion was made in arrest, for that there was no consideration upon which to ground the action. But it was adjudged for the plaintiff, the court observing, that when a thing is to be done by the plaintiff, be it ever so small, it is a sufficient consideration for the promise.

So in the case of Knight v. Rushwood, in the same book (p. 469), Mrs. R. had given a bond for £200 to the plaintiff, and afterward assigned to the defendant all her goods to pay her debts. The defendant insisting that it had been read to the obligor as a bond of £100 only, promised the plaintiff to pay it, if he and two witnesses would swear before the mayor of London, that it was read to her as an obligation of £200, which was done. The question was, whether there was a consideration for the promise; and the whole court held, that the inconvenience of making the oaths was a sufficient consideration; that the smallness was immaterial—if any, it was enough—and referred to the previous case of Sturlyn v. Albany. (See, also, March v. Culpepper, Cro. Car. 70). So if A. promises B. to pay him a sum of money if he will call for it at a particular time, and B. calls accordingly, the promise is binding; the calling for the money being sufficient consideration for the promise. Powell on Cont., 343, 5 Pick. 384). These cases are all referred to as sound law in the modern respectable treatises on the subject. (Comyn. on Cont., 16; 1 Sewl. N. P. 32; Powell on Cont., 343; Saund. Pl. and Ev., 147; Bac. Ab. Assumpsit, C.) and the principle is recognized in Brooks v. Ball, (18 Johns. 337). It is said in Comyn's Dig., (Action upon the case upon Assumpsit, B. 4), that proof of a debt is a good consideration for an assumpsit, "for it is a charge to the plaintiff; as if a woman in consideration of the proof of a debt due from her husband, promise payment. So if an heir promise to pay the debt of his ancestor; or if an executor promise upon proof of the delivery of goods to his testator to pay for them."

The case of McAuley v. Billenger (20 John. R. 89), is not distinguishable from the present. That was an action to recover a sum subscribed by the defendant below, for the repairs of a church. The suit was in the name of a committee appointed to receive subscriptions for this purpose, and to whom the money was made payable, and who had subsequently entered into a contract with a person for the repairs as contemplated in the subscription paper. Entering into this engagment for the repairs, agreeably to the understanding of all parties concerned in getting up the subscription and in pursuance thereof, was regarded as a sufficient consideration for the promise to pay by the subscribers. The case of Amherst Academy v. Cowles (6 Pick. 431), contains similar doctrine. A subscription to a fund of $50,000 to be made a permanent investment for the benefit of a

literary institution, was held to be valid and binding, as the execution of the trust on the part of the trustees, or even being engaged in the process of execution, afforded a sufficient consideration for the undertaking of the defendant. And the case of The First Religious Society of Whitestown v. Stone (7 John. R. 112) stands upon the same principle.

I can not doubt, therefore, but that the assent of the plaintiffs to the proposition contained in this instrument, and the fulfillment of its terms and conditions on their part, or in other words, the labor and expense of procuring subscriptions to the fund, and of investing the same at their instance and request, as may be fairly inferred from all the circumstances attending the proposition, afford a sufficient consideration for the undertaking of the subscribers. * * *

The CHANCELLOR. The first question in this case, but which I consider of minor importance, is that of consideration. The agreement upon which the suit was brought was not by the terms of it, nor was any part of it to be performed within one year from the making thereof. The subscription is dated upon the 6th of July, 1833, and all the counts except the third, which was not attempted to be proved, allege the agreement to have been made by Stewart on that day. The first installment of the subscriptions was not to be paid until the 1st of August, 1834. The case, therefore, comes within the first subdivision of the second section of the title of the Revised Statutes relative to fraudulent conveyances and contracts in relation to goods, chattels and things in action; and the agreement must not only be in writing, but there must be a valid and sufficient consideration appearing upon the face of the writing, upon which the subscribers are sought to be charged. (2 R. S. 135.) The language of the statute is explicit in declaring that every agreement that by its terms is not to be performed within one year from the making thereof, shall be void, unless such agreement, or some note or memorandum thereof expressing the consideration is in writing and subscribed by the party to be charged therewith. The consideration stated in the three counts of the declaration, which were attempted to be sustained by proof is, in part, at least, an alleged agreement on the part of the corporation to procure subscriptions and contributions to the amount of $50,000 by the 1st of July, 1834. But upon the face of the written agreement I find no evidence of any undertaking on the part of the corporation that they will procure subscriptions and contributions to the amount of $50,000 or to any amount within the prescribed period. Nor was their acceptance of the subscription of Stewart even an implied assent on the part of the corporation that they would even attempt to raise the amount by circulating a subscription for the purpose. And if the subscription papers had never been presented to any one after Stewart's name was subscribed to it, he could not have complained that the corporation had violated any agreement, either express or implied, on their part.

It is true that it was made a *condition* of the agreement that it should not be binding upon the subscribers, unless the aggregate of

their subscriptions and contributions should amount to at least $50,000 within the time specified. But even in this condition there is no intimation that the corporation are to procure, or to have any instrumentality in procuring such subscriptions and contributions, or that they were to be even permitted to expend the then existing funds of the college for that purpose. And even if we go out of the writing, and examine the parol proof which was adduced to make out such a consideration, I do not find any evidence which shows that there was an agreement on the part of the trustees to be at the expense of procuring subscriptions. Indeed, upon reading the written agreement, I should infer the contrary to be the fact; and that the donors, or some of them, whose names headed the subscription and who were the friends of the institution, had gotten up this subscription as an agreement between themselves to contribute certain proportions to increase the funds of the college at least $50,000 beyond the amount it before had; and that it would be inconsistent with the real object of the donors to have those funds reduced by expenditures of the kind contemplated.

As a subscription of a single individual, agreeing to make a donation to another individual or to a corporation for the benefit of the donee merely, I should have great difficulty in finding a valid consideration to sustain a promise to give without any equivalent therefor, and without any binding agreement on the part of the donee to do anything on his part which would be a loss or injury to him. And it can hardly be said to be a consideration to support a promise of a donor to give at a future time, that the donee agrees to receive and invest the fund when paid and to apply it to the payment of his debts generally, or any particular class of his debts; or to apply it to the payment of such sums as he may thereafter agree to give to his servants for their services. In the case of The First Religious Society in Whitestown v. Stone (7 John. Rep. 112), no such difficulty existed, for there was a sufficient consideration stated in the contract itself. The agreement in that case was stated to be in consideration of $1 received from the trustees of the corporation, as well as the further consideration that it was to raise a salary for a clergyman to be employed to preach for the benefit of the subscribers.

Neither is there any difficulty in my mind finding a good and sufficient consideration to support a subscription of this kind made by several individuals. Every member of society has an interest in supporting the institutions of religion and of learning in the community where he resides. And when he consents to become a subscriber with others to raise a fund for that purpose, the real consideration for his promise is the promise which others have already made or which he expects them to make, to contribute to the same object. In other words, the mutual promises of the several subscribers to contribute towards the fund to be raised for the specified object in which all feel an interest, is the real consideration of the promise of each. For this purpose, also, the various subscriptions to the same paper and for the same object, although in fact made at different times, may in legal contem-

plation be considered as having been made simultaneously. The consideration of the promise, therefore, is not any consideration of benefit received by each subscriber from the religious or literary corporation to which the amount of his subscription is made payable, nor is his promise founded upon any consideration of injury which the payee has sustained or is to sustain or to be put to for his benefit. But the consideration of the promise of each subscriber is the corresponding promise which is made by other subscribers. Mutual promises have always been held sufficient as between the parties to sustain the promise to each. And it had also been the settled law from the time of the decision in the case of Dutton v. Pool (Freem. Law Rep. 471), in 1678, down to the present time, that a party for whose benefit a promise is made may sue in assumpsit upon such promise, although the consideration therefor was a consideration between the promisor and a third person. (See Schermerhorn v. Vanderheyden, 1 John. Rep. 139.) Upon this subscription the several subscribers mutually promise each other to pay to the trustees of Hamilton College the sums subscribed by them respectively, upon the condition that the funds when collected by the corporation shall be invested as a permanent fund, and the income thereof applied to the support of the officers of the institution. The legal effect of the written agreement, therefore, is the same as if it had been stated at length in the subscription that the consideration of the promise of each was the promise made to him by the other subscribers to pay to the corporation the sums by them subscribed respectively. And if this agreement had been set out in the declaration with the names of the other subscribers thereto, with the sums subscribed by them respectively, I think a sufficient consideration to support the promise to pay to the corporation of the college would have appeared to support the action. * * *

Senator BOCKEE. But there is another question of very great interest and importance, whether there was any consideration for the defendant's promise, so as to make it a legal obligation. It may be assumed as an axiom, which can not be disputed, that a promise founded on duties of imperfect obligation or mere motives of benevolence, or a desire to promote the interest of education, of charity or piety, is nothing more than the promise of a gift, and is not a legal contract on which an action can be maintained. If we take the first clause of this subscription-paper by itself, where the subscribers bind themselves to pay certain sums of money to the trustees of Hamilton College, it does most clearly and inevitably come within the description of a gratuitous promise, and is void for want of consideration. Do the conditions which are underwritten vary the obligations which the subscribers are under to the trustees of the college? The first of these conditions is merely directory, and relates to the investment and appropriation of the moneys when collected, and can have no bearing upon this question of consideration. The second condition is not, as is incorrectly stated in the second count of the plaintiffs' declaration, "provided that the *plaintiffs* should and would, by the first day of July, 1834, procure subscriptions and contributions to the amount of

$50,000." If the agreement had been that the defendant would pay $800 to the plaintiffs, provided *they* should and would raise $50.000 it would be a good executory consideration, and would, in my view, entirely change the nature of this instrument, and transform what I now consider a naked promise of a donation into a legal and binding contract.

The meaning of this condition must be ascertained from the terms in which it is expressed. There is no reference to the plaintiffs, and it does not appear from the instrument that they are to perform any conditions. The promise is to pay money upon a contingency having no relation to any action on the part of the plaintiffs. If the unqualified promise is void for want of consideration, I can not conceive that it is rendered more obligatory by the condition contained in this subscription paper. The promise of the defendant and also the promises of all the other benevolent and public spirited gentlemen who have joined with him in the subscription are voluntary and gratuitous donations, and they are not less so because they are conditional and depend upon the contingency that the subscriptions shall within a limited period be raised to $50,000. This condition was doubtless made as an inducement to liberal subscriptions, and as an incentive to the friends of the college to exert themselves in raising the fund. It is an arrangement among the parties who are subscribers, and the obvious motive of each one is to make his own subscription the means of calling into exercise the liberality of others. In looking for a consideration to support a contract between these parties, we can not go beyond the subscription paper. That is the only evidence on which any legal claim can be asserted. We do not find in this paper any act or thing to be done by the plaintiffs on the performance of which they can be legally entitled to claim as a debt what was offered as a gift. * * *

Senator PORTER. The defendant below was sued upon his subscription to the funds of the Hamilton College, and he resists the payment upon a variety of grounds. It appears that a special effort was made in the year 1833 to raise the sum of $50,000 to be added to the permanent funds of that institution, but the income of this sum was to be applied specially to the payment of the salaries of the officers of the college. The first objection that I propose to consider is that which affirms that there was no consideration for the promise made by the defendant to pay the trustees the amount of his subscription.

By the instrument signed by the defendant, the subscribers promised to pay to the trustees of Hamilton College the sums of money set opposite their respective names, upon certain conditions therein specified. The question is, whether there appears upon the face of the instrument a consideration to sustain the promise made by the defendant. Let us consider the whole scope and extent of this writing, and the understanding and agreement of both parties at the time it was signed. The trustees come to the defendant and propose to him, that if he and others will, *promise* to pay them $50,000 as a permanent fund, the interest of which shall be applied to the payment of teachers

in the college, they will incur the labor and expense of obtaining the subscription to that amount, to be certified by Mr. Hunt or Mr. Johnson; that they will collect the same, and invest the amount collected permanently, and in some safe and secure manner; that they will collect, receive and pay over the annual interest forever thereafter to the teachers of the college, free from all charge upon this fund; and they engage to take upon themselves the care and expense of taking charge of the fund, and preserving it in all its integrity, upon a continued permanent investment, and of applying the income according to the designs of its public spirited, enlightened and liberal donors, free from all abatement; so that their charity may go down to all time, testifying to their liberality, and enabling this public institution to confer upon the community that is interested in its prosperity, the blessings of education and science. All this, they say, we will undertake on our part. The defendant says, very well; if you will promise for yourselves and your successors to perform this very charitable service if the subscribers will promise to pay you this amount, I am content, and will promise, as one of those subscribers, to pay you $800 towards that fund, which promise is to be binding upon me, if responsible subscriptions are obtained to that amount in the opinion of Mr. Hunt or Mr. Johnson. It seems to me that this is a fair and rational paraphrase of the real agreement between these parties. And if so, is there not a mutuality in it? A promise on the part of the defendant to pay, provided the trustees will promise on their part to perform? I think the promise on the part of the trustees is valid, and obliges them to perform their agreement, and that therefore it furnishes a good consideration for the promise of the defendant. There is a contract made between the donors and the trustees, for the donation, security and disposition of the fund. The promise on the part of the trustees they have assumed and ratified by accepting the subscriptions and collecting the fund, and they have subjected themselves to a perpetual obligation to fulfill that promise in good faith. This obligation may be enforced at all times; and the manner of executing the trust on their part may always be the subject of judicial inquiry, and the court will require that the trusts and the promises are all fulfilled.

In the case of the Trustees of Dartmouth College v. Woodward (4 Wheat. 518), Ch. J. Marshall, speaking of the contributions to the fund of that institution, says: "These gifts were made, not indeed to make a profit to the donors, or their posterity, but for something in their opinion of inestimable value, for something which they deem a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object, in the mode prescribed by themselves."

It is not important that the the consideration of a promise should be plainly expressed in the writing; it is enough if it appears from the nature of the instrument and the recitals contained in it. If it is manifest that there was in the minds of the parties some obligation assumed, or some service to be rendered by the promisee, as the equiva-

lent asked for the promise by the promisor, the promise is not void for want of a consideration. The law upon this subject is well stated, and the authorities collected in Saund. Pl. & Ev. 147. I can not doubt but that the promise of the defendant was made upon a good consideration. * * *

For reversal 21, for affirmance 5.

See 23 Am. & Eng. Ency. 791 *et seq.*; Beach, § 584; Boone, § 108; Clark, §§ 93–7; Cook, §§ 71–5; Elliott, § 349; Langdell's Summary of Contracts, §§ 183–7; Morawetz, §§ 43–59; Taylor, §§ 62–64, 509–12; I Thompson, §§ 1200–13; VII Thompson, §§ 8606–25.

Note. If subscriptions are acted upon and money is expended on the faith of them, the donor or subscriber is estopped from claiming there is no consideration. 1816, Kidwelly v. Raby, 2 Price (Eng. Exch.) 93; 1828, Amherst Academy v. Cowls, 6 Pick. (Mass.) 427; 1852, Kennebec, etc., R. R. Co. v. Palmer, 34 Maine 366; 1857, Wesleyan Seminary v. Fisher, 4 Mich. 514; 1877, Roche v. Roanoke Classical Sem., 56 Ind. 198; 1877, M. E. Church v. Kendall, 121 Mass. 528; 1878, Simpson Centenary College v. Bryan, 50 Iowa 293; 1881, Twin Creek, etc., Co. v. Lancaster, 79 Ky. 552; 1885, Osborn v. Crosby, 63 N. H. 583; 1886, Roberts v. Cobb, 103 N. Y. 600; 1897, School District v. Sheidley, 138 Mo. 673; 1898, Beatty v. Western College of Toledo, 177 Ill. 280, 42 L. R. A. 797; 1899, Lasar v. Johnson, 125 Cal. 549, 49 C. L. J. 409, 58 Pac. 161. Also, see, cases *infra*, pp. 482, 491–492. *But, see*, Bryants Pond, etc., Co. v. Felt, 87 Maine 234, *infra*, p. 474; Hudson Real Estate Co. v. Tower, 161 Mass. 10, *infra*, p. 478; Baptist Church v. Cornell, 117 N. Y. 601.

Sec. 100. *The general form of such contract:* As a rule, the form is immaterial, unless the statute or charter requires a particular form. It may be either a statutory or a common law contract.

NULTON v. CLAYTON.

1880. IN THE SUPREME COURT OF IOWA. 54 Iowa Reports, 425–428, 37 Am. Rep. 213.

Action to recover upon an alleged subscription to the stock of a banking corporation. The question arises upon demurrer to the petition, the defendant claiming that the petition does not show that the defendant became a subscriber to the stock in such sense that he became obligated to take and pay for it. The corporation is the Farmers' and Merchants' Bank of Bloomfield. The plaintiff is the assignee of the corporation. The petition avers that the capital stock was divided into shares of $100 each, and that the defendant subscribed for ten shares. As constituting the subscription, the plaintiff sets out as an exhibit to his petition a certain written statement, and the articles of incorporation, both purporting to be subscribed by the defendant. The statement is in these words:

"We, the undersigned, having associated ourselves together for the purpose of organizing a banking association, and transacting the business of banking under chapter 52, of the revision of 1860, do declare and state as follows:

"*First.* The name and title of the association shall be The Farmers' and Merchants' Bank of Bloomfield, Iowa.

"*Second.* The authorized capital of said Farmers' and Merchants' Bank of Bloomfield, Iowa, shall be $150,000, which shall be divided into shares of $100 each.

"*Third.* The name and residence of the stockholders of this association, with the number of shares held by each, are as follows:

"J. W. Clayton, ... 10 shares."

The essential part of the articles of incorporation is in these words:

"*Eighth.* Fifty per cent. of all the stock subscribed for this association before it commences business shall be paid in at the time of commencing business, and the balance so subscribed shall be paid at such times and in such installments as the board of directors may prescribe."

The petition avers that the directors have called for full payment of all the stock subscribed.

To the petition so showing the defendant demurred. The court sustained the demurrer. Judgment having been rendered for the defendant, the plaintiff appeals.

ADAMS, Ch. J. The action is brought to recover one-half of the amount of the alleged subscription, the other half having already been paid. The defendant insists that it is not shown that he contracted to pay any sum whatever. The defendant did not become a stockholder by subscribing the articles of incorporation. If he became such he did so by subscribing what we have denominated the statement. The more important portion of it is the third division. That is a declaration purporting to be made by the associated persons showing each his respective interest in the corporation. Is it a subscription to stock? If so, the defendant is liable to pay for the number of shares set opposite his name, without a promise to do so in so many words. This has been held repeatedly.

In Spears v. Crawford, 14 Wend. 20,[1] the writing subscribed was in these words:

"We, the subscribers, do hereby severally agree to take the shares by us subscribed in the Harlem Canal Company." A certain number of shares was set opposite the name of each subscriber. The question presented was whether the mere agreement to take shares rendered the defendant liable to pay for them. The court held that it did.

In Hartford & New Haven R. Co. v. Kennedy, 12 Conn. 500, the word "subscriber" was used in what was claimed to be the subscription to stock. It was held that the subscriber was liable to pay for the stock, without a promise to do so in so many words. The court said: "It is true a promise to pay in precise terms does not appear to have been made. The defendant has not affixed his signature to an instrument which contains the words, 'I promise to pay,' but he has done an equivalent act. He has contracted with the plaintiff to become a member of the corporation, and to be interested in its stock."

In Rensselaer & W. Plank Road Co. v. Barton, 16 N. Y. 460, the

[1] 28 Am. Dec. 513.

court said: "Whatever may be the form or language of a subscription to the stock of an incorporated company, any person who in any manner becomes a subscriber for, or engages to take any portion of, the stock of such company, thereby assumes to pay according to the conditions of the charter." See, also, Small v. Herkimer Manufacturing and Hydraulic Co., 2 Comst. 335; Dayton v. Borst, 31 N. Y. 437; Hartford & New Haven R. Co. v. Croswell, 5 Hill 384; Waukon & Mississippi R. Co. v. Dwyer, 49 Iowa 121.

Probably the defendant would not deny that where there is a valid subscription to stock, or written agreement to take stock, there arises upon such subscription or agreement an obligation to pay for it. But the defendant insists that the writing in this case, whatever it may be called, falls short of being a subscription to stock, or agreement to take stock.

It declared that "the number of shares held by each are as follows:" Then follow names and amounts. The averment of the petition in substance is that the defendant by his contract subscribed for ten shares. By this we understand that the writing was signed by the defendant. The association purports to be incorporated under the general incorporation law. What purpose such a written declaration by the associated persons could have if they were not thereby to become subscribers, each for the amount set opposite his name, we are unable to conceive. It is suggested that the written declaration was, perhaps, designed as a written admission of a previous subscription, but we see no reason for a formal written admission of what must have been already in writing if there was a subscription to be admitted. It appears to us far more probable that the declaration was designed as a subscription. *Now it matters not how informal the writing may be, if the intent of the parties can be collected from it. What the intent was in this case we have no reasonable doubt. The parties intended to adopt articles of incorporation, and become subscribers to the stock thereunder. If they did they became obligated to pay in accordance with the eighth article to which they made themselves parties.*

Suppose a creditor of the association had brought an action upon his claim against the defendant, alleging that he is a partner. We think that the defendant might, and would, have set up the incorporation and sought shelter beneath it. There is no doubt that he in good faith attempted to become a member and limit his liability by the exemption provided. If he could have escaped liability as a partner by setting up the incorporation and his membership, he can not escape the limited liability incident to such membership.

We think that the demurrer was improperly sustained.

Reversed.

Note. For subscriptions to commissioners see Walker v. Devereaux, *supra*, p. 385.

For subscriptions to incorporators, see Nickum v. Burkhardt, *supra*, p. 391.

See, also, 1819, Chester Glass Co. v. Dewey, 16 Mass. 94; 1841, Cheltenham, etc., R. Co. v. Daniel, 2 Q. B. 281; 1848, Lohman v. N. Y., etc., R. Co., 2 Sandf. (N. Y.) 39; 1856, Fisher v. Evansville, etc., R. Co., 7 Ind. 407; 1856,

Poughkeepsie & S. P. P. R. v. Griffin, 21 Barb. (N. Y.) 454; 1858, Mobile & O. R. Co. v. Yandall, 5 Sneed (Tenn.) 294; 1860, Clark v. Farrington, etc., 11 Wis. 306; 1864, Ashtabula & N. L. R. Co. v. Smith, 15 O. S. 328; 1869, Iowa & M. R. Co. v. Perkins, 28 Iowa 281; 1873, Peninsula R. Co. v. Duncan, 28 Mich. 130, *infra*, p. 482; 1878, Woodruff v. McDonald, 33 Ark. 97; 1882, Wheeler v. Millar, 90 N. Y. 353; 1893, Barron v. Burrill, 86 Maine 72, 29 Atl. 938; 1896, Ventura, etc., R. Co. v. Collins, 116 Cal. 260, 46 Pac. Rep. 287. See, also, 23 Am. & Eng. Ency., p. 786, *et seq.*; Beach, §§ 61–5; Boone, § 108; Cook, §§ 52–3; Elliott, § 348; Morawetz, § 43, *et seq.*; Taylor, §§ 509–12; I Thompson, §§ 1136–95; II Thompson, §§ 1305, 1788.

Writing is not necessary—statute of frauds does not apply. 1853, Chaffin v. Cummings, 37 Maine 76; 1858, Cookney's Case, 3 DeG. & J. 170; 1886, Colfax Hotel Co. v. Lyon, 69 Iowa 683; 1887, Wemple v. R. R. Co., 120 Ill. 196; 1887, Bullock v. Falmouth, etc., Co., 85 Ky. 184; 1893, Webb v. R. R. Co., 77 Md. 92, *infra*, p. 528; 1894, York v. Park Building Assn., 39 Neb. 834; 1895, Shelfenberger v. Patterson, 168 Pa. St. 30; 1895, Tabler v. Anglo-American Assn., 32 S. W. (Ky.) 602. See, Cook, §§ 52-3; Elliott, § 348; I Thompson, §§ 1146–7. *Contra*, a *subscription* requires writing, for *subscribe* literally means an underwriting. 1827, Thames T. Co. v. Sheldon, 6 B. &. C. 341; 1858, Pittsburgh, etc., R. Co. v. Gazzam, 32 Pa. St. 340; 1877, Galveston Hotel Co. v. Bolton, 46 Tex. 633; 1878, Freeland v. N. J. Stone Co., 29 N. J. Eq. 188; 1887, Fanning v. Ins. Co., 37 O. S. 339, 41 Am. Rep. 517.

Subscription may be assigned—Taylor (5th ed.) §§ 01, 102; 1902, Manchester v. Williams, — N. H. —, 52 Atl. 461, 16 Am. & E. C. C. (N. S.) 884.

ARTICLE II. FORMS OF ASSOCIATION CONTRACTS; STATUTORY SUBSCRIPTIONS.

Sec. 101. *An exclusively statutory contract.*

THE SEDALIA, WARSAW & SOUTHERN RY., APPELLANT, v. WILKERSON, ADMINISTRATOR.[1]

1884. IN THE SUPREME COURT OF MISSOURI. 83 Missouri Reports 235–244.

MARTIN, C. This is an action to enforce an alleged subscription to the capital stock of plaintiff. The demand was first presented in the probate court for allowance against the estate of the subscriber, and was taken thence by appeal to the circuit court. The principal facts in the case are set forth in the following agreed statement:

It is hereby stipulated and agreed by and between the parties hereto, that upon the trial of this case the following facts shall stand admitted, viz.:

1. That the plaintiff is a railroad corporation, created and existing under the general railroad incorporation laws of the state, under the corporate name of the Sedalia, Warsaw and Southern Railway Company.

2. That its articles of association were filed in the office of the secretary of state, September 16, 1879, the same having been pre-

[1] Arguments omitted.

pared and signed by the parties thereto between the first day of September, 1879, and the sixteenth day of September, 1879, and that said Smith did not sign said articles, nor authorize any one to sign his name thereto, and that said Smith died intestate on the eleventh day of July, 1879.

3. That in the year 1877, the defendant, said George R. Smith, signed and delivered to one Cyrus Newkirk, who was afterwards named in said articles as one of the directors of plaintiff and who was then soliciting subscription to the capital stock of said proposed incorporation, now the plaintiff herein, a certain written instrument to be read in evidence in the case.

3½. That prior to the bringing of the suit in the probate court of Pettis county, the plaintiff had complied with all the conditions of said written instrument referred to in the preceding stipulation as to the construction and completion of said railway, and that on October 30, 1880, plaintiff made a call for payment of all subscriptions to its capital stock.

4. That for the purpose of this trial the same effect shall be given to the instrument referred to in the third stipulation as though the name of the Sedalia, Warsaw and Southern Railway Company appeared in the stead of that of the Sedalia, Warsaw and Memphis Railway Company.

5. That after said articles of association were filed in the office of the secretary of state, as aforesaid, the plaintiff corporation duly organized by the appointment of William Gentry, one of the directors named in the said articles, as president; also by the appointment of D. H. Smith, another of said directors, as vice-president; John D. Crawford, secretary, and Cyrus Newkirk, treasurer.

6. That after such organization by plaintiff, said Cyrus Newkirk turned over and delivered said instrument referred to in the third stipulation to the secretary of the plaintiff, and that plaintiff thereupon received and accepted the same as a subscription to its capital stock, and ordered the name of said Smith to be placed upon its stock books as a stockholder of fifty-five shares of its capital stock, which was accordingly done.

7. For the purpose of this case the instrument of writing referred to in stipulation No. 3 shall be considered as applying only to the $1,000 cash part thereof, which yet remains unpaid, the remaining portion having been heretofore arranged in a manner not affecting the issues in this case.

8. These stipulations shall not be taken as binding or estopping either party hereto, in any other cause, but shall be used in the trial of this case only.

The plaintiff read in evidence the subscription paper referred to in the stipulation signed by the defendant's intestate, which constitutes the foundation of the demand against his estate.

"We, the undersigned, agree each severally to take the number of shares of the capital stock of the Sedalia, Warsaw and Memphis (Southern) Railway Company written opposite our names respect-

ively, and to pay for the same as soon as the road of said company shall be fully completed and in operation to the south line of Pettis county, in the direction of Warsaw, and the road-bed of said company completed from Sedalia to Warsaw. The payment of our several individual subscriptions to be secured to the satisfaction of the board of directors of said company before a contract for the building of said road is closed.

"Names.	*Shares.*	*Amount.*
"George R. Smith, ...	——	$5,500

"On condition as follows: One thousand dollars cash; $3,000 in work to be done for said railway company at the shops of the Smith Manufacturing Company, at regular prices; $1,500 in real estate, consisting of the three lots on the north side of Fourth street, in the city of Sedalia, lying south of the lots of the Smith Manufacturing Company, and adjoining the M., K. & T. railroad on the west—above mentioned lots are numbered 14, 15 and 16, of block 1, Smith & Martin's Third Addition.

"(Signed.) G. R. SMITH."

This being all the evidence, the plaintiff asked the court to declare, in substance, that the plaintiff, upon the agreed facts, was entitled to recover the $1,000 mentioned in the subscription paper. The court refused to make the declaration and rendered judgment on said facts in favor of defendant, from which the plaintiff appeals.

The only question presented in the record is, whether the defendant's intestate by virtue of his signature to the paper submitted in evidence, which was preliminary to the execution of the articles of association, became legally bound as a stockholder in the corporation, subsequently organized under article 2 of chapter 21 relating to the voluntary incorporation of railroads. The corporation contemplated in this preliminary paper is a creature of the statute. By complying with certain requirements specifically indicated therein, the subscribers of said paper, or any one else desiring the same thing, might become entitled to the rights and be subject to the liabilities of stockholders in a body corporate.

The statute which enables them to call into being the body corporate governs their relation to that body. It is full and explicit, and leaves no excuse for resorting to the rules of the common law in determining who are and who are not members of the body. I accept this proceeding as an attempt to enforce the statutory liability of the defendant's intestate as a member and stockholder of the association contemplated in the preliminary paper.

In recurring to the statute it would seem that only two modes are provided by which a person may become a subscriber to the capital stock of a corporation, either by signing the articles of association alluded to in the first section of the second article, or by subscribing to the capital stock after the creation of the corporation. The defendant's intestate died before the articles of association which gave being

to the corporation were executed and filed, consequently he could not have become a member by subsequent subscription. If he did not become such before they were filed, then he was no subscriber or stockholder at all. As it appears from the agreed statement of facts that his name was never signed to the articles of incorporation, the argument against the plaintiff is conclusive, if the premises are correct.

That they are correct, I think no one can doubt after reading the provisions of the statute relating to the incipient steps necessary to be taken in order to give rise to the relation of stockholder and corporation. Section 764, Revised Statutes, provides that any number of persons, not less than five, may form a railroad company; that for such purpose they may make and sign articles of association, in which shall be set forth the name of the company, period of its existence, the *termini* of its road, its length, the counties through which it is to run, the amount of capital stock, number of shares of stock, and the names and places of residence of the directors. It requires each member to subscribe to such articles by signing his name and place of residence, and the number of shares he agrees to take. A certain amount of capital stock must be subscribed, according to the character and length of the road, and five per cent. of the amount so subscribed paid thereon to the directors named in the articles. To these articles must be attached the certificate of at least three directors, under oath, to the effect that the conditions relating to the amount and payment of stock have been complied with. The section then goes on to say: "And thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in said company, shall be a corporation by the name specified in such articles of association, and shall possess the powers and privileges granted to corporations, and be subjected to the provisions relating thereto contained in this chapter."

I am unable to perceive how any persons of the requisite number, desirous of forming a railroad company under the provisions of this statute, can do so in any other mode than the one pointed out in it. In no other mode can the relation of stockholder and corporation, under this statute, be established. The statute neither contemplates nor alludes to any preliminary paper of subscription such as the one given in evidence. The fact that informal papers and circular letters are commonly signed and published as a part of the enterprise and zeal which gives birth to public corporations, can make no difference as long as the statute fails to recognize them among the necessary and prescribed legal steps to be taken by the incorporators to create the body corporate. The allusion in the statute to "all persons who shall become stockholders in said company," evidently refers to such as become stockholders by subscribing for stock after the corporation is established, in subscription books opened by the directors, according to the provisions of section 711, Revised Statutes.

It has been held by the courts of New York, in construing a statute in most respects like our own, that a party failing to sign the arti-

cles of association could not be subjected to the liability of a stockholder, although he has signed a preliminary subscription paper. Troy & Boston R. R. v. Tibbitts, 18 Barb. 297; Poughkeepsie & Salt Point Plank Road Co. v. Griffin, 24 N. Y. 150. I find nothing in the cases cited by plaintiff's counsel materially conflicting with this construction. Some of them are cases in which preliminary requests, petitions, or subscriptions are made prior to, or in contemplation of, the grant of a charter by legislative enactment. The acts when passed took effect upon the petitioners or subscribers, and by force of their terms made them liable as members or stockholders, although they may have failed to participate in the subsequent proceedings by which the corporation was organized. Others are cases in which the act of incorporation, either general or special, had been passed, and the defendants are held liable as stockholders, by reason of subscriptions within the peculiar meaning and terms of the acts, or because the acts, unlike the one before us, failed to prescribe any particular method of subscription by which a person might acquire the rights and be subject to the responsibilities of a stockholder. Tonica, etc., R. v. McNeely, 21 Ill. 71: Johnson v. Ewing Female University, 35 Ill. 518; Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336; Hartford & New Haven R. v. Kennedy, 12 Conn. 500; Taggart v. Western Md. R., 24 Md. 663; Penobscot R. Co. v. Dummer, 40 Maine 172; Kennebec & Portland R. v. Palmer, 34 Maine 366; Cross v. Pinckneyville Mill Co., 17 Ill. 54; Athol Music Hall Co. v. Cary, 116 Mass. 471.

I do not regard the case of Peninsular R. Co. v. Duncan, 28 Mich. 130, as an authority in point. Without assenting to the conclusion reached in that case by a majority of the court (there being an able dissenting opinion against it), I need only remark, for the purposes of this case, that the construction adopted by the court was placed upon the peculiar phraseology of the statute which it was held referred to preliminary subscriptions, thereby intending to make the signers thereof members of the corporation when established. There being no such reference or intention contained in the language of our statute, I am of the opinion that the defendant's intestate can not be held liable as a stockholder by reason of his signature to the paper submitted in evidence. Accordingly the judgment of the court below is affirmed.

PHILLIPS, C., not sitting. EWING, C., concurs. HOUGH, C. J., absent.

Note. See 1854, Troy & Boston R. Co. v. Tibbitts, 18 Barb. (N. Y.) 297; 1856, Buffalo & N. Y. R. Co. v. Dudley, 14 N. Y. 336; 1861, Poughkeepsie & S. R. Co. v. Griffin, 24 N. Y. 150; 1873, Carlisle v. Saginaw Valley R. Co., 27 Mich. 315; 1874, Dutchess, etc., Co. v. Mabbett, 58 N. Y. 397; 1875, Reed v. Richmond, etc., Co. 50 Ind. 342; 1875, Parker v. N. C. M. R. Co., 33 Mich. 23; 1878, Monterey, etc., Co. v. Hildreth, 53 Cal. 123. Beach, § 513; Clark, p. 271; Cook, §§ 57-59; Elliott, § 344; Morawetz, §§ 54-57; Taylor, § 516; I Thompson, §§ 1157-1160.

Sec. 102. Same. The statute may make those who incorporate members and not those who take the stock.

THE CASE OF THE PHILADELPHIA SAVINGS INSTITUTION.[1]

1836. IN THE SUPREME COURT OF PENNSYLVANIA. 1 Wharton (Pa.) Rep. 461–468.

At the last term, an application was made by Mr. Norris for a rule to show cause why an information in the nature of a writ of *quo warranto* should not be filed, to inquire by what authority Joseph Feinour and others exercised the rights of members of the Philadelphia Savings Institution.

At the same time a rule was granted upon the president and directors of the same institution, to show cause why a *mandamus* should not issue, requiring them to admit William C. Bridges to participate in the transaction of the said institution, at its meetings of business.

Upon the return of these rules, the following appeared to be the material circumstances:

The Philadelphia Savings Institution was incorporated by an act of the legislature of Pennsylvania, passed on the 5th day of April, 1834.

The first section declared that certain persons therein named (forty-six in number) "and all and every other person or persons, hereafter becoming members of the Philadelphia Savings Institution, in the manner hereinafter mentioned," should be created and made a corporation and body politic, with the usual powers and capacities.

The 2d, 3d and 4th sections were as follows:

"Sec. 2. The object of this corporation shall be to receive from time to time, and at all times, from all persons disposed to entrust them therewith, such funds as may be deposited with them, and for which they shall pay to the depositor such rates of interest as may be from time to time agreed upon by the directors of the said institution: *Provided*, That the said rates of interest shall not be reduced without giving at least sixty days' notice of their intention so to do, in two or more of the daily papers of the city of Philadelphia.

"Sec. 3. For the security of the depositors of the said institution, it shall be the duty of the persons named in the first section, and of their associates, to raise and form a capital for the said institution. of not less than $50,000, nor more than $200,000, in shares of $25 each, which capital shall be at all times liable to the depositors for the amount of their deposits and of the interest accruing thereon. The said shares shall be transferable on the books of the company in such manner as may be designated by the by-laws of the said institution.

"Sec. 4. There shall be a meeting of the *members* of the said Philadelphia Savings Institution, on such a day in the month of May next, and at such place as the five persons first named in this act, or any

[1] *Note.* Arguments omitted.

three of them, shall appoint, and give at least ten days' notice of such meeting in two or more newspapers printed in the city of Philadelphia, and on such day in the month of May, and at such place annually thereafter as the by-laws of said institution shall provide, for the purpose of choosing from *among the members*, thirteen directors to manage the affairs of the said institution for twelve months thereafter, and until a new election shall take place, and the five persons first named shall be judges of the first election of directors, and the judges of all future elections shall be appointed, and notice of such elections given in such manner as the by-laws shall provide."

The fifth section declared the duties and powers of the directors; among which it was provided that they should have power to "provide for the admission of *members*, and furnishing proofs of such admission," and to pass all such by-laws as shall be necessary to the exercise of their powers and of the other powers vested in the corporation by the charter; "*Provided*, that all such by-laws as shall be made by the directors, may be altered or repealed by two-thirds of the *members*, at any annual meeting, or at any general meeting called in pursuance of any by-law made for that purpose; and the majority of *members* may, at any annual or general meeting, pass by-laws which shall be binding upon the directors."

The sixth section authorized the corporation to invest its funds in public stocks of the state, or of the United States, or in real securities, or in the discount of notes, and personal securities; provided that the rate of discount should not exceed one-half per cent. for thirty days.

The seventh section was as follows:

"Sec. 7. It shall be the duty of the directors, at least once in every six months, to appoint from the *members* of the said coporation, five competent persons as a committee of examination, whose duty it shall be to investigate the affairs of the said corporation, and to make and publish a report thereof in one or more newspapers printed in the city of Philadelphia—and it shall also be the duty of the directors, on the first Monday of January and July, in each and every year, to make and declare a dividend of the interest and profits of the said corporation, after paying its expenses, and the same to pay over to the *stockholders* or their legal representatives, within ten days thereafter."

The eighth section provided that nothing in the act contained should be so construed as to give or extend any banking privileges to the institution, or to give or allow any compensation to the directors thereof.

Shortly after the act of incorporation, the directors adopted certain by-laws, among which were the following:

"Law 4. Any member of the institution may, by writing addressed to the treasurer, resign and relinquish his place and right as a member of the institution, and every member who shall cease to be a stockholder, shall at the same time cease to be a member.

"Law 5. No person shall be eligible as a member, unless he shall have been a depositor one year, or a stockholder six months. All

elections for membership shall be by ballot at a general meeting of the institution, at which the votes of two-thirds of the whole number of members of the institution shall be requisite for admission."

At a general meeting held on the 5th of January, 1836, the old by-laws were repealed by the members and in lieu of the above laws, viz., law 4th and 5th, they passed the following by-laws:

"Law 3, section 3. The number of members of the institution shall be limited to fifty, and in case of vacancy by death, resignation or otherwise, it shall be the duty of the president immediately to call a general meeting of the institution to supply such vacancy, and at any election of members a majority of the whole number of members shall be present, and the person or persons balloted for shall have received the votes of at least two-thirds of the members present.

Provided, that no person shall be elected a member who shall not have been nominated at some meeting previous to that at which he shall be balloted for.

Sec 4. Any member of the institution may, by writing addressed to the president, resign and relinquish his place and right as a member of the institution at any general meeting of the members."

The law No. 5 above quoted was repealed.

The board of directors afterward, viz., on the 14th of January, 1836, passed the following by-law, being a repeal of and in substitution of by-law 4 above:

"Law 4. Any member of the institution may, by writing addressed to the president, resign and relinquish his place and right as a member of the institution at any general meeting of the members."

The questions submitted to the court were:

1. Whether persons originally members, who had transferred their stock and no longer possessed any interest in the stock, continued to be members, with the right of voting for directors, etc.

2. Whether a person to whom stock in the institution was assigned—as upon purchase—became a member, *ipso facto*, without admission by the directors.

Mr. James S. Smith and Mr. Sergeant contended that none but persons having a pecuniary interest in the corporation by holding stock, were to be considered as members. Mr. W. M. Meredith and Mr. Broom, *contra*.

ROGERS, J. The rules obtained in this case involve two questions, which depend upon the construction of the act of the 5th of April, 1834, incorporating the Philadelphia Savings Institution.

1. Is a stockholder a member of the corporation, and as such entitled to participate in its business?

2. Does he cease to be a member when he ceases to be a stockholder?

In relation to the power of admitting members of a corporation, as is said in Angel and Ames on Corporations, 62, reference must often be had to the provisions and spirit of the charter, and when the charter is silent, we must look to the provisions of the common law, and to the particular nature and purpose of the corporation. In certain cor-

porations (such, for example, as religious, charitable and literary) the number of members is often limited by charter, and whenever there is a vacancy, it is usually filled by a vote of the company. As regards trading and joint stock operations, no vote of admission is requisite, for any person who owns stock therein, either by original subscription or by conveyance, is in general entitled to, and can not be refused, the rights and privileges of a member. Gray v. Portland (3 Mass. 364); King v. Bank of England (Doug. 524). In moneyed institutions, such as banks, insurance, canal and turnpike companies, etc., the mere owning of shares in the stock of the corporation gives a right of voting, and a stockholder ceases to be a member by a transfer of stock. There is then this marked distinction arising from the nature of the corporation. In the one case, a pecuniary interest is the evidence of membership, whilst the affairs of religious, charitable or literary institutions are committed to those who have no pecuniary interest whatever in their management. If this were a corporation of the former description, it would greatly strengthen the argument of the respondent's counsel, but I can not view it in that light, but look upon this and all institutions of a like kind as partaking of the nature of a charity, where the professed object is to advance the interests of the poor and helpless. The object of this institution is declared to be, to receive from time to time, from all persons disposed to entrust them therewith, such funds as may be deposited with them, and for which they are to pay the depositors such rates of interest as may be from time to time agreed upon by the directors. These deposits, as is well known, are made in small sums by the poor, and the institution is professed to be more especially for their benefit. In aid of this object, and as subsidiary to it, the legislature in the third section directs that for the security of the depositors, etc., it shall be the duty of the persons before named, and of their associates, to raise a capital, etc., of not less that $200,000, in shares of $25 each. Which capital is to be at all times liable to the depositors for the amount of their deposits and the interest.

In other institutions of the like kind, the latter provisions are omitted; they were manifestly introduced into this charter, not for the benefit of the stockholders, but as an additional security or pledge to the depositors. As an inducement to make this investment, in the sixth section the corporation is authorized to invest its funds "in public stocks of this state, or the United States, or real securities or in the discount of notes and personal securities;" and in the seventh section the directors are authorized to declare a dividend of the interest and profits of the corporation, after paying its expenses, and to pay it over to the *stockholders*, or their legal representatives. It seems to me most clear that the legislature had no intention of establishing a joint stock company, but that there was a mere modification or change in the provisions usually inserted in the charters of savings fund institutions.

But at any rate these rules of construction only apply when the charter is silent. So that in this, as in every other case, we must look

to the act itself, having regard to the particular nature and purpose of the corporation. In the charter there are antagonist interests; the interest of the stockholders is in some measure in opposition to the interest of the depositors. It is for the benefit of the one to decrease, and the other to increase the rate of interest on deposits; and hence, there may be a peculiar propriety in the legislature to intrust the control of the funds to persons who have no pecuniary interest in the corporation. At least I perceive nothing in this of which the stockholders have any right to complain. If the stockholders have the exclusive management of the institution, for which the respondents contend, a temptation is held out to divert the institution from its original and primary object and convert it into a bank, differing only in the fact that it is a bank of discount and deposit, and not of circulation. Besides, if a pecuniary interest is the only criterion of membership it may with equal plausibility be said that the depositors are members also, and as such entitled to participate in its management. In the first section it is enacted "that the persons therein named, and all and every other person or persons hereafter becoming members of the Philadelphia Savings Institution, in *the manner hereinafter mentioned*, shall be and are hereby created and made a corporation by the name and style of the Philadelphia Savings Institution." The manner in which they can become members is pointed out in the fifth section. Among other matters, the directors have power to provide for *the admission of members and furnishing proofs of such admission*. This we conceive to be inconsistent with the idea that a stockholder is *ipso facto* a member of the corporation; for if so why confer the power to provide for the admission of members? The legislature does not confine the power to furnishing proofs of the admission of members, but they, in express words, grant the power to admit members of the corporation. This we conceive to be an authority to elect such persons as members as *they* may deem best fitted to carry into effect the objects of the charter. The respondent's case also derives additional strength from the seventh section. A distinction is there taken between a *member* of the corporation and a *stockholder*. It is made the duty of the directors to appoint from the *members of the corporation* five competent persons as a committee of examination to investigate the affairs of the corporation; and in the same section to declare a dividend, etc., and pay the same over to the *stockholders*, or their legal representatives. Why, it has been asked, this change of phraseology, if a stockholder, as such, is a member of the corporation? It is also worthy of remark that the legislature wholly omit to regulate the right of voting; a regulation always introduced in all joint-stock incorporations. It is the uniform policy to limit the number of votes to which stockholders may be entitled, in all such companies, a limitation which would not have been omitted had the legislature conceived this to be an institution of that description.

Reliance has been placed on the word "*associates*," in the third section, which the counsel of the commonwealth says must refer to stockholders. This is an argument not without plausibility. This

section makes it the duty of the persons named in the act, and of their associates, to raise a capital of not less than $200,000; but in what manner this is to be effected is left to their discretion. It would seem to be the intention of the legislature to give power to admit members *before*, as well as *after*, the capital was raised; and indeed they might have required the aid of others than those named to effect this result. I see nothing in the act which forbids this, but I think a fair construction of this part of the charter shows that this power was intended to be given. If so, this is an argument to show that a moneyed interest is not an indispensable condition of membership.

It is said that the directors have passed a by-law that every member who shall cease to be a stockholder shall cease to be a member. Whether this is so or not is of little importance; for although the charter give authority to the directors to admit members, there is none given to disfranchise them. A by-law may modify and change the constitution of a corporation, but can not alter it. It may regulate in a reasonable manner, the exercise of a right in the internal affairs of a corporation, in the conduct of its members, or the mode by which a person is admitted to the exercise of a right to which it has an inchoate title; but it can not take away a right, or impose any unreasonable restraint in the exercise of it. 2 Kyd on Corporations, 107, 122.

Rules discharged.

Sec. 103. Same. The statute may require signing and acknowledging articles of association by original shareholders.

COPPAGE, RECEIVER, v. HUTTON.

1890. IN THE SUPREME COURT OF INDIANA. 124 Indiana Reports 401–403, 7 L. R. A. 591, 24 N. E. Rep. 112.

From the Montgomery circuit court.

ELLIOTT, J. The appellant sues as the receiver of an insolvent corporation, and seeks to recover a subscription which he alleges the appellee made to the capital stock of the corporation. It is alleged that the appellee, with others, signed articles of association, and that he agreed to take two shares of the capital stock, and pay therefor $100. The introductory clause of the articles of association reads thus: "We, the undersigned, agree to take the stock in the amount set opposite our names in a company to be organized for manufacturing and selling the Williamson Straw Stacker." There were eighty-three signers, and seven of them acknowledged the execution of the articles of association before a notary public, and the instrument was duly recorded. It is also alleged that $8,000 of stock was subscribed, that the company was duly organized and a board of directors elected.

There can be no doubt under the authorities that a valid subscrip-

tion to the capital stock of a corporation may be made by signing the preliminary articles. Such a subscription becomes enforcible upon the perfection of the corporate organization according to the law under articles of association. Miller v. Wild Cat G. R. Co., 52 Ind. 51; Nulton v. Clayton, 54 Iowa 425; Phœnix, etc., Co. v. Badger, 67 N. Y. 294; Cravens v. Eagle, etc., Mills Co., 120 Ind. 6. If the promise of the appellee is not binding it must be for some other reason than that it was made before the organization of the corporation was fully effected.

The statute requires that the persons who desire to organize a corporation shall "make, sign and acknowledge, before some officer capable to take acknowledgment of deeds, a certificate in writing," setting forth therein certain enumerated things. Section 3851, R. S. 1881. The contention of the appellee is that the promise is not effective, because the complaint shows that only seven of the eighty-three signers acknowledge the certificate. It seems quite clear, under the decision of this court in Indianapolis, etc., Mining Co. v. Herkimer, 46 Ind. 142, that the mere signing of the paper was not sufficient to complete the obligation, and that, in order to make valid and effective articles of association against all who sign, all must acknowledge them as the statute requires. Here it affirmatively appears that seven only of the signers acknowledged the execution of the instrument, and it can not be inferred that those who did not acknowledge it remained bound by its terms. As to them the instrument was incomplete, and it is quite well settled that an incomplete subscription can not be enforced. Dutchers, etc., R. Co. v. Mabbett, 58 N. Y. 397; Reed v. Richmond, etc., R. Co., 50 Ind. 342; Richmond St. R. Co. v. Reed, 83 Ind. 9; Williamson v. Kokomo, etc., Ass'n, 89 Ind. 389.

It is, however, argued by appellant's counsel that the complaint does affirmatively show that the corporation was organized, but this does not meet the question, for it may well be that it was organized without the appellee as a stockholder. The fact that he did not acknowledge the instrument as the law requires implies that he did not become a stockholder, and there is nothing in the complaint which rebuts or opposes this implication. It devolved upon the plaintiff to remove the inference if he could. As the appellee did not acknowledge the instrument as the law requires, he did not become a stockholder, and if he were insisting that he was entitled to the number of shares set opposite his name, it is quite clear that the corporation might successfully resist his claim, since it is obvious that only those who acknowledge the articles of association as the law requires can successfully insist upon their right to stock. If the appellee can not be regarded as a stockholder, then it seems quite clear that he did not bind himself by simply signing the articles of association.

Whether a good complaint can be framed is not the question before us, for the only question presented by the record is as to the sufficiency of the complaint as it is written.

Judgment affirmed.

Note. See cases cited, *supra*, p. 463.

ARTICLE III. FORMS OF ASSOCIATION CONTRACTS; COMMON LAW SUBSCRIPTION CONTRACTS.[1]

Sec. 104. (1) Agreements to subscribe for stock in a corporation formed or to be formed.

CHARLES THRASHER v. THE PIKE COUNTY RAILROAD COMPANY.[2]

1861. IN THE SUPREME COURT OF ILLINOIS. 25 Ill. Reports, p. 393 (Orig. ed.); p. 340–348, Gross's Edition, 1876.

Appeal from the circuit court of Pike county; the Hon. J. S. Bailey, judge, presiding.

This was an action of assumpsit, by the Pike County Railroad Company against Charles Thrasher, upon the following agreement:

"We, the undersigned, agree to subscribe to the stock of the Pike County Railroad, the sum set against our names, when the books may be opened for subscription.

"Griggsville, March 19, 1856.

"Charles Thrasher . . . . . $3,000."

Mr. JUSTICE BREESE delivered the opinion of the court.

The appellee, who was plaintiff in the court below, urges several reasons justifying a recovery in this case, which it is necessary to notice. The declaration contains a special count, averring that on the 19th of March, 1856, the plaintiffs were a body politic and corporate with power to construct and operate a railroad within the county of Pike, and authorized by law, as such corporation, to secure subscriptions to the capital stock of the company to the amount of $1,000,000, in shares of $100 each, and, desiring to ascertain what amount of stock would be subscribed, and not having opened regular subscription books, but intending so to do, agreed with the defendant that they would, in a reasonable time thereafter, open books for the purpose of securing such subscriptions, and that they would permit and allow the defendant, when the books should be opened, to subscribe to the capital stock of the company thirty shares of $100 each, and upon payment therefor, the defendant should be the owner of thirty shares of the capital stock of the company. It is then averred that the defendant, in consideration of this promise, undertook and promised the plaintiff that he would subscribe to the stock of this company the sum of $3,000 when the books should be opened for subscriptions; that this promise was by a writing, signed by the defendant, and by him delivered to the plaintiff. It is then averred, that on the same day subscription books to the capital stock of the company were opened, of which the defendant had notice. The breach is, that the defendant neglected and refused to subscribe anything to the capital stock, accompanied by an averment that the subscription, when the

[1] See note 93 Am. St. R. 349.

[2] Only the part of the opinion relating to the nature of the agreement to subscribe is given.

books were opened, was due and payable before the commencement of the suit, and although notified thereof, the defendant has refused to pay any part of the sum of the $3,000. The common counts are added, in one of which the indebtedness is alleged to be for 100 shares of the stock of the Pike County Railroad, before that time bargained and sold to the defendant.

This is the cause of action as set forth by the plaintiffs, and it is claimed by them that they are entitled to recover as damages the par value of the stock, or the amount of calls made from time to time upon it, and which, at the commencement of the suit, amounted to fourteen installments, of five per cent. each, making, in all, $2,100.

This, we do not think, is a fair view of the defendant's liability upon his promise, if one was made to the plaintiffs. His undertaking is to subscribe a certain amount of stock when the subscription books should be opened. This promise does not make him a stockholder, and, as such, liable to calls. The company has parted with no stock to him, and can only claim as damages the actual loss sustained by them by his failure, or refusal to subscribe, when he was notified that the books were opened for such purpose. The company has the stock which the defendant promised to take, but did not take. His promise is like any other promise or agreement to purchase any specific article of property. If the property contracted be retained by the vendor, and there is no delivery to the purchaser, or offer to deliver, the damages must not be measured by the value of the property, for it would not be just, in such cases, that the vendor should retain the property and recover also the value of it from the promisor. Some damage might result from the loss of a bargain, and to such the vendor would be entitled, if the extent could be established. In many cases they would be merely nominal. On an agreement for the sale and purchase of stocks, and a refusal by the purchaser to take the stocks, the measure of damages, ordinarily, might be the difference between the par value of the stocks and their market value, or between them and money. As well argued by the appellant, the defendant, having violated his promise by failing to subscribe, he has acquired no right to stock, nor could a recovery in this action entitle him to become a stockholder. The company retains its stock, and the defendant his money. A stock certificate of $3,000 would represent a value to the company equivalent to so much money, and, in a statement of their liabilities, this would appear against the company as so much held by the stockholders, for which the company was responsible. If there is no actual subscription, the company does not incur this liability. There being no special damage alleged, or proved, we do not think the plaintiffs could recover under this declaration, as they have done, the par value of the stock the defendant promised and agreed to take. A proper count might doubtless be so framed as to justify a full recovery under sufficient proof. * * *

Reversed.

Note. See note at the end of next case.

Sec. 105. Same.

STRASBURG RAILROAD COMPANY v. ECHTERNACHT.[1]

1853. In the Supreme Court of Pennsylvania. 21 Pa. St. Rep. 220–222, 60 Am. Dec. 49.

Certiorari to the common pleas of Lancaster county.

This was a bill in equity on the part of the railroad company, filed with the view of enforcing the specific performance of an agreement, which was as follows:

"We, the undersigned, agree to take the number of shares of the capital stock of the Strasburg Railroad Company, set opposite to our respective names, the price per share to be $100, provided there can be a charter obtained at the next ensuing session of the legislature of Pennsylvania, granting said company to terminate said road at the east end of the borough of Strasburg, and connecting with the state road at or near Lemon Place; granting also the said company to do all the business connected with the road, such as forwarding and receiving produce of all kinds, coal, lumber, and all other commodities as are transportable over other railroads."

William Echternacht, the defendant, was a signer for five shares. Application was made to the legislature, and on the 11th of February, 1851 (which was during the next ensuing session after the signing of the agreement), the act to incorporate the Strasburg Railroad Company was passed (Pam. L. p. 53), the provisions of which are in accordance with the terms specified in the above agreement.

The road was commenced, and it was alleged that the property of the defendant rose in value. He, however, refused to subscribe to the stock of the company, and the bill in question was filed.

On the part of the defendant the bill was demurred to. The facts stated in the bill were not confessed, but it was alleged that no matter of equity was stated in the bill whereon a decree of specific performance should be made.

The demurrer was sustained by the court below, and the bill was dismissed; and to this error was assigned.

Black, C. J. Before the Strasburg Railroad Company was incorporated the defendant and others signed a paper, agreeing that if it should be incorporated with certain privileges, they would subscribe the number of shares set opposite to their respective names. The charter was obtained, and the defendant refused to take the stock. Whereupon the company brought this bill in equity to enforce specific performance of the contract.

A contract can not be made by one person alone. It takes two to make a bargain. Before a promise becomes a binding obligation, it must not only be made to, but must be expressly or impliedly accepted

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A contract can not be made by one person alone. It takes two to make a bargain. Before a promise becomes a binding obligation, it must not only be made to, but must be expressly or impliedly accepted

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by the party for whose benefit it was meant. The paper before us is no more than a naked expression of the subscriber's intention to purchase certain shares in the capital stock of a company which it was expected would be incorporated by the legislature. Besides it is without any sufficient consideration. It is not pretended and can not be made out from the paper, that the agreement of the defendent was the motive of the others for taking stock. It is well settled that procuring legislation of any kind, is not a consideration which will support even a direct promise to pay a fair compensation for the labor of the promisee about such a business.

Again: If there was a binding engagement, it was not made with the railroad company, which did not exist at the time.

But, supposing this to have been a valid contract, to which the plaintiff was a party, and based upon good consideration, a bill in equity is not the mode of enforcing it; the remedy at law for its violation being full, complete and adequate.

Decree affirmed.

Note. See, 1880, Lake Ontario, etc., Co. v. Curtis, 80 N. Y. 219; 1898, Yonkers' Gazette Co. v. Taylor, 30 N. Y. App. Div. 334, on 337; 23 Am. and Eng. Enc., p. 786; Beach, §§ 61–65, 510–554; Clark, § 99; Cook, §§ 52–63; Elliott, §§ 345, 345*a*, 348; Morawetz, § 47, *et seq.*; Taylor, §§ 509–512, 1 Thompson, §§ 1138–1145.

Sec. 106. (2) Agreements subscribing to stock in a corporation to be formed. Theories:

(*a*) A mere offer that may be withdrawn at any time before organization and acceptance by the corporation.

BRYANT'S POND STEAM MILL COMPANY v. JOHN G. FELT.[1]

1895. IN THE SUPREME COURT OF MAINE. 87 Maine Rep. 234–240, 47 Am. St. R. 323.

On report.

This was an action of *assumpsit* brought to recover of the defendant the sum of two hundred dollars, as appeared by his alleged subscription upon an original subscription book, and upon the outer cover of which was the following writing: "Subscriptions for a steam mill to be erected at or near Bryant's Pond." The original agreement was as follows:

"We, the undersigned, hereby agree to pay for the number of shares set opposite our names, said shares to be ten dollars each, and non-assessable, for the purpose of erecting suitable buildings, with steam power, for the manufacturing of various kinds of wood to be

[1] Arguments omitted.

used in the contract of one C. H. Adams, he paying three per cent. annually as rent on all money so paid, said moneys to be paid when needed for the purpose above named, providing the town will abate taxes on said buildings and stock for the term of ten years."

Plea, general issue and the following brief statement:

And for a brief statement of special matter of defense, to be used under the general issue pleaded, the defendant further says: That said defendant never subscribed for nor promised to pay for any shares in the said Bryant's Pond Steam Mill Company; that the signature of said defendant was procured and affixed to said paper declared on, if at all, on Sunday, and whatever contract was made, if any, was made on Sunday, and therefore void; that subsequent to the time his said name was affixed to said paper and prior to the commencement of this suit, and prior to the organization of this company, this defendant revoked said subscription and notified the plaintiff and the solicitors for said stock that he should not accept the same, and requested his name stricken from the list of subscribers; that no person is named in said subscription paper as payee, and no contract was ever entered into with any person or persons; that no sum is named in said paper declared upon as a limit to the amount to be raised and is indefinite and uncertain; that a sufficient sum was not raised or subscribed for erecting buildings with steam power for the manufacturing of the various kinds of wood, as alleged, and plaintiff was obliged to, and did, mortgage the property to complete the amount; that at the time the plaintiff company pretended to organize, this defendant was not recognized as a subscriber, did not participate in the organization, and is not named therein as one of the subscribers to the stock of the same; that there were conditions attached to said subscription paper which are essential to be performed, and which have never been performed on the part of this plaintiff or any other parties interested in the said subscription, or on the part of the town of Woodstock; that said paper, purporting to be a subscription of shares of stock, is without consideration and void.

WALTON, J. The only question we find it necessary to consider is whether a subscriber to the capital stock of an unorganized corporation has the right to withdraw from the enterprise, provided he exercises the right before the corporation is organized and his subscription is accepted. We think he has. Such a subscription is not a completed contract. It takes two parties to make a contract. A nonexisting corporation can no more make a contract for the sale of its stock than an unbegotten child can make a contract for the purchase of it.

The right of subscribers to the capital stock of a proposed corporation to withdraw their subscriptions at any time before the organization of the corporation is completed has been affirmed in several recent and well-considered opinions. The right rests upon the impregnable ground of the legal impossibility of completing a contract between two parties, only one of which is in existence. There can be no meeting of the minds of the parties. There can be no acceptance of

the subscriber's proposition to become a stockholder. There can be no mutuality of rights or obligations. There can be no consideration for the subscriber's promise. As said in one of our own decisions, it is a mere *nudum pactum*—a promise without a promisee—a contractor without a contractee. In fact, every element of a binding contract is wanting. If the subscriber's promise to take and pay for shares remains unrevoked till the organization of the proposed corporation is effected, and his promise has been accepted, then we have all the elements of a valid contract. Competent parties. Mutuality of duties and obligations. A valid consideration, the promise of one party being a sufficient consideration for the promise of the other. A promisee as well as a promisor. A contractee as well as a contractor. In fact, all the elements of a valid contract are present, and the subscription has become binding upon both of the parties. But, till the corporation has come into existence, all these elements are necessarily wanting, and the subscriber's promise amounts to no more than an offer, which, like all mere offers, may be withdrawn at any time before acceptance. When accepted it becomes binding. Till accepted it remains revocable. This conclusion is sustained by reason and authority.

In Starrett v. Rockland Co., 65 Maine 374, the plaintiff sought to recover a portion of the dividends of a successful insurance company. He had subscribed for five shares of the stock before the organization was effected; but the evidence of acceptance of his subscription by the corporation after its organization was not satisfactory, and the court held that without such acceptance there was no completed or binding contract; that the minds of the parties never met; that the plaintiff's subscription, being made before the corporation came into existence, amounted to no more than a proposal to take so many shares—a mere *nudum pactum*—imposing no obligations and securing no rights.

And in Carr v. Bartlet, 72 Maine 120, the right of subscribers to withdraw from such undertakings while they remain inchoate and incomplete, is recognized and affirmed.

In Muncy Traction Engine Co. v. Green, 143 Pa. St. 269, 13 Atl. Rep. 747, decided in 1888, the defendant had been active in procuring subscribers to the capital stock of a proposed corporation, and had himself subscribed for twenty shares, but he wrote to the chairman of the meeting for the organization of the corporation, that, for reasons satisfactory to himself, he withdrew his subscription. The court ruled that the defendant had a right to withdraw his subscription at any time before the organization of the corporation was completed; and the jury having found as a matter of fact that the withdrawal was before the organization of the corporation was completed, a verdict for the defendant was affirmed, and judgment rendered thereon.

In Hudson Real Estate Co. v. Tower, 156 Mass. 82 (1892), the action was founded on a subscription to the capital stock of an unorganized corporation, and the defense was based on an alleged with-

drawal of the subscription. The right to withdraw was controverted. The court held that at the time when the defendant signed the subscription paper declared on, it was not a contract, for want of a contracting party on the other side; that while such a subscription may become a contract after the corporation has been organized, still, until the organization is effected, and the subscription is accepted, it is a mere proposition or offer, which may be withdrawn like any other unaccepted proposition or offer.

It is urged by the counsel for the plaintiff corporation that such subscriptions create binding and enforcible contracts between the subscribers themselves, and are, therefore, irrevocable, except with the consent of all the subscribers; and some of the authorities cited by him seem to sustain that view. But we find, on examination, that such views, when expressed, are in most cases mere *dicta*, and that the cases are very few in which such a doctrine had been acted upon. Reason and the weight of authority are opposed to such a view. Of course, subscription papers may be so worded as to create binding contracts between the subscribers themselves. But we are not now speaking of such subscriptions; or of voluntary and gratuitous subscriptions to public or charitable objects, which, when accepted and acted upon, become binding. We are now speaking only of subscriptions to the capital stock of proposed business corporations. With regard to such subscriptions we regard it as settled law that they do not become binding upon the subscribers till the corporations have been organized and the subscriptions accepted; and that, till then, the subscribers have a right to revoke their subscriptions. And, in view of the fact that such subscriptions are often obtained by over-persuasion, and upon sudden and hasty impulses, we are not prepared to say that the rule of law which allows such a revocation is not founded in wisdom. We think it is.

In the present case an old man, upwards of eighty years of age, and now dead, was induced to subscribe for twenty shares of stock in a proposed, but not then organized, manufacturing corporation; but after a little reflection, he determined to revoke his subscription and withdraw from the enterprise. He notified the agent of the promoters, through whom his subscription had been obtained, of his determination to withdraw, and requested him to take his name off the subscription paper. And he again sent word by his son to have his name taken off. And notice of his withdrawal, and of his request to have his name taken off of the subscription paper, was given to the other subscribers at one of their meetings, and before the corporation was organized. We think his withdrawal was legal and complete, and that no action to recover the amount of his subscription is maintainable.

Other grounds are urged in defense of the action, but it is unnecessary to consider them.

Judgment for defendant.

Note. **See note at end of next case.**

Sec. 107. Same. Notice of withdrawal.

HUDSON REAL ESTATE COMPANY v. HERMAN C. TOWER.

1894. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 161 Mass. Reports 10–16, 42 Am. St. Rep. 379.

Contract, to recover the amount of a subscription by the defendants, as copartners, for ten shares of stock in the plaintiff corporation. After the former decision, reported 156 Mass. 82, the case was tried in the superior court before Bond, J.

The jury returned the verdict for the defendants, and the plaintiff alleged exceptions. The facts sufficiently appear in the opinion.

ALLEN, J. It was heretofore decided in this case that until the organization of the corporation the defendant's subscription was a mere proposition or offer which might be withdrawn, like any other unaccepted offer. 156 Mass. 82. The principal question which the plaintiff now seeks to present is whether, upon the evidence and under the ruling of the court, the jury were warranted in finding a legal withdrawal or revocation of the subscription.

The only withdrawal or revocation relied on occurred in an interview between one of the defendants and Henry Tower, on August 31, 1889. In view of the verdict the only question left is whether a notification of withdrawal given orally to Henry Tower was sufficient.

It will be necessary to state the situation of the parties. The contract declared on is given below.

"We, the undersigned, hereby subscribe for and agree to purchase the number of shares set against our respective names, of the capital stock in the corporation to be organized under the laws of such state, as a committee hereafter to be appointed from the subscribers shall determine, said shares of capital stock to be of the par value of $50, and the capital stock of said corporation to be not less than $25,000, said corporation to be organized for the purpose of purchasing land, and erecting a shoe shop thereon, with the necessary appliances connected therewith, in the town of Hudson, to be rented, when completed, to H. H. Mawhinney & Co., for a term of ten years at a rental of seven per cent. per annum on the cost of the plant when completed. Said corporation to be organized as soon as may be, and in advance thereof an agreement in writing between a committee of the subscribers, in behalf of all, with said H. H. Mawhinney & Co. to be executed, binding the latter to take said plant for the period and at the terms stated, and on the organization of said corporation to be re-executed to bind both parties. And the subscribers hereto hereby bind themselves severally to pay for said stock to the treasurer of said corporation in the way and manner that the corporation when organized shall determine. And we severally agree that one seal shall be the seal of each.

"Hudson, August 7, 1889."

The corporation was organized under the laws of Maine. The meeting for the organization was held at Portland, Maine, August 29, 1889, at which time the articles of agreement, having been signed, were presented, by-laws were adopted, and officers chosen. The necessary papers were then prepared as required by law, and were approved by the attorney-general of Maine, on September 5, were recorded on September 6, and were received and filed in the office of the secretary of state on September 7, 1889. It was agreed at the argument that, under the laws of Maine, the legal existence of the corporation as a corporation, began on September 7.

On the 31st of August, Henry Tower's position was as follows: It must be assumed, though the bill of exceptions does not in express terms so state, that he was one of the subscribers. One of the plaintiff's requests for instructions assumes that there was a contract of the firm above referred to "with Henry Tower and others in behalf of the associates for the purchase of land and building a shoe shop thereon, dated August 19, 1889." This contract, being thus referred to by the plaintiff as an undisputed fact, must be taken to show that Henry Tower was acting as the person first named on the committee contemplated by the subscription paper, to obtain an agreement in writing binding said firm to take a lease of the premises. On August 29, at a meeting which apparently was the first formal step in the organization of the corporation, he was chosen president. By the statutes of Maine, which it was agreed we should refer to, the choice of officers is a necessary preliminary to the creation of the corporation. Revised Statutes of Maine of 1883, ch. 48, §§ 17–19.

It is also obvious that on August 31 he was, in the opinion of the jury, acting as an officer in behalf of the associates, and not merely on account of his personal interest as one of the subscribers. Such is the fair result of the instructions taken as a whole. The judge, in the course of his charge, called the jury's attention to this distinction by saying: "If Henry Tower was one of the officers of the associates for the purpose of managing their business, it would not be necessary that any other notice should be given than what was given to him; but if he went there simply as being interested, not acting as an officer, * * * it may be that he was not an officer, so that he would be a party authorized to receive any notice of withdrawal, and if he was not, then it would be necessary for that fact to be communicated to the meeting." It being pointed out to the judge, at the close of the charge, that the plaintiff's records showed that at the meeting on the 29th of August, Henry Tower was chosen president, he further instructed the jury that if he had been so chosen president, and if the defendants notified him distinctly that if a certain event should happen with reference to the change of the policy of the corporation as to mortgaging its property they would no longer be in the association and would not pay a cent on their subscription, that would be a sufficient notification of their withdrawal if the event did happen. The undisputed testimony, so far as it is recited or disclosed in the bill of exceptions, goes to show that Henry Tower, in that interview, was

acting in a representative capacity and not merely on his own personal account. The plaintiff's requests for instructions raised no question on this point, but asked the court to rule that, "in order to constitute a valid withdrawal, the defendants must do some act or make some unequivocal or unconditional statement to the proper officer or officers of the associates which shall amount to a public withdrawal from said contract." The instructions were given with reference to this request, and, as we understand them, they amounted to this, that Mr. Tower having been chosen as president, and acting for the associates, was, on August 31, a proper officer to be notified by the defendants of their withdrawal.

We think this instruction was right. No instruction was asked at the trial that, in order to withdraw from the associates, notice must be given to all of them individually or at a meeting of the associates. The plaintiff only contended that the notice must be given to the proper officer or officers, and it would be plainly impracticable to require a direct personal notice to them all. The right to withdraw would be nugatory if this were necessary. A subscriber who has a right to withdraw may not know, or have the means of knowing, who all of his associates are, or where they live. If he does know, they may be many in number, and widely scattered, or some of them may be away on a journey. No general meeting of them may be called which he can attend without leaving the state. He need not wait for a meeting before giving his notice of withdrawal. It was, indeed, held, in an early case in England, that all of the other subscribers must not only have notice, but must actually consent, before one of the subscribers could withdraw. Kidwelly Canal Co. v. Raby, 2 Price 93. But, now, in England, as well as here, no such consent is necessary. If every one of the other subscribers should object, yet it is the right of the subscriber to withdraw before the corporation is formed. It is merely a question of giving due notice of his withdrawal. And in England it is not intimated in any modern case, so far as our examination has gone, that notice must be given to all the other subscribers, or at a meeting of subscribers. The retraction has usually been made to the same persons to whom the application for shares was made. See Lindl. Part. (4th ed.) 99–105, and numerous cases cited.

In this country no case has been cited, and we have found none, discussing the question what notice of withdrawal shall be sufficient. In some cases no attempt to withdraw was made till after the corporation was formed. See, for examples, International Fair and Exposition Association v. Walker, 83 Mich. 386; Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248; Ashuelot Boot and Shoe Co. v. Hoit, 56 N. H. 548; Shober v. Lancaster County Park Association, 68 Pa. St. 429. It is said in Cartright v. Dickinson, 88 Tenn. 476: "Before the organization of the corporation and acceptance of the subscription * * * the promoters might, perhaps, agree to release a subscriber by substituting other names for his." This goes on the idea that the subscriber has not an absolute right to withdraw, and that somebody's assent is necessary. In

Plank's Tavern Co. v. Burkhard, 87 Mich. 182, the subscriber apparently made known his refusal to the persons who brought a second paper to be signed by him, and it was held to be sufficient, but the proper mode of giving such notice is not discussed, and the court incidentally remarked that "the corporators well knew when the company was organized * * * that the defendants expressly repudiated the whole arrangement." It is held that the death of a subscriber before the formation of the corporation is a revocation of a subscription. Phipps v. Jones, 20 Pa. St. 260; Wallace v. Townsend, 43 Ohio St. 537; Pratt v. Elgin Baptist Society, 93 Ill. 475; Sedalia, Warsaw and Southern Railway v. Wilkerson, 83 Mo. 235. Insanity is also held to be a revocation in Beach v. First Methodist Episcopal Church, 96 Ill. 177. Death is a public fact, of which all the world must take notice, though the above decisions were not put on that ground (Marlett v. Jackman, 3 Allen 287), but insanity is not. In most of the cases where the right of withdrawal of a subscription has been held to exist, there is nothing to show that all the other subscribers were notified, and there has been no question as to the sufficiency of the mode in which the withdrawal was made. See, in addition to the cases above cited, Auburn Bolt and Nut Works v. Shultz, 143 Pa. St. 256; Muncy Traction Engine Co. v. Green, 143 Pa. St. 269; Garrett v. Dillsbury and Mechanicsburg Railroad, 78 Pa. St. 465; Strasburg Railroad v. Echternacht, 21 Pa. St. 220. An offer of reward made by public proclamation may be withdrawn in the same manner, and the fact that a claimant of the reward was ignorant of the withdrawal of the offer is immaterial. Shuey v. United States, 92 U. S. 73. And if not withdrawn by any express notice, a withdrawal is implied after the lapse of a considerable time. Loring v. Boston, 7 Met. 409.

In the present case, it seems to us that Henry Tower was a proper person to whom a withdrawing subscriber might give notice of his withdrawal. So far as appears in the bill of exceptions, there was no other officer or person who so well or fully represented the subscribers at large. He was at the head of the principal committee, and in addition to this he had been selected and chosen as president, and he was acting in behalf of the subscribers. There is nothing to show that the chairman of the meetings had any duties except merely as presiding officer at the meetings. Taking the case as it stood, and in view of the requests for instructions, which implied that the notice of withdrawal would of course be given to some officer, and of the fact that nobody else was suggested as the proper officer or person to receive the notice, the ruling of the court was right, that notice to him was sufficient; and the fact that the association did not come into legal existence as a fully-formed corporation till a later date does not render the notice to him insufficient, under the circumstances.

The plaintiff requested a ruling that the defendants could not withdraw after the associates had taken action on the strength of their

subscription. This was rightly refused, as was held in the former decision.

The plaintiff also asked an instruction that the defendants' offer was not conditional, and could not be made so by oral testimony. This instruction was given.

The evidence to which the plaintiff objected was properly admitted for the purpose for which it was received, and the instructions to the jury carefully limited it to that purpose, and confined the attention of the jury to the single point of the defendants' withdrawal of their subscription.

Exceptions overruled.

Note. See the following cases: 1857, Lake Ontario, etc., R. Co. v. Mason, 16 N. Y. 451, 463; 1868, Rose v. San Antonio, etc., R. Co., 31 Texas 49; 1875, Garrett v. Dillsburg, etc., R. Co., 78 Pa. St. 465; 1877, Gaff v. Flesher, 33 O. S. 107; 1885, Tilsonburg, etc., Co. v. Goodrich, 8 Ont. (Q. B. D.) 565; 1885; Cook v. Chittenden, 25 Fed. Rep. 544; 1885, Gulf, etc., Ry. v. Neely, 64 Texas 344; 1888, Muncy Traction Eng. Co. v. De La Green, 143 Pa. St. 269; 1891, International F. Ass'n v. Walker, 88 Mich. 62; 1893, White v. Kahn, 103 Ala. 308; 1893, Greenbrier Indus. Ex. v. Rodes, 37 W. Va. 738; 1893, Lewis, etc., v. Hillsboro, etc., Co., 23 S. W. (Texas) 338; 1894, Nehema Coal Co. v. Settle, 54 Kan. 424; 1895, Halifax C. Co. v. Moir, 28 N. S. 45; 1896, Providence, etc., Co. v. Kent, etc., Co., 35 Atl. (R. I.) 152; 1896, Re Hannan's, etc., Co., 74 L. T. Rep. 550; 1898, Common v. Matthews' Rap. Ind. Quebec, 8 B. R. 138. *But see*, 1896, Phil. & Del. Co. Ry. v. Conway, 177 Pa. St. 364. See, also, Beach, §§ 516–517; Clark, §§ 93–97; Elliott, §§ 344, 345*a*; Morawetz, §§ 49–51; Taylor, §§ 513–515; I Thompson, §§ 1162–1163, VII Thompson, § 8606.

Sec. 108. Same.

(*b*) Offer until acted upon in accordance with its provisions, then becomes binding.

THE PENINSULAR RAILWAY COMPANY v. DUNCAN.[1]

1873. IN THE SUPREME COURT OF MICHIGAN. 28 Mich. Reports 130–152.

Error to Kalamazoo Circuit.

COOLEY, J. This case presents the question whether one who becomes one of the original associates for the formation of a railway company, and signs a subscription agreeing to take a certain number of shares of the capital stock of the proposed company, and to pay therefor, "at such times and in such sums as the same shall be assessed, demanded and required to be paid by the directors of the said company," but who afterward fails for any reason to sign the articles of incorporation, or to subscribe for stock on the commissioners' books, can be held liable upon his preliminary subscription, after the com-

[1] Part of opinion omitted, also all of dissenting opinion of Campbell, J.

pany has been formed and assessments been made and payment demanded.

The question arises upon the first section of the act for incorporation of railroad companies, approved February 12, 1855, as amended in 1867. Laws of 1867, vol. i, p. 90. The plaintiffs insist that the signers of the preliminary subscription, whether they afterward sign the articles or not, if the corporation is duly formed, have the same absolute right to stock therein that those have who execute the articles, or to whom stock is awarded on subscriptions upon the commissioners' books; and that having a right to the stock, they are under a corresponding obligation to pay for it. On the other hand, the position of the defendants is that the preliminary subscription, though possibly a convenient step in the organization of a corporation, is by no means indispensable, but that the corporation originates with the articles of association, and that no one who previously had contemplated becoming a member, however strongly or in whatever form of words he may have expressed his intention to that effect, is bound by that expression, if, when the articles are to be signed, he declines to unite in them, or for any reason fails to do so, and thereby, expressly or by implication, elects not to become a member. Up to that time, it is insisted everything is provisional and inchoate; nobody is bound or can be bound without further vol ntary action of his own.

A consideration of the question thus presented is peculiarly embarrassing, in consequence of the totally different views which have been taken of it by able jurists in other states where similar statutes exist. We have examined the reported cases with care, and while we find many of the opinions able, and in the main well reasoned, yet as it is impossible to reconcile them, and none of them follows precisely the train of reasoning through which we have been led to our own conclusion, we have not deemed it advisable to review the cases in this opinion, but shall proceed, with such brevity as the case will admit, to present our own views.

It may be quite true, as is insisted on the part of the defense, that a preliminary subscription is not an indispensable requisite in the formation of a corporation under the general railroad law. If the requisite number of persons execute the proper articles, naming therein their directors, and attach thereto the affidavit required by the statute, verifying the fact that they are subscribers for the requisite amount of stock, and have paid to the directors five percentum thereon, it is difficult to perceive any ground upon which it could be plausibly contended that the corporation was not duly organized, or to suggest any important function that the preliminary subscription could have performed for such subscribers, and which in the particular case has not been performed without it. Nevertheless, a very cursory examination of the statute must convince any one that such a subscription, whether indispensable or not, is contemplated as a proceeding which will generally, at least, take place. This is evident from the expressions employed in the statute in conferring authority to organize. The persons who may incorporate themselves are "any

number of persons not less than twenty-five, being subscribers to the stock of any contemplated railroad." They are allowed to do so "when stock to the amount of $1,000 for every mile of said road so intended to be built" "shall be in good faith subscribed, and five per cent. paid thereon." There can not be subscriptions to the stock until something is in writing for the subscribers to sign. The statute gives no form for such a subscription; it indicates no machinery by means of which it is to be originated or signatures obtained. Everything is left to the voluntary action of the promoters of the enterprise, and whatever form of writing is satisfactory to them, and sufficiently indicates the general purpose sought to be accomplished, and the share the several subscribers are to take in it, would undoubtedly be sufficient.

By any such voluntary subscription to take stock, however, we should naturally understand some mutual agreement by which the promoters severally agree to take and pay for certain shares in the proposed corporation; something, in short, like or similar to the agreement which was actually entered into in the present case. *We do not understand that there would be any difficulty at the common law in enforcing the promises contained in an agreement of this general nature against the several promisors, where the object to be accomplished was lawful, where a beneficial purpose was in view, and where it was possible to make to the several promisors the return which their subscriptions called for.* In such cases the promises are mutual; acts are done and moneys expended in reliance upon the subscriptions, and the moment the promises are accepted by the organization and action of the corporation to which they are provisionally made, there can generally be no difficulty in their enforcement if the corporation then has it in its power to give the stock subscribed for, and offers to do so. In such a subscription thus accepted there would be all the requisites of a valid contract, proper parties and a promise made upon a legal and valuable consideration.

In this case, however, the question involved is not one to be settled entirely by the rules of the common law, but there is involved a question of statutory construction. It is argued by the defense that the terms of the statute are such as to make any preliminary subscription that may have been entered into entirely immaterial and nugatory the moment the articles are executed, and that promises therein contained are incapable of enforcement, because under the statute the subscribers are not entitled to stock in the corporation, and, consequently, do not receive a consideration for their promises. This construction arises principally upon one clause of the first section of the general railroad act, which, after providing what the articles of association shall contain, and for their being subscribed and recorded, declares that "thereupon the persons who have subscribed, and all persons who shall from time to time become stockholders in such company, shall be a body corporate," etc. The argument is that by the express terms of this statute only the subscribers to the articles and those who *subsequently* become stockholders in the manner provided by law—that is to say,

by subscribing for stock on the commissioners' books—can be stockholders or entitled to stock, and, consequently, the subscribers to the preliminary agreement who do not sign the articles are in terms excluded.

It is possible that a strict and literal interpretation of the statute would require this construction to be put upon it; but it does not necessarily follow that such a construction would be proper or even admissible. What we should seek here is the intention of the legislature and not the testing by nice rules of art the language employed. It may possibly appear, as is too often the case, that the legislation has been carelessly phrased, and will be perverted if tested by nice rules. There are two very strong reasons why the statute should not be so construed as to make the articles nullify the preliminary subscription if any other construction is admissible. The first is that it nullifies the mutual promises of the parties made for a beneficial object, and which, on grounds of public policy as well as mutual good faith, ought to be sustained and enforced, unless abandoned by common consent. The second is that, by rendering the preliminary subscription which the statute provides for, if it does not make necessary, a perfectly useless proceeding, it in effect, as has been well said in a leading case supporting this construction—Troy and Boston R. R. Co. v. Tibbits, 18 Barb. 304–305,—imputes folly to the legislature; an imputation we ought to be very slow to make, and never except upon the most imperative reasons.

Our own view, after a careful examination of the statute, is that the construction which excludes the subscribers to the preliminary subscription from corporate membership, is rather forced than otherwise. The statute does not say that the persons who have subscribed *the articles of association*, and those who shall, from time to time, become stockholders, shall be the corporation, but those "who have subscribed." Subscribed what? The very first words of the section provides that the *subscribers* to the stock of a contemplated road may incorporate themselves by complying with certain conditions. The subscribers here intended are unquestionably the subscribers to the preliminary agreement; and these *subscribers*, to use the words of the statute, when the necessary amount of stock is in good faith *subscribed* by them, are allowed to organize. These persons, then, are spoken of as persons who have *subscribed*, and their subscription contemplates that they are to have stock in the proposed corporation. The parties to the articles also subscribe them; their subscription is provided for by the same section, and theirs also contemplates that they are to have stock in the corporation. It is after these different subscriptions for stock are thus spoken of and provided for that the statute proceeds to say that those who have *subscribed* shall be corporators. What warrant have we for saying that one class of subscribers was intended and not the other?

The truth is, both classes were intended, because in contemplation of the statute the two were to be identical. The statute does not suppose there will be subscribers to the preliminary agreement who do

not sign the articles. It provides that after the requisite subscriptions are obtained, the subscribers may select directors, "and thereupon *they shall severally* subscribe articles of association." They are expected to subscribe the articles, and not merely that portion who may then, on considering the question as a new one, decide to take interests in the company.

It is not assumed that there will be any doubt or question that all who have mutually pledged themselves to each other to form a corporation for the object proposed will unite in the necessary steps for that purpose, and it does not therefore distinguish between the subscribers to the two papers because it supposes no distinction will exist.

We have, nevertheless, to deal with the case where a subscriber to the one has neglected or refused to sign the other; and the question is, whether such neglect or refusal precludes the attaching of any legal liability. We have the case of a subscription provided for by law, designed to accomplish an important beneficial purpose, subscribed by several parties in reliance upon their mutual promises, but which one perhaps elects to annul by not taking a certain further step which the statute contemplates he will take. The corporation to which the subscriber's promise was provisionally made has been called into being and has accepted his promise, and now offers to perform its part by giving the stock subscribed for if it has the power to do so. And the question is whether, in this exceptional case not provided for or contemplated by the statute, the subscriber may treat his preliminary promise as of no force.

A preliminary question will perhaps be, whether it possessed any force whatever, or, on the other hand, was to be looked upon as mere *nudum pactum*, without either parties or consideration, before the articles were signed. The necessary conclusion from the defendant's premises must be, as we think, that it was so. *We can not conclude, however, that such preliminary promises, made in accordance with the law, as a step in the accomplishment of a public enterprise, can be regarded as entirely without legal significance. If a subscriber pays his five per cent. upon his subscription, and it is received and retained by the custodian agreed upon by the associates, we think he has acquired some rights by such subscription and payment. He has acquired the important right to take part in the organization of the corporation, in the choice of directors, in the determination of the route, and in shaping the constitution of the company. These rights are often of high value, and might even be more so in a pecuniary point of view than the stock subscribed for is ever expected to be. It can not be said that a subscription and payment, which secure these important privileges, are of no force, nor ought it to be the case that the party making them may disaffirm his action at his own mere pleasure after other parties, more observant of their own stipulations, have taken further action which is unquestionably binding upon them, in reliance upon his promised assistance.*

In the present case it does not become necessary to discuss the

question whether a party who expressly revokes his subscription before the corporation is formed can be compelled to pay it afterward. Such a case is not, by the record, placed before us. *Undoubtedly if the corporation is never formed, the subscription becomes a nullity. No promisee in that case ever comes into existence. And if the subscribers are only twenty-five in number, any one of them may defeat the enterprise, by refusing to join in the articles, because twenty-five are made necessary by the statute.* It may, under some circumstances, be bad faith in a subscriber to do this, but he would unquestionably have the power. It would be equally true if a larger number of subscribers should subscribe only the requisite amount of stock, and any one might defeat an organization by refusing to sign the articles unless a further subscription could be obtained from some other source. *In these cases the subscriber is discharged, not for reasons personal to himself, but because on grounds of public policy corporate privileges are withheld from an association which does not furnish the required evidence of earnestness and ability to carry on the undertaking.*

The case at bar is neither of these. Here the corporation has not failed of organization, but a subscriber has failed, for some unexplained reason, to sign the articles with the others. We might suggest a great many possible reasons for the failure, some of which, unquestionably, would discharge him from all moral, as well as legal, obligation on his subscription. We might suppose, for instance, that the other subscribers considered him an undesirable associate, and for that reason refused to allow him to take part in organizing, while willing enough to receive his money afterwards. As already said, the stock proposed to be given by the corporation is not the sole consideration for his promise to pay, but he is entitled to the valuable privilege of a voice in determining the important questions to be settled by the articles, and if denied that by his associates he is absolved from all responsibility. But this defendant, for aught we know, may have had and enjoyed that privilege, and then failed to subscribe the articles for the express purpose of avoiding responsibility, or, on the other hand, because when sufficient subscriptions were obtained to perfect the organization it was deemed necessary or important to obtain further signatures. But as we do not know the reason, it is idle to indulge in suppositions. It is sufficient that the defense plant themselves on the broad ground that no original subscriber who fails to sign the articles can be bound by his subscription.

As it has already been seen that the preliminary subscription is in proper form for obligatory force as a mutual promise, and is provided for by the statute, if one who signs it must also sign the articles of association in order to render himself liable, the reasons for requiring this must be either: *First*, reasons personal to himself, and which render it unjust or inequitable that he should be held in the absence of any renewal of his promise by an execution of the articles; or *second*, reasons resting on considerations of public policy, and which, independent of any questions of justice or equity as between the individual

and his associates, require all subscriptions to the stock at the time of the organization to be represented by the signatures to the articles.

There can be no reasons of the first class, if the subscriber has participated in the organization, or has had the opportunity to do so. In such case, with the right to the stock, the subscriber has had, or might, at his option, have had everything promised him by his associates or by the corporation as the consideration for his promise to pay, and good faith to his associates whose action his promise may be supposed to have influenced more or less, and who keep on their part the promise mutually made, requires that he should keep it also. It may safely be assumed that they incur expenses for preliminary surveys, procuring subscriptions, pledges of rights of way, and such other matters as are necessary to enable them intelligently and properly to settle the questions which are to be determined by the articles, and if he allows these to be incurred while his promise stands unrevoked and in reliance upon it, the moral obligation on his part to fulfill his promise is very strong, and in the absence of any unfair dealing on the part of his associates ought to be regarded by him as imperative.

And we can not imagine any reasons of public policy for requiring all the preliminary subscribers to sign the articles, or for relieving from responsibility all who do not sign. As the articles constitute a more formal document than the preliminary subscription usually does, and set forth the definite particulars of the enterprise, it will be more satisfactory and conclusive of the precise work the subscribers propose to accomplish, and be less likely to leave questions open to dispute between the individual associates and the organization. The probability, however, that the preliminary subscription will be so vague and uncertain as to raise serious questions as to the actual intent can be no greater than the probability of like questions in innumerable contracts which are being made constantly, and in which it has never been thought even wise to require by law the observance of more formality. * * *

We suppose the statute to require the articles to be signed by at least twenty-five associates, representing subscriptions to the amount of a thousand dollars a mile, upon which five per centum shall have been paid in, in order that mere bubble enterprises shall not be allowed the apparent sanction of a legal organization, and be afforded the opportunity, not only to embarrass and perhaps preclude more substantial projects, but also to have facilities for annoying and perhaps defrauding the public by exercising the right of eminent domain, and by contracting debts in apparent execution of improvements which the means at command give no assurance of being carried out. The state requires this evidence of good faith and ability in the associates before it will endow their association with legal entity; but when these appear to the extent required, the demands of public policy in this regard are satisfied, and we do not see that the state has any concern in the question whether other associates representing more aid subscribe the articles or not. If the state is satisfied with subscriptions to a certain amount, but the projectors have in fact obtained

more, no very good reason can be suggested why the state should impose, as a penalty upon the corporation, that it shall not enforce such additional subscriptions unless the names are obtained to a certain paper required for the purpose of giving public evidence of certain facts already proved by previous subscriptions to the full extent required. And we are therefore forced to the conclusion that when such subscriptions are obtained to the articles as are necessary for the purposes of incorporation, if there are further subscribers to the preliminary subscription, who, for reasons of convenience to themselves, or because it was supposed to be unnecessary, or for any other reason than a previous withdrawal from the enterprise, shall neglect to sign the articles, such previous subscribers can not, on any ground of public policy, be held discharged from any obligation, either moral or legal, to fulfill their promises.

So far we have not discussed the question whether there can be any embarrassment in counting such preliminary subscribers among the stockholders. We do not see why there need be. The subscriptions, together with the articles of association, will pass to the hands of the proper officers, and they will furnish all necessary information to the commissioners, who are to receive further subscriptions for the balance of the capital stock, and apportion it if there shall be any excess. If we are warranted in so construing the statute as to include in the subscribers who are to be counted as corporators when the commissioners begin their labors, those who have subscribed preliminary subscriptions, as well as the subscribers to the articles, then the commissioners have only to receive the subscriptions for, and apportion such portion of the stock as is not represented by these two classes of subscribers. From the best consideration we have been able to give the statute, we think such a construction perfectly legitimate. Any other would make the preliminary subscription not what on its face it seems to be, a provisional offer for the acceptance of the corporation when formed, but only a provisional offer to make an offer if the subscriber at a subsequent time shall elect to do so. We are unwilling to conclude that the legislature, in pointing out the steps in the organization of a corporation, has indicated among them a proceeding so frivolous and futile. We think the subscribers, who, with those who subsequently associate themselves with them, are to be the corporators, are the subscribers to the original subscription; and though it is perfectly true that the statute supposes such subscribers will sign the articles also, it neither takes away their rights, nor absolves them from obligations for a failure to observe this formality, but *if the corporation is duly formed, on general principles applicable to such undertakings as the preliminary subscribers have entered into, they are liable for the fulfillment thereof in the absence of any provision of the statute which expressly or by necessary implication must have the effect to release them therefrom.* And our reading of the statute discloses no such provision.

In our discussion of the case so far we assume that the subscriber paid his five per cent. on the subscription. This, or something equiva-

lent, would be necessary to entitle him to participate in the organization, and if he fails to obtain that privilege the subscription would probably be ineffectual. He would not be one of the associates in in such a case. But if the requisite amount is paid by the other subscribers, we see no reason to doubt that credit might be given to him for this first payment, and he be admitted to all the privileges of the rest. What circumstances would be equivalent to the giving of credit by implication, in the absence of any express understanding to that effect, it would be out of place to discuss here. That there might be such circumstances is undoubted. The present record assumes that the intestate had become one of the original associates, and if any question of fact is to be raised upon that point, it must be presented upon the proper issue.

The declaration in this case sets out the original subscription, avers that defendant signed the same and agreed to take $1,000 of the stock of the proposed corporation, but it does not expressly say that he made any payment. It does aver, however, that the defendant, in consideration of his subscription, "and in consideration that stock to the amount of $1,000 for every mile of said Peninsular Railway Extension Company had been subscribed for and taken in good faith, *and five per cent. paid thereon as required by said act*, in consideration that said Peninsular Railway Extension Company was, to wit, on the third day of January, 1868, duly organized and became a body politic and corporate under the laws of the said state of Michigan, he, the said Delamore Duncan, then and there promised," etc. We are inclined to think that, under a demurrer such as has been interposed in this case, it must be assumed that the defendant had done whatever was necessary to perfect his subscription, and entitle him to participate as one of his associates in organizing, and that his failure to take part in that proceeding was not because of being wrongfully excluded. The allegation that five per cent. had been paid on the subscriptions may fairly be applied distributively, and the allegation that the corporation was duly organized would imply participation or the opportunity to participate in all the associates. And, though these facts are set forth by way of the recital merely, the declaration in this particular would be good on general demurrer at least, and also on a special demurrer aimed only at other defects. * * *

Our conclusion is that the demurrer ought to have been overruled. The judgment must, therefore, be reversed, with costs, and the cause remanded. And in view of the conclusions reached, it would be proper that the parties respectively have leave to file new pleadings.

GRAVES, J., and CHRISTAINCY, Ch. J., concurred; CAMBELL, J., dissents.

Note. See cases, *supra*, § 99, p. 456.

Sec. 109. Same.

(*c*) Binding contract from time of making.

THE TONICA AND PETERSBURG RAILROAD COMPANY v. McNEELY.

1859. IN THE SUPREME COURT OF ILLINOIS. 21 Ill. Rep. 71–72.

In 1856 a voluntary association, in the name and style of the plaintiffs, was formed for the construction of a railroad from Tonica to Jacksonville, in this state, contemplating an application to the next session of the legislature for an act of incorporation. Said association was organized by the election of officers, and subscriptions of stock, in shares of one hundred dollars each, were obtained in that year for a large amount. The intestate subscribed two shares and died some days before the incorporation of the plaintiffs. By consent of the parties this case was tried by the court, Harriott, judge, and the plaintiffs proved on the trial the organization of their company, calls by the directors for the whole of the stock, and notices to the stockholders by advertisements in two newspapers.

The court rendered judgment for the defendant below.

CATON, C. J. *A subscription made in contemplation of a charter to construct a railroad or to accomplish any other legitimate object is a valid contract between the parties, and as such may be enforced the same as any other contract.* The object of the contract is lawful and is founded on a good consideration, which is the mutual promise expressed in the contract. Upon the general principles of law by which all contracts are governed, we are at a loss to see what objections are to be urged to the enforcement of such a contract, which could not be urged to any other contract for the payment of a specified sum of money. There is no pretense in this case that the objects contemplated by the contract are not provided for by the charter, or that the charter which was obtained, or the organization or action under it were not in strict pursuance of the contract. No such defense has been insisted upon. But it is simply claimed that the contract was void—a *nudum pactum*. We are of opinion that where the objects of a contract are lawful, and it is founded upon a good consideration, and is entered into by parties capable of contracting, it creates a legal obligation, which may be enforced according to its terms. We know of no law against this proposition, but are very familiar with a great deal for its support.

The judgment must be reversed and the cause remanded.

Judgment reversed.

Note. See, 1816, Kidwelly Canal Co. v. Raby, 2 Price (Eng. Excheq.) Rep., p. 93, and cases cited, *supra*, § 99, p. 456.

Sec. 110. Same.

(*d*) An offer to the corporation, and a binding contract between the parties.

MINNEAPOLIS THRESHING MACHINE CO. v. DAVIS.

1889. IN THE SUPREME COURT OF MINNESOTA. 40 Minn. Reports, 110–117, 12 Am. St. Rep. 701, 3 L. R. A. 796, 26 Am. & Eng. Corp. Cas. 61, 41 N. W. Rep. 1026.

Plaintiff brought this action in the district court for Hennepin county, for installments alleged to be due from defendant as a subscriber to its capital stock. A jury was waived, and the action tried by Lorchren, J., who held that the defendant never became a subscriber, and ordered judgment in his favor. A new trial was refused, and the plaintiff appealed. The facts on which the question of the defendant's liability turned are stated in the opinion, the material parts of the subscription paper, exhibits A and B, therein mentioned, being as follows:

"Memorandum of agreement made and entered into between the undersigned, citizens of Minneapolis, Minn., each for himself, parties of the first part, and John S. McDonald, of Fond du Lac, Wis., party of the second part. The party of the first part, in consideration of the party of the second part moving his plant and machinery to the city of Minneapolis, to enter into the manufacture of threshing machines, horse-powers and engines, and for the purpose of forming a joint-stock company to engage in the manufacture of the aforesaid threshers and other machinery, * * * with a capital stock of $250,000, the aforesaid citizens of Minneapolis, parties of the first part, hereby subscribe to and severally agree to take and pay for, in cash, the amount of capital stock set opposite their respective names in a company to be organized as aforesaid for the purposes aforesaid. And the said John S. McDonald, hereby agrees, that whenever the amount subscribed, exclusive of his own, shall reach the sum of $190,000, he will subscribe to said capital stock the further sum of $60,000, payable in the manner specified in a certain proposition signed by him and attached hereto. The conditions upon which said subscriptions are made are as follows, to wit: *First.* No subscription is to be binding until the sum of $250,000 is subscribed, including the subscription of John S. McDonald. *Second.* The $190,000 subscribed by the citizens of Minneapolis to the capital stock aforesaid it is understood and agreed is to be paid in payments as follows, as soon as the company is organized. * * * The undersigned subscribe the amounts set opposite their respective names on condition that all the works of the company shall be located at Junction City, Hennepin county, Minn. John A. Davis, $5,000," (and others). "Proposition made by John S. McDonald referred to in the annexed memorandum: The said John S. McDonald is to subscribe

for $60,000 of the capital stock as follows. * * * John S. McDonald."

MITCHELL, J. This was an action to recover installments due on subscriptions to stock of the plaintiff. The facts fully appear from the findings of the court, in connection with exhibits A and B attached to the complaint. Those material for present purposes are that, a scheme having been started to organize a manufacturing corporation with $250,000 capital, whose works should be located at Junction City, near Minneapolis, and one McDonald having proposed that if the citizens of Minneapolis would subscribe $190,000 to the capital stock, he would subscribe the remaining $60,000, one Janney, a promoter, but not a subscriber to the stock of the proposed corporation, acting as a voluntary solicitor, having with him the subscription paper (exhibits A and B), about April 1, 1887, proceeded to canvass for subscriptions to the stock of the proposed corporation, on the terms and conditions embodied in the paper. He first applied to defendant, who subscribed $5,000 of stock. Afterwards, and about the same date, other citizens respectively subscribed to the stock, on the same paper, to the aggregate amount, including defendant's subscription, of $190,000, of which over $65,000 has been paid in to plaintiff. Thereupon McDonald, in accordance with his proposition, subscribed the remaining $60,000, which he has paid up in full. All the conditions expressed in the written subscriptions (exhibit A) having been fully performed and complied with, the proposed corporation was afterwards, about April 25, 1887, organized, and these subscriptions to its stock delivered over to it. The corporation, acting in good faith upon such subscriptions, including that of defendant, expended large sums of money in locating and constructing its works, and entered into large contracts, and incurred liabilities to the amount of over $75,000. During all this time, the corporation had no notice or knowledge of any condition being attached to defendant's subscription other than those expressed in the subscription paper itself. Neither is it found or claimed that any of the other subscribers to the stock had any such notice or knowledge. Defendant was not present at the organization of the corporation, and never attended or took part in any of its meetings, and had no notice or knowledge that the subscription paper had been transferred or delivered over to the plaintiff, or that the plaintiff relied on it, until about November, 1887, just prior to the commencement of this action.

Upon the trial the defendant was permitted, against plaintiff's objection and exception, to testify that he signed or subscribed to the stock only upon the express oral condition and agreement then had between him and Janney, that the latter should retain in his possession said agreement with his name signed thereto, and not deliver it to any one, or use it in any way, until certain four persons should subscribe to the stock, each in the sum of $5,000; that Janney took the agreement from defendant on that express condition and understanding, and not otherwise; that none of these four persons ever did subscribe to the stock of the plaintiff, and that defendant never author-

ized Janney or any one to deliver said agreement to any one except upon the condition referred to. The court found the facts to be in accordance with the testimony, and upon that ground found as a conclusion of law that defendant never became a subscriber to the plaintiff's stock. The competency of this evidence is the sole question in this case.

Under the elementary rule of evidence that a written agreement can not be varied or added to by parol, it is not competent for a subscriber to stock to allege that he is but a conditional subscriber. The condition must be inserted in the writing to be effectual. This rule applies with special force to a case like the present, where to allow the defendant now to set up a secret parol arrangement by which he may be released, while his fellow-subscribers continue to be bound, would be a fraud, not only upon them, but upon the corporation which had been organized on the faith of these subscriptions and upon its creditors. The defendant, of course, does not attempt to controvert so elementary a rule as the one suggested, but contends that the effect of this evidence was not to vary or contradict the terms of the writing, but to prove that there was never any delivery of it, and hence that there never was any contract at all, delivery being prerequisite to the very existence of a contract. His claim is that the subscription paper was given to and received by Janney merely as an escrow, or as in the nature of an escrow, only to be delivered or used upon the performance of certain conditions precedent, and that until they were performed there could be no valid delivery.

In determining this question it becomes important to consider the nature of a subscription to the stock of a proposed corporation, and the relation of the different parties to each other under the facts of this case. *A subscription by a number of persons to the stock of a corporation to be thereafter formed by them has in law a double character: First. It is a contract between the subscribers themselves to become stockholders without further act on their part, immediately upon the formation of the corporation. As such a contract it is binding and irrevocable from the date of the subscription (at least in the absence of fraud or mistake), unless canceled by consent of all the subscribers before acceptance by the corporation. Second. It is also in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, becomes as to each subscriber a contract between him and the corporation.* 1 Mor. on Priv. Corp., § 47, *et seq.;* Red Wing Hotel Company v. Frederich, 26 Minn. 112, 1 N. W. Rep. 827. Janney, the promoter, who solicited and obtained the subscriptions, occupied the position of agent for the subscribers as a body, to hold the subscriptions until the corporation was formed in accordance with the terms and conditions expressed in the agreement and then turn it over to the company without any further act of delivery on the part of the subscribers. The corporation would then become the party to enforce the rights of the whole body of subscribers. It follows then, that, considering the subscription as a contract between the subscribers, a delivery to Janney

by a subscriber was a complete and valid delivery, so that his subscription became *eo instanti* a binding contract. The case stands precisely as a case where a contract is delivered by the obligor to the obligee. It can not therefore be treated as a case where the writing has been delivered to a third party in escrow.

The defendant, however, attempts to bring the case within the rule of Westman v. Krumweide, 30 Minn. 313, 15 N. W. Rep. 225, in which this court held that parol evidence was admissible to show that a note delivered by the maker to the payee was not intended to be operative as a contract from its delivery, but only upon the happening of some contingency, though not expressed by its terms; that is, that the delivery was only in the nature of an escrow. We so held upon what seemed the great weight of authority, although the doctrine, even to the extent it was applied in that case, is a somewhat dangerous one. The distinction between proving by parol that the delivery of a contract was conditional, and that the contract itself contained a condition not expressed in the writing, is one founded more on refinement of logic than upon sound practical grounds. It endangers the salutary rule that written contracts shall not be varied by parol. Said Earl, J., in Pym v. Campbell, 6 El. & Bl. 370, in sustaining such a defense: "I grant the risk that such a defense may be set up without ground, and I agree that a jury should, therefore, look on such a defense with suspicion." And in all the cases where such a defense has been sustained, so far as we can discover, they have been cases strictly between the original parties, and where no one has changed his situation in reliance upon the contract and in ignorance of the secret oral condition attached to the delivery, and hence no question of equitable estoppel arose. Many of these cases have been careful to expressly limit the rule to such cases. Benton v. Martin, 52 N. Y. 570; Sweet v. Stevens, 7 R. I. 375.

Conceding the rule of Westman v. Krumweide, *supra*, to its full extent, there are certain well-recognized doctrines of the law of equitable estoppel which render it inapplicable to the facts of the present case. This subscription agreement was not intended to be the sole contract of defendant. It was designed to be also signed by other parties, and from its very nature defendant must have known this. Each succeeding subscriber executed it more or less upon the faith of the subscriptions of others preceding it. The paper purports on its face to be a completed contract, containing all the terms and conditions which the subscribers intended it should. When this agreement was presented to others for subscription, defendant had not only signed it in this form, but he had also done what, under the facts, constituted, to all outward appearances at least, a complete and valid delivery. He had placed it in the proper channel according to the ordinary and usual course of procedure for passing it over to the corporation when organized, and clothed Janney with all *indicia* of authority to hold and use it for that purpose without any other or further act on his part, untrammeled by any condition other than those expressed in the writing. In reliance upon this, others have not only subscribed to the

stock, but have since paid in a large share of it. The corporation has been organized and engaged in business, expending large sums of money and contracting large liabilities, all upon the strength of these subscriptions to its stock, and in entire ignorance of this secret oral condition which defendant now claims to have attached to the delivery. To permit defendant to relieve himself from liability on any such ground, under this state of facts, would be a fraud on others who have subscribed and paid for stock, upon the corporation which has been organized and incurred liabilities in reliance upon the subscriptions, and on creditors who have trusted it. The familiar principle of equitable estoppel by conduct applies, viz.: Where a person, by his words or conduct, willfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief so as to alter his own previous condition, he is estopped from denying the truth of such facts to the prejudice of the other.

We have examined all the numerous cases cited by the defendants' counsel, and fail to find one which, in our judgment, is analogous in its facts, or the law of which will cover the present case. The two which at first sight might seem most strongly in his favor, are Beloit and Madison R. Co. v. Palmer, 19 Wis. 574, and Ottawa, etc., R. Co. v. Hall, 1 Bradw. (Ill. App.) 612. But an examination of these cases will show that in neither did or could any question of estoppel arise, and in both the court held that the person to whom the instrument was delivered after signature was a stranger to it, so that it was strictly a delivery in escrow to a third party. Cases are cited where a surety signed a bond or non-negotiable note, and delivered it to the principal obligor, upon condition that it should not be delivered to the obligee until some other person signed it, and where, without such signature, the principal obligor delivered it to the obligee, and yet the courts held that the surety was not liable, although the obligee had no notice of the condition. Such cases seem usually to proceed upon the theory that a delivery to the principal obligor under such circumstances is a mere delivery in escrow to a stranger; the term "stranger," in the law of escrows being used in opposition merely to the party to whom the contract runs. It may well be doubted whether in such cases, where the instrument is complete on its face, the courts have not sometimes ignored the law of equitable estoppel. No such defense would be allowed in the case of negotiable paper, and it is not clear why the distinction should be drawn on that line. The doctrine of estoppel rests upon totally different grounds, and operates independently of negotiability, being founded upon principles of equity. But whether the cases referred to be right or wrong, we do not see that they are in point here. Our conclusion is that the court erred in admitting the evidence objected to, and for that reason a new trial must be awarded.

Order reversed.

Note. See 1896 Phil. & D. Co. R. v. Conway, 177 Pa. St. 364. Also citations to § 99, *supra*, p. 456.

Sec. 111. (3) Subscription to agent or trustee, for proposed corporation.

SAN JOAQUIN LAND AND WATER CO. v. WEST.

1892. IN THE SUPREME COURT OF CALIFORNIA. 94 Cal. Reports, 399–405; 29 Pac. Rep. 785.

Appeal from a judgment of the superior court of San Joaquin county and from an order denying a new trial.

The following is a copy of the body of the agreement referred to in the opinion of the court:

"We, the undersigned, hereby agree with each other, and the one with the other, that a corporation shall be formed by us under the name of 'San Joaquin Land and Water Company,' for the purpose of procuring water rights on one or more of the rivers or streams running through the counties of Calaveras, Tuolumne, Stanislaus and San Joaquin, in this state; * * * that the capital stock of said corporation shall be $1,000,000, divided into 10,000 shares of $100 per share; and we hereby agree with each other, and one with the other, that we will take the number of shares of the capital stock of said corporation which appears opposite our respective names hereunto subscribed, and will pay 20 per cent. of the par value of said shares so subscribed by us respectively in five (5) days after the articles of said incorporation shall have been filed in the office of the county clerk of said county of San Joaquin, and will pay the same to F. M. West, at the Stockton Savings and Loan Society Bank at Stockton, Cal. We hereby constitute said F. M. West as the agent to collect the amount which becomes due as aforesaid. We further nominate, constitute and appoint L. U. Shippee, J. L. Beecher, and George Gray, as our agents, and the agents of the corporation so to be formed, to negotiate for the purchase of any one or more water rights, canals, reservoirs, aqueducts, or water-ways for said corporation, and draw from said West any or all moneys that may have been paid to him by us respectively, by virtue hereof, and use said money for paying for same; and any and all contracts which our said agents may make in said matter shall be binding upon said corporation, and also upon us. Our said agents are further authorized to employ engineers and other assistance, and have them survey routes for such canals, and examine proper locations for dams, and do such other service as may be, in their opinion, for our best interest and the interest of said corporation to accomplish the object or purpose for which the same is to be formed.

"Dated November 19, 1887."

Further facts are stated in the opinion of the court.

HARRISON, J. The controversy involved in this action arises out of the construction to be given to the terms of an instrument executed between the subscribers thereto for the incorporation of the plaintiff,

and preliminary to such incorporation. The instrument itself was before this court in the case of West v. Crawford, 80 Cal. 19,[1] and there set out at length. It was then held that West was authorized to collect in his own name twenty per cent. of the amount that the parties to that instrument had agreed to subscribe to the capital stock of the plaintiff by reason of their express agreement therein to pay it to him. After that decision the subscribers paid their twenty per cent. to West, and at the commencement of this action he had in his hands of the amount so collected by him $35,861.25, for the recovery of which the plaintiff brought this action, as money had and received by him to and for its use and benefit. After the commencement of the action West, under the order of the court therefor, paid the money to the clerk of the court, to be held subject to the order of the court, and the appellants were substituted as defendants in his place, and answered the complaint. Upon the trial of the issues, the court rendered judgment in favor of the plaintiff, from which the defendants who were substituted for West have appealed.

1. The agreement in question is of that character which is not unfrequently made by the subscribers to a corporation prior to its actual incorporation, and as preliminary thereto, its object being for their mutual benefit and protection until the organization of the corporate body, and also for the ultimate benefit of the corporation. Upon the formation of the corporation such an agreement, with its advantages and rights, inures to the benefit of the corporation, irrespective of any agreement or want of agreement to that effect, and notwithstanding it may contain special provisions for carrying its own terms into execution.

By the express terms of this instrument, West was simply "the agent to collect the amount" which should become *due* to the plaintiff by virtue of the subscription to its capital stock which the parties to the instrument should make in pursuance of their agreement. By the instrument itself, the subscribers agreed to "take," i. e., to subscribe for, the number of shares set opposite their names respectively, and "to pay twenty per cent. of the par value of *said* shares so subscribed, and that they would pay 'the same' to West in five days after the articles of incorporation were filed. The only money which the subscribers agreed to pay to West was for the stock which they should subscribe for to the plaintiff, and West was simply constituted the 'agent' for the corporation, to collect the amount which should become 'due' under their subscription, and after its collection to hold it for the use and benefit of the corporation. By the same instrument, the subscribers appointed the appellants, together with one Shippee, as their 'agents,' and 'the agents of the corporation so to be formed,' with authority 'to negotiate for the purchase' of property 'for said corporation,' and draw from West any or all moneys paid to him, 'and use said money for paying for same.' " Giving to this language its reasonable construction, it was an authority to these three individuals, as agents of the subscribers prior to the organization of the corporation,

[1] See *infra*, p. 500.

to make negotiation for the purchase of property, and that upon the formation of the corporation their agency for the subscribers should cease, and thereafter they should act for the corporation. They could not be the agents of the subscribers and of the corporation for the same purpose at the same time, inasmuch as the interests of the subscribers as individuals would be adverse to the interests of the corporation. The instrument does not provide that the appellants with Shippee would at any time be the custodians of the money collected by West. They were only to "draw,' from him such money as they might need to use in paying for any property that they should purchase for the corporation, and as it is not claimed that they have negotiated for the purchase of any property for the corporation, there was no occasion for them to draw any of the money from West, or for him to deliver it to them. They, as well as West, were at all times after the incorporation of the plaintiff only its "agents," and having no interest coupled with their agency, it was competent for the plaintiff to remove them at any time, and appoint other agents in their places, or itself assume the custody and disposition of the money. The finding of the court, that, upon the incorporation of the plaintiff, the appellants not only ceased to act as agents of the subscribers, but that "before any of the moneys were paid to West they repudiated such agency, and refused to act under said appointment, and wholly abandoned the same," fully established the right of the plaintiff as against their claim to the custody of the money.

The appellants, however, contend that the court below in its judgment disregarded the construction given to the agreement by this court in its opinion in the case of West v. Crawford, 80 Cal. 19, and that it was then held that the plaintiff herein had no right to the custody of the moneys which might be collected by West under that agreement. While there is some language in that opinion that upholds this contention, the opinion must be construed with reference to the case before the court for its determination. That was merely whether West could maintain an action for the recovery of the twenty per cent. agreed to be paid by the subscribers, and his right to maintain such action was upheld upon the ground that the subscribers had made an express promise to pay it to him at a fixed date after the filing of the articles of incorporation. The only parties before the court were West and some of the subscribers, and the ultimate right to the custody of the money was not involved in the action. For the purpose of meeting the argument of the appellants therein, that the money belonged to the corporation, and could be collected only by it in the manner provided by statute for collecting assessments, it was stated in the opinion that it did not appear from the agreement that the corporation would ever be entitled to receive the money. It was not intended thereby to preclude the corporation from asserting its right to the money, nor could any statement in the opinion have that effect. The corporation was not before the court, and as its right to the money had not been submitted by it to the court for determination, it could not be estopped by any statement in the opinion from subsequently

asserting such right, and any statement in the opinion respecting its right to the money would be only a *dictum*, and not binding either upon the court or the corporation.

2. It was necessary that Shippee should have been made a party defendant. The action was brought originally against West to recover certain moneys which had been collected and were held by him for the use and benefit of the plaintiff. This money was paid into the court, and the appellants were substituted as defendants in the place of West, and in their cross-complaint they asked that the money be paid to them alone. Inasmuch as West held the money for the use and benefit of the plaintiff, he could not, by paying that money into court, change or diminish the right of the plaintiff to receive it, nor was its right in any respect affected by the substitution of the appellants as defendants in the place of West. The appellants, after having repudiated their agency, can not claim that Shippee's presence in court was essential to a determination of the plaintiff's right. Shippee and the appellants are in no respect trustees under the instrument for the purposes of carrying into effect any of its provisions. There was no trust created by the instrument other than such a trust as always exists between a principal and his agent, nor do the moneys in question constitute a trust fund to be disposed of under the directions of a court of equity. They are simply moneys belonging to the plaintiff, and which it has the right at any time to demand from its agent.

The judgment and order are affirmed.

GAROUTTE, J., and DE HAVEN, J., concurred.

Note. See note, p. 482.

Sec. 112. Same.

WORKS, J. Extracts from opinion in West v. Crawford, 80 Cal. 19, on pp. 27, 28, 29, 30, 31 and 32.

The action is not brought by a corporation, nor is this an attempt to enforce an assessment made by a corporation. The contract sued on is two-fold—it amounts to a subscription to the stock of a corporation, to be thereafter organized; and in addition, it is an express promise to pay *to the plaintiff in this action* twenty per cent. of the amount of such subscription. The simple question, then, is, whether or not this promise to pay the plaintiff can be enforced. The subsequent incorporation of the company named in the contract was a matter of no consequence, except that it fixed the time when the money should become due and payable, the agreement being to pay five days after the articles of incorporation should be filed. The subsequent action of the board of directors ordering the collection of twenty per cent. of the money subscribed was wholly unimportant. If this action is maintainable at all, it is not by reason of any such action on the

part of the corporation, but by virtue of the mutual promise of these parties to pay to the plaintiff the amount of money named. * * *

It is true, as contended by counsel for the appellants, that the mere signing of this agreement to subscribe to the stock of the corporation did not make the defendants members of such corporation. To do so the statute must have been complied with by the signing of the articles of incorporation, or otherwise complying with its provisions. (Troy and Boston Railroad Co. v. Tibbits, 18 Barb. 297; Erie and New York City Railroad Company v. Owen, 32 Barb. 616; Dorris v. Sweeney, 64 Barb. 639.)

But it seems to us that the question whether they thereby became members of the corporation or not is immaterial to this controversy. The right to recover here, as we have said, depends wholly upon their express promise to pay the money to the plaintiff in this action, and if the suit can not be maintained on that ground, it is quite clear to us that the judgment of the court below is erroneous. * * *

It is insisted that the agreement sued upon was not binding until all the capital stock had been subscribed for, but we see nothing in the agreement indicating such an intention on the part of the signers, nor does any reason occur to us for so holding. There are authorities to the effect that a party agreeing to subscribe to a certain number of shares of a corporation to be organized can not be held liable to pay assessments on his subscription until the whole of the stock is taken. (Steamboat Co. v. Seawell, 78 Maine 176; Oldtown and Lincoln R. Co. v. Veazie, 39 Maine 571; Atlantic Cotton Mills v. Abbott, 9 Cush. 423; Stoneham Branch R. Co. v. Gould, 2 Gray 277; Hughes v. Antietam Mfg. Co., 34 Md. 316.)

But the contract under consideration bears evidence of a different intention on the part of its signers. They contract to pay a sum of money to a third party and not to the corporation. We must presume that they contracted with knowledge of the fact that a valid incorporation of the company mentioned might take place under our code without the whole of the stock being subscribed. Therefore, it can not be presumed that their promise to pay was on condition that the whole of the stock should be taken. If this was their intention, it should have been expressed in the agreement.

The parties mutually agreed with each other, that is, with those who signed the contract, to pay a certain sum of money to the plaintiff. He was thereby made a trustee of an express trust and authorized to collect the money agreed to be paid. (Code Civ. Proc., § 369; Winters v. Rush, 34 Cal. 136; Considerant v. Brisbane, 22 N. Y. 389.)

The parties, by their mutual agreement, made the plaintiff *their* trustee to collect and receive the money to be paid. He was not in any sense the trustee of the corporation. There is nothing to indicate that the money was ever to go to the corporation. On the contrary, the contract shows on its face that it was not. When collected by the plaintiff it was to go into the hands of the other trustees, to be used by *them* in the purchase of water rights. How these water rights are

to be transferred to the corporation, if at all, is not stated, but this omission can not affect the liability of the parties to pay their debt. Their mutual promise, one to the other, was a sufficient consideration for the promise of each, and the contract was valid and binding. (Twin Creek and Turnpike Co. v. Lancaster, 79 Ky. 552; Christian College v. Hendley, 49 Cal. 347; George v. Harris, 4 N. H. 533, 17 Am. Dec. 446; Amherst Academy v. Cowls, 6 Pick. 427, 17 Am. Dec. 387; Funk v. Hough, 29 Ill. 145.)

Note. Compare Lake Ontario, etc., R. Co. v. Curtiss, 80 N. Y. 219; Quick v. Lemon, 105 Ill. 578.

See 23 Am. & E. Encyc., p. 800; Beach, § 519; Clark, p. 272; Cook, §§ 57-69; Elliott, § 347; Morawetz, §§ 47, 66; I Thompson, § 1245.

Sec. 113. (4) Underwriting.

IN RE LICENSED VICTUALLERS' MUTUAL TRADING ASSOCIATION. EX PARTE AUDAIN.[1]

1889. IN THE ENGLISH COURT OF APPEAL. L. R. 42 Chancery Division, 1–8, 26 A. & E. C. C. 217.

After a company called the Licensed Victuallers' Mutual Trading Association, Limited, had been formed, but before its shares had been fully offered to the public, George Rudall, an agent of the company, applied on its behalf to Claude Audain, a stock broker and financial agent, who traded as Holloway & Co., to "underwrite" a portion of its shares, which were of the nominal value of £1 each, and an agreement was entered into between them, which was embodied in two letters dated the 19th of March, 1888.

The first of these letters was written to Holloway & Co. by George Rudall, and was as follows:

"GENTLEMEN—In consideration of your underwriting £10,000 'A' shares in the Licensed Victuallers' Mutual Trading Association, Limited, at 15 per cent. discount, I, acting on behalf of the company, undertake that all the applications which have been received up to the present time, or may be received within one week of the closing of the lists, shall be allotted in full from the said 10,000 shares underwritten by you. Yours truly, GEORGE RUDALL."

The second letter was written to George Rudall by Audain, and was as follows:

"DEAR SIR—Referring to your favor of even date, copy of which we inclose, we hereby agree to underwrite £10,000 'A' shares in the Licensed Victuallers' Mutual Trading Association, Limited, on the terms therein named. Yours faithfully, HOLLOWAY & Co."

"P. S. We further agree to pay the application money upon any balance of shares required to make up the 10,000 within one week's date. HOLLOWAY & Co."

[1] Statement of facts abridged; arguments and opinions of Lindley and Bowen, L. JJ., omitted.

On the 14th of April, 1888, the company proceeded to allotment, and 8,555 shares were, in pursuance of the agreement thus constituted, and without any further application for them being made, allotted to Claude Audain under the name of Holloway & Co. Notice of such allotment was given to him on the same day.

On the 17th of April Claude Audain returned to the company the notice of allotment which had been sent to him, and at the same time wrote to the secretary declining to take the shares.

On the 23d of May a resolution was passed for the voluntary winding-up of the company, and on the 16th of July an order was made that the voluntary winding-up of the company should be continued under the supervision of the court.

On the 17th of August, 1888, the liquidator settled the name of Holloway & Co. on the list of contributories in respect of these 8,555 shares.

Claude Audain then applied to be removed from the list of contributories, and his motion for that purpose came on before Mr. Justice Chitty on the 20th of December, 1888.

Mr. Justice Chitty considered that the letter (Mr. Audain's letter of the 19th of March, 1888) must be treated as an application for so many of the 10,000 shares to which the underwriting agreement extended as might not be applied for by the public, *i. e.*, for the 8,555, and that whatever question might have been raised at the time, the case was merely the common case struck at by the 25th section of the Companies Act, 1867. The parties, his lordship said, were apparently not aware of the fact that issuing shares at a discount of 15 per cent. was beyond the powers of the company; and he held that the application, not having been made until after the winding up, must be refused with costs.

From this decision Claude Audain appealed.

COTTON, L. J. This is an appeal from the refusal of Mr. Justice Chitty to relieve the appellant from liability in respect of a number of shares which had been allotted to him in a company now being wound up, as the balance required to make up a certain number of 10,000 shares. The substantial question is whether the appellant is or is not under any liability at all in respect to the shares so allotted to him. That question turns upon the contract, and the contract, if any, is to be found in the underwriting agreement which was entered into between the appellant and the agent of the *Licensed Victuallers' Mutual Trading Association*. From the evidence which has been given as to the meaning of the expression "underwriting" as applied to shares, it appears that an "underwriting" agreement means an agreement entered into before the shares are brought before the public, that in the event of the public not taking up the whole of them, or the number mentioned in the agreement, the underwriter will, for an agreed commission, take an allotment of such part of the shares as the public has not applied for. That is what is meant when it is said that a person has agreed to "underwrite" a certain number of shares in a company, and that is, in my opinion, what was meant by the term "underwrite"

in the present agreement. "Underwriting" is a well-known thing in connection with the formation of companies. The appellant, in agreeing to "underwrite" a certain number of shares, has agreed to do this particular thing, and, in my opinion, he is just as much bound in equity as if the thing which he was to do had been set out at length in the contract which was entered into. (His lordship then read the letters of 19th March, 1888, and continued): It appears to be the usual course that some formal application should be made for the shares, and it is said that there should have been some formal application made for allotment of the shares in the present case. But the postscript to the letter writtten by the appellant shows that he considered that what he had done amounted to an application, and that he himself treated the letter not only as a guarantee, but as an application to take the balance of the shares required to make up the £10,000.

A further question arises as to the meaning of the expression underwriting "at 15 per cent. discount." It appears from the evidence that the expression "discount" is an unusual term in connection with the underwriting of shares, and that it is not a term to which any meaning of art can be given; and it further appears that under an underwriting agreement a commission is paid on all the shares to which the agreement applies, whether taken by the public or by the underwriter himself. But the court must put a construction on the word. And I think that upon the fair construction of the words used, they mean not "discount" in the proper sense of the term, but merely "commission," the amount to be paid to the underwriter in respect of the shares which he underwrote. It is not really a sum to be deducted from the nominal amount of the shares when they are applied for and allotted, but a sum to be paid on all the shares underwritten. "That being so, it was not an agreement to allot shares at 15 per cent. discount, but to pay 15 per cent. commission to the appellant in consideration of his having made the contract with the company. I think, therefore, that the decision of Mr. Justice Chitty was right in not removing the appellant's name from the register in respect of these shares. The appeal must accordingly be dismissed.

Note. See Cook, § 15.

Sec. 114. (5) Application, allotment and notice.

IN RE FLORENCE LAND AND PUBLIC WORKS COMPANY, NICOL'S CASE.[1]

1885. IN THE ENGLISH COURT OF APPEAL. L. R. 29 Chancery Division, 421–447.

[The Florence Land and Public Works Company, Limited, was incorporated on the 25th of January, 1866, under the Companies Act,

[1] Statement abridged. Only part of opinion of Chitty, J., of the Chancery Division is given. Arguments and the opinions of Baggallay, Bowen and Fry, L. JJ. of Appeal, affirming Chitty's decision, are omitted.

1862, with a nominal capital of £500,000, divided into 25,000 shares of £20 each. The object of the company was to purchase a concession granted to Mr. H. D. Davies by the municipal corporation of the city of Florence.

Negotiations having been commenced with the Agra and Masterman's Bank to open a credit for the company for a large sum of money, the bank consented to the proposal on condition that a certain number of shares were *bona fide* subscribed for. In consequence of this a memorandum of agreement was prepared in the following terms:

"We, the undersigned, hereby consent and agree to take the number of shares in the capital of the above company set opposite to our names, and to pay the sum of £8 per share into the hands of the bankers of the company on or before the 1st of February, 1867, and we further agree to sign the articles of association when required.

"25th January, 1866."

This memorandum was signed by seventy-one persons, among whom Mr. Tufnell signed for 250 shares, Mr. Ponsonby for 250, and Mr. Joseph Wilkinson (who was not a subscriber of the memorandum of association) for 100. The solicitor of the company having advised that this memorandum of agreement would not be sufficient to constitute the subscribers shareholders without an allotment of shares to them, a letter of allotment, signed by the secretary of the company, was sent by order of the board on the 12th of April, 1866, to each subscriber in the following form:

"Sir,

"I beg to inform you that the directors have allotted you —— shares in this company.

"In accordance with the memorandum of agreement signed by you, you will have to pay to the Agra and Masterman's Bank, Limited, the bankers of the company, on or before the 1st day of February, 1867, the sum of £——."

The total number of shares thus allotted was 20,220.

The names of the allotees, however, were not entered on the register of members, and no share certificates were issued to them; nor was any money paid by them in respect of the shares.

In June, 1866, the Agra and Masterman's Bank stopped payment, and the above mentioned memorandum and letters of allotment appear to have been treated as inoperative.

By an indenture, dated the 23d of March, 1869, and made between the company of the one part and H. D. Davies and J. T. Campbell of the other part, an arrangement was made under which it was agreed that the company should pay Davies and Campbell £80,000, and should allot them or their nominees 24,350 shares, on which £10 each should be taken as paid, and that Davies and Campbell should release the company from all claims upon them. This deed was registered on the 21st of April, 1869. In accordance with this agreement the board of directors, on the 6th of April, 1869,

passed a resolution cancelling the allotment of 20,200 shares, and allotted 24,350 to Davies and Campbell and their nominees.

On the 21st of April, 1869, a return was made for the first time to the registration office of the 25,000 shares in accordance with this allotment, and similar returns were made in each year until the winding up of the company. On the 16th of November, 1877, an order for winding up of the company was made on a petition presented in the month of July previous. At that time the register of shares comprised the whole capital of 25,000 shares, with £10 paid on each share, which were divided between fifteen persons. Wilkinson's name did not appear on the register.

Wilkinson died in October, 1868, having appointed J. Nicol his executor.

The official liquidator now applied to the court to rectify the register by striking out 100 of the shares of H. D. Davies, and entering them as the shares of Wilkinson.

The summons was heard before Mr. Justice Chitty on the 26th of November, 1883.]

CHITTY, J. This is an application by the official liquidator to place the executor of Mr. Wilkinson upon the list of contributories for 100 shares. Mr. Wilkinson's name had never been on the register of the members of the company; from the year 1869 downwards, the register of members has been filled up, and all the shares of the company appear to be held by members of whom Mr. Wilkinson is not one. The liquidator has proved to my satisfaction that, in the year 1866, there was a complete contract to take shares on the part of Mr. Wilkinson. The contract is shown in this way: There is what was termed an "agreement" signed by Mr. Wilkinson and other gentlemen by which they consented and agreed to take a number of shares in the company set opposite their names. That, of itself, of course, was not an agreement. In point of law that was only an offer, and the offer required acceptance on the part of the company. Beyond all question the company accepted it; they accepted it possibly by their having handed the document itself to the Agra and Masterman's Bank, who were able to make advances. However that may be, the company clearly accepted the offer in the manner I am about to mention. In the usual way the directors met, and they resolved to allot the shares to the persons mentioned in what I have already called the "offer," including Mr. Wilkinson, and they notified that to Mr. Wilkinson. Accordingly there was a complete contract on the part of Mr. Wilkinson, also binding on the company, to take 100 shares. The form of the resolution was, that the directors allotted 100 shares to him, and the argument before me has proceeded to a great extent on the meaning of the word "allot." There is no difference, as has been often pointed out, between a contract to take shares and any other contract. What is termed "allotment" is generally neither more or less than the acceptance by the company of the offer to take shares. To take the common case, the offer is to take a certain number of shares, or such a less number of shares as may be allotted.

That offer is accepted by the allotment either of the total number mentioned in the offer, or a less number, to be taken by the person who made the offer. This constitutes a binding contract to take that number according to the offer and acceptance. To my mind there is no magic whatever in the term "allotment" as used in these circumstances. It is said that the allotment is an appropriation of a specified number of shares. It is an appropriation, not of specific shares, but of a certain number of shares.

It does not, however, make the person who has thus agreed to take the number of shares a member from that moment; all that it does is simply this—it constitutes a binding contract under which the company is bound to make a complete allotment of the specified number of shares, and under which the person who has made the offer and is now bound by the acceptance is bound to take that particular number of shares. In most cases the act of placing the person who has agreed to become a member on the register is a mere matter of form, and may be described as a mere ministerial act; but it appears to me that in point of law, all that is done by the process I have indicated, and all that was done in this case, was to make a complete and binding contract.

As Lord Justice Baggallay said in *In re* Scottish Petroleum Company,[1] "to constitute a binding contract to take shares in a company when such contract is based upon application and allotment, it is necessary that there should be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of such allotment having been made." There Lord Justice Baggallay used the term "allotment" in what appears to me to be the proper sense of the term. It is only as constituting one of the steps which go to form a complete contract. There have been other cases in which the term has been used by judges, but I am satisfied that all they meant was that there had been, in the particular case before them, complete allotment; that is, that the name of the person who had "agreed to become a member," to use the language of the 23d section of the act, had been entered upon the register. Where the contract exists and no question of delay or acquiescence arises, I repeat that the placing of the name of the person who has agreed to become a member upon the register is a mere formal act, and it may be performed at some considerable interval of time. In most cases it is, of course, the duty of the directors immediately after the so-called allotment, that is to say, the notification of the acceptance of the offer, to place the person's name on the register of members.

In this case, as I have said, the register, since the year 1869, has been filled in so as to exhaust the total number of shares which could be taken in the company, and Mr. Wilkinson's name is not to be found on the register. What apparently was done was this: In 1869 the directors resolved to cancel the former allotment, and made new allotments to the extent I have mentioned; and they made a complete

[1] 23 Ch. D. 413, 430.

allotment by entering upon the register the names of the persons who had thus agreed in 1869 to become members in respect of the whole of the shares.

The question really turns upon the act of parliament. I may state that, according to my recollection, the term "allotment" is not even mentioned in the act anywhere. The term "allotment" is a popular term; it is not a technical term occurring in the act of parliament itself. The 23d section says: "The subscribers of the memorandum of association of any company under this act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned." Now, stopping there, the decisions are quite clear that, where a person has signed the memorandum, and afterward the company have made a complete allotment of all the shares in the company by entering on the register the names of other persons who also agreed to become members, in the winding up the court will not place even the person who has signed the memorandum on the list of contributories. Why is that? Because the portion of the section which I have read makes the signing of the memorandum the agreement, and then requires the further proceeding of placing that person's name upon the register as a member. That is the construction which has been adopted by the courts, and is settled law, with reference to the earlier part of the 23d section. The second part of the section is this: "And every other person who has agreed to become a member of the company under this act, and whose name is entered on the register of members, shall be deemed to be a member of the company." The effect of the legislation in this part of the section is identical with the legislation in the earlier part, the only difference being that the signing of the memorandum is by statutory enactment to be deemed to be a contract to take shares, whereas in the case of other persons you must have an actual contract to take the shares; and in both cases the name is to be entered upon the register of members.

It seems to me that all the decisions in the earlier part of the session apply with full force to the case which is now before me. If anything, this is an *a fortiori case*, seeing that the eigtheenth section of the act enacts that "the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate." The persons who have subscribed the memorandum do at once constitute a corporate body. Again, the language of that section tallies with that of the twenty-third section. It is not "together with such other persons as may from time to time agree to become members," but "together with such other persons as may from time to time become members."

The result, therefore, appears to me to be quite clear that the liquidator is in the position in which the company would have found itself if there had been no winding up, and the company were endeavoring to enforce specific performance of this contract. The answer, of

course, would be plain: there has been such delay before the winding up—eight years or more having been allowed to elapse, and this application not having been made until within a recent period—that the court would refuse to enforce specific performance. On that ground alone this application fails. If the persons who had agreed to become members had acted as shareholders the consideration would have been entirely different; but both parties, that is to say, the company on the one side and Mr. Wilkinson on the other, have acquiesced in this state of things, that Mr. Wilkinson should not be treated as a member. He has never on any occasion attempted to assert his right, and he seems in the year 1869, when the act of cancellation took place, to have submitted to it; but whether he submitted to it or not, it is quite plain, since then, that he has acquiesced, and that if he or his executor were to come now and say, "I am a member; put me on the list of contributories, because there will be a surplus to be divided in the winding up of this company," his application would be refused, just as much as I think the application of the liquidator ought to be refused now.

I should say, that, to avoid any technical question, I allowed the summons to stand over in order to serve the other persons whose names appear upon the register. They do appear; they have argued that there is no case against them made for rectifying the register; they claim to be allowed to hold the shares which they purport to hold for the long period I have mentioned, namely, from 1869; and therefore it is impossible for me to exercise the power which is conferred upon the court in the winding-up, to rectify the register of members as against them, or, indeed, as I think, against Mr. Wilkinson. The result is that the application fails.

I ought to say this, that, although these directors have not power to accept a surrender of the shares, yet they were the managers of the company, and if the company itself have, just as in the case of any ordinary individual corporation that has entered into a contract of which specific performance is sought either by them or against them, created an equity against themselves; and this is an equity in which Mr. Wilkinson, by resisting what is in substance a suit for specific performance, is setting up, and it appears to me successfully. Therefore, no question arises as to the act of the directors being *ultra vires*, because they have no power to accept surrenders. It appears to me that Mr. Wilkinson's executor has succeeded, and I therefore refuse the application.

Note. See 23 Am. & Eng. Ency. p. 791; Beach, § 514; Cook, §§ 23–56; Elliott, § 351. Re London and Northern Bank, 81 L. T. R. 512.

Sec. 115. (6) Estoppel. (See McCarthy v. LaVasche, 89 Ill. 270, 31 Am. Rep. 83, *supra*, p.253.)

Note. Voting alone is not sufficient to estop. 1882, Burgess v. Seligman, 107 U. S. 20; 1887, Union Sav. Ass'n v. Seligman, 92 Mo. 635, 1 Am. St. Rep. 776.

FORM OF SUBSCRIPTION TO STOCK IN A CORPORATION TO BE FORMED.

The following is suggested as a form for such subscription:

This agreement entered into among the parties whose names are undersigned witnesseth:

That for and in consideration of the advantages arising to each of us from concert of action through the form of a corporate organization, and of the mutual promises and agreements herein contained, made each for himself and with each of the others who have heretofore or who do hereafter sign this agreement, subscribing for shares of stock in the corporation to be hereafter formed, and of the further consideration of the efforts made and to be made by [John Smith, and, etc.,] in procuring signatures hereto subscribing for stock in said proposed corporation, upon the terms herein contained, and aiding in incorporating and organizing the same, and of the further consideration of $1 by each of us paid to each of the others, the receipt whereof is acknowledged,[1] do hereby covenant and agree to form a corporation such as hereinafter indicated, and do hereby, under our hands and seals[2] (hereby severally agreeing that one seal shall be the seal of each), subscribe to the stock of such corporation the amounts set opposite our names, and do hereby constitute and appoint the said [John Smith, etc.,] our agents and attorneys to procure such subscriptions, and aid in organizing such corporation (for which services said Smith, et al., are to receive the sum of ——— dollars, to be borne by each of the parties hereto in the proportion the stock subscribed by him bears to the total stock subscribed, or for which services said Smith, etc., are to receive ——— shares of the stock of such corporation, fully paid up) agreeing hereby to pay to said Smith, etc., ———, or, at their request, to said corporation, the sum of ——— dollars upon each share subscribed, when the sum of ——— dollars shall be subscribed, or at such time thereafter as they shall designate upon ——— days' prior notice, for the purposes hereinafter set forth.

This agreement shall become operative only in case the sum of ——— dollars shall be subscribed.

The name of said corporation shall be ———;

The location of the principal office shall be ———;

The purpose of such corporation shall be ———;

The amount of capital stock shall be ———, in shares of ——— dollars each, to be paid for as follows: [——— dollars upon request of agents herein named as above set forth, the balance upon call of directors in such sums and at such time as the directors of such corporation shall designate upon ——— days' previous notice].

Said corporation shall be organized under the laws of the state of ———.

[1] It would seem that such a provision was useless, but Mr. Taylor, Law of Private Corporations, § 94, does not think so. Hence its insertion here.

[2] Mr. Taylor, § 94, and Prof. Langdell, in Summary of Contracts, § 186, think the agreement should be under seal.

Names.	Seals.	No. of Shares.	Amount.
.....	.....	.....	.....
.....	.....	.....	.....

For form of World's Fair subscription contract, see 1 Cook Corp. (4th ed.) p. 190.

ARTICLE IV. FORMS. CONDITIONAL SUBSCRIPTIONS.

Sec. 116. Conditions may be express or implied.

ANDERSON ET AL. v. MIDDLE AND E. T. CENTRAL R. CO.[1]

1891. IN THE SUPREME COURT OF TENNESSEE. 91 Tenn. 44, 17 S. W. Rep. 803.

Appeal from chancery court.

LURTON, J. A number of subscribers to the original stock of the defendant company have joined in filing this bill for the purpose of enjoining suits at law upon their several contracts of subscription. The corporation, expressly waiving all questions of jurisdiction, answers, and submits the liability of complainants to the judgment of the court, and by cross-bill seeks a recovery against each of them. The learned chancellor was of opinion that no liability existed, and perpetually enjoined suits at law, and dismissed the cross-bill. In support of this decree a number of propositions have been urged.

* * *

2. The capital stock was fixed by the corporators, at a meeting held for purposes of organization, at $3,000,000. Something less than $50,000 of this had been taken when this bill was filed. Complainants' contention is that, until the whole of the stock is taken, they can not be made liable for calls on their subscriptions. It is well settled that there is an implied condition that the amount of stock specified in the charter, articles of association, or contract of subscription, or fixed by the corporators when authorized to settle same, shall be actually taken before the subscribers shall become liable. Read v. Gas Co,, 9 Heisk. 545; Mor. Priv. Corp., § 156; Burt Priv. Corp., § 535. This implication may, however, be rebutted by the terms of the charter, or the provisions of the enabling act, articles of association, action of stockholders or corporation fixing capital, or by the conditions of the contract of subscription. So a subscriber may waive such condition, and this waiver may be either express or implied. A waiver will generally be implied if the subscriber consents to the letting of contracts, the creation of debt, or the doing of any

[1] Part of opinion and arguments omitted.

corporate act involving the necessity of calling in the subscribed stock, unless the charter expressly forbid the doing of any corporate act until the requisite capital is taken. Mor. Priv. Corp., § 156; Burt Priv. Corp., § 535, and authorities cited. There is nothing in the charter or resolution fixing the amount of capital stock, or in the original contract of subscription, rebutting the usual implied conditions, and taking their contract of subscription out of the general rule of law. But, after the original subscription had been made, a majority of the subscribers entered into the following agreement: "For the purpose of enabling the Middle and East Tennessee Central R. Co. to put their road under construction from the Chesapeake and Nashville Railroad to Hartsville, Tenn., the undersigned subscribers to the capital stock of the said M. & E. T. C. R. Co. agree that they will pay their said subscriptions as fast as the work progresses, provided that not more than 25 per cent. shall be called for in any one month." Upon the faith of this agreement the directors let out a contract for the construction of the very part of the projected line contemplated by this agreement, being eleven and one-half miles, and covering the route between the Chesapeake and Nashville road and the town of Hartsville. The contractors were shown this supplementary agreement, and, upon the faith of it, accepted a contract to construct so much of the road as was agreed to by that paper, and had completed about 70 per cent. of the work when this suit was begun. The obvious effect of assenting to this agreement was to waive the implied condition that the whole of the stock should be raised, and was an undoubted agreement that the work should begin at the Chesapeake and Nashville Railroad instead of the town of Gallatin. Some of the complainants did not sign this agreement, and are not shown to have assented, by votes or otherwise, to the commencement of work or the creation of debt. There is proof that at a meeting of subscribers it was unanimously resolved that the directors should let out a contract for that part of the line between Gallatin and Carthage, but it is not shown that the complainants who failed or refused to sign the agreement above set out in any way participated in this meeting, or that their stock was represented. We therefore decide that such of complainants as did not sign the agreement assenting to the beginning of the work between the Chesapeake and Nashville Railroad and the village of Hartsville are not now liable to have their stock called. The remainder of the complainants have expressly agreed to the beginning of construction and to the payment of their stock as work progressed, and as to them this implied condition has been waived.

3. Certain other positions remain to be considered as to those of complainants who have waived the condition that the full capital stock should be raised. It is said that the defendant company is now insolvent, and that the original scheme for a route from Gallatin to Knoxville can not be carried out, and that the enterprise has been dwarfed to a short link, beginning eight and one-half miles from Gallatin, and terminating at Hartsville. It is urged that the charter provided for a road beginning at Gallatin, and not at a point on the Chesapeake and

Nashville road, eight and one-half miles from Gallatin, and that it should terminate at Knoxville, and not at the town of Hartsville; that complainants are business men and property owners in Gallatin, and that the scheme into which they entered contemplated a great through road, passing through the coal-fields of the Cumberland Mountains, and connecting their city with other lines of railway and with the flourishing city of Knoxville. They further insist that to procure their subscriptions the officers and agents of the company represented that no calls would be made upon their subscriptions until the company had secured a contract whereby, if it should build to Carthage, it could consolidate with a road thence to Knoxville, to be built by a Mr. Crawford, and that no call should be made until the Chesapeake and Nashville road was constructed into Nashville, and a running arrangement made by which the trains of the defendant company should be carried into Nashville over the track of the Chesapeake and Nashville; that none of these things have been done, or are now possible; and that, therefore, they should not be held liable. The company, for answer to the objection as to the beginning point of the road under construction, interpose an alleged amendment to the charter, fixing the beginning point at the Chesapeake and Nashville Railroad, near Gallatin. This amendment was obtained in 1884, upon application of the directors, as provided by the act of 1875, as amended by the act of 1883, ch. 163. It was duly registered in Sumner county, but appears never to have been registered with the secretary of state. This neglect makes the amendment, even if otherwise valid, ineffectual and void. An amendment must be registered as the original, and, until this is done, is subject to the same objection which renders void a defectively registered charter. Brewer v. State, 7 Lea 682. Another amendment was obtained pending this suit, changing the termini to the Chesapeake and Nashville Railroad near Gallatin, and the town of Carthage in Smith county. This amendment seems to have been in all respects properly registered. By it the capital stock was reduced to $350,000. This reduction does not help the case, inasmuch as it is not shown that even this has been taken, to say nothing of other objections not necessary to consider. Without passing upon the validity of this second amendment, we are of opinion that, whether valid or invalid, the complainants are estopped to question their liability as subscribers. They expressly agreed that, to enable the company to put under construction the line between the Chesapeake and Nashville Railroad and town of Hartsville, they would pay their subscriptions as that work progressed, in calls of 25 per cent. monthly. It is too late now to say that the line has not been begun at Gallatin, or that it can not be carried beyond Hartsville. We know of no reason why this company might not have begun the work of construction at any point on the line between Gallatin and Knoxville. If its finances should prove insufficient to connect the part so constructed with the charter termini, this ought not, in law or equity, to relieve the subscribers who assented to the beginning of so

great an enterprise upon so insufficient a capital. The representations made to induce subscriptions were all made antecedent to the written contract of subscription, and upon this ground, as tending to contradict the written contract, were excluded. This ruling was doubtless correct. * * * Decree reversed as to all complainants, except Anderson, Miller and Thompson.

Note. See Denny Hotel Co. v. Schram, 6 Wash. 134, 36 Am. St. R. 137, *infra*, p. 553; Angell & Ames, §§ 146, 543; Beach, §§ 531–41; Boone, § 110; Clark, §§ 107–9; Cook, §§ 77–89; Elliott, §§ 352–9; Morawetz, §§ 78–93; Taylor, §§ 517, 518–21; I Thompson, §§ 1235–42; VII *Ib.*, § 8612.

That all stock must be subscribed before any subscriber, who is not estopped by his own acts, shall be called upon to pay anything except for preliminary or organization expenses, see 1827, Salem Mill Dam Corp. v. Ropes, 6 Pick. (Mass.) 23; 1854, Stoneham Branch R. Co. v. Gould, 2 Gray (Mass.) 277; 1872, Peoria & R. I. R. Co. v. Preston, 35 Iowa 115; 1876, Warwick R. Co. v. Cady, 11 R. I. 131; 1878, Allman v. Havana R. & E. Co., 88 Ill. 521; 1879, Banty v. Buckles, 68 Ind. 49; 1885, Halsey Fire Eng. Co. v. Donovan, 57 Mich. 318; 1886, Rockland Mt. D. & S. S. Co. v. Sewall, 78 Maine 167; 1887, Haskell v. Worthington, 94 Mo. 560; 1889, Anvil Mining Co. v. Sherman, 74 Wis. 226; 1891, Association v. Walker, 88 Mich. 62, 49 N. W. 1086; 1894, Stearns v. Sopris, 4 Colo. App. 191; 1895, McKay v. Elwood, 12 Wash. 579; 1898, Cusick v. Bartlet, 91 Maine 153; 1898, McFarland v. West Side Imp. Assn., 56 Neb. 277, 76 N. W. 584. But see 1855, York, etc., R. v. Pratt, 40 Maine 447; 1878, Cheraw, etc., R. v. White, 10 S. C. 155; 1891, Hamilton v. Clarion, etc., R., 144 Pa. St. 34.

This rule, however, does not apply to subscriptions to authorized increases of stock. 1856, Nutter v. Lexington, etc., R., 72 Mass. 85; 1877, Clarke v. Thomas, 34 O. S. 46; 1886, Delano v. Butler, 118 U. S. 634; 1889, Avegno v. Citizens' Bank, 40 La. Ann. 799; 1891, Bank v. Eaton, 141 U. S. 227; 1891, Port Edwards, etc. R. v. Arpin, 80 Wis. 214.

Sec. 117. Express conditions may be attached to subscriptions made (1) before, or (2) after incorporation. Payment of deposits.

TAGGART v. THE WESTERN MARYLAND R. COMPANY.[1]

1866. IN THE COURT OF APPEALS OF MARYLAND. 24 Md. Reports, 563–597, 89 Am. Dec. 760.

Action by railroad company to enforce stock subscriptions.

BOWIE, C. J., delivered the opinion of the court.

The general assembly, at January session, 1852, incorporated "The Baltimore, Carroll and Frederick Railroad Company," with a clause prescribing certain preliminaries usually observed in opening the books and taking subscriptions for stock, prior to the organization of a company, among others, the prepayment of $1 per share on every share subscribed; also, requiring the road therein contemplated to be commenced within three years and finished within ten from the passage of the act, otherwise the same should be null and void. Books

[1] Arguments omitted; statement of facts, except as appears in opinion of court, omitted. Part of opinion relating to other points, omitted.

were opened by the commissioners, the requisite number of shares subscribed, a board of directors and a president were elected and the company fully organized.

After this organization the appellant, on the 28th of April, 1853, subscribed for ten shares, in one of the subscription books, held by Mr. Johnson, upon *the terms and conditions prescribed therein* and the charter, with this condition annexed: "*Provided*, The said contemplated road should be built on the then present track of the then existing branch to 'Green Spring,' of the Baltimore and Susquehanna Railroad," but did not pay the sum of $1 per share, required by the charter to be paid to the commissioners, at the time of subscribing.

The name of the corporation was subsequently changed, by act of assembly, to that of "The Western Maryland Railroad Company." The defendant's subscription, with others, was returned to the stockholders, and classified among the conditional subscriptions. The construction of the road not having been commenced within the time prescribed by the original charter, the act of 1856, ch. 289, was passed, waiving all claims of forfeiture, by reason of the company's failure to comply with any of the provisions of the act of incorporation, and allowing six years for the commencement, and twelve from the passage of the act for the completion of the road.

The "Green Spring" branch of the Baltimore and Susquehanna Railroad was adopted by the appellee on the 31st of March, 1857, and the road put under contract for construction. No calls were made for payment of subscriptions until the 25th of June, 1857. The appellee never indicated, affirmatively, any intention of abandoning the work of the appellant; never affirmatively withdrew his subscription, or attended any meeting of the stockholders or subscribers to the stock.

Several calls for installments having been made and refused, this action was brought on the 1st of February, 1861. The prayers offered by the plaintiff (now appellee), and granted by the court, present three negative propositions:

1. That the change in the corporate name of the appellee by the act of 1853, ch. 37, is not a bar to the present action.

2. That upon the finding of the facts therein before specified, the non-payment of $1 per share by the defendant, at the time of his supposed subscription, *is not of itself a bar* to the present action.

3. That the failure to commence the work within three years from the act of incorporation (1852, ch. 304), the act of 1856, ch. 289, being duly passed and accepted by the stockholders of the plaintiff, is not a bar to this suit.

The first proposition is admitted, but the second and third propositions are specially denied by the prayers of the defendant, which were rejected by the court, and constitute the ground of this appeal.

The first and third prayers of the appellant are the converse of the appellee's second; the appellant's second prayer, of the appellee's third.

The learned counsel differ as to the range of the first and third

prayers. The appellee contends they present only the question of the effect of the non-payment of the cash installment of $1 at the time of the subscribing; on the other hand, it is insisted they embrace the conditional character of the subscription, and the validity of such. It is observable that these prayers refer specifically to the subscription, in the following terms: "And that *the defendant made the subscription offered in evidence by the plaintiff*," etc., as one of the facts upon which the proposition of the defendant was based. This specific reference in each of the prayers under consideration was not merely introductory to the other facts connected with it, but called for an examination of the subscription itself, its character and conditions.

The subscription of the appellant is not set out in terms in the bill of exceptions, but referred to as a conditional subscription. In the *narr.* and appellee's brief, it is set out "*in totidem verbis*," as thereinbefore cited.

Assuming that the evidence, offered by the plaintiff (and refused to the defendant in his prayer), corresponds with the subscription set out in the *narr.*, the legal sufficiency of such subscription was necessarily brought before the court by the first and third prayers of the defendant, whether the right of action depended on the prepayment of the deposit or the conditional character of the subscription itself. The supposed contract being in writing, its validity was a question for the court, and however the latter view may have been overlooked in the discussion of the former, it seems necessarily involved at the disposal of these prayers.

The first point presented by the prayers arises under the third section of the act of 1852, ch. 304, incorporating the appellee, which directs that "upon every subscription, there shall be paid at the time of subscribing, to the company or their agents, appointed to receive such subscription, the sum of $1 on every share subscribed." As there are other cases involving the construction of this section, we are requested to interpret it, not only as it may operate upon the facts in this case, but upon subscriptions made to commissioners or their agents, prior to the organization of the company. It is contended that this clause applies peculiarly and solely to the latter class of subscriptions, as to which, it is only directory and not indispensable. The class of cases maintaining the contrary, it is insisted, originated in the decision of the case of Jenkins v. The Union Turnpike Company, 1 Caine's Cases in Error 86, by the court of errors in New York, which was contrary to the better opinion (as it said) of the supreme court of New York, and make only a "*suite d'erreurs.*" The defect or vice of the original decision is not pointed out, but it is impeached as emanating from a court, constituted of laymen, as well as lawyers, and of less authority than the tribunal whose decision it reviewed and reversed. A decision not universally adopted, but questioned, doubted and overruled. We are invoked not to follow such precedents, upon a mere comparison of facts, but to apply the judicial mind to a consideration of the principles of law applicable to them.

With the earnest exhortation in view, we have examined the series of cases referred to, and will concisely state the result.

The controlling principle, on which those cases are founded is, that all charters or acts under which highways are erected, and franchise and privileges conferred, are deputations of public power or authority to be strictly construed. The subscription for stock must be founded on a valid consideration, and constitute a contract binding on both parties "*eo instanti.*" The promise of the subscriber being based on the promise or expectation of becoming a stockholder, if the right to the stock is not consummated by payment of the deposit, the obligation to pay the subscription is not binding.

Chancellor Lansing, treating the act under which the subscription was made in that case as a public law, the provisions of which he must notice officially, whether pleaded or not, thus defines the duties of the commissioners:

"From the record it appears that commissioners were appointed by the statute to perform certain duties particularly described. They were to receive subscriptions and to receive for the benefit of the defendants (in error) $10 on each share of the stock of their company. The plaintiff (in error) subscribed, but it does not appear that he paid. At the time these steps were taken the corporation described in the act was not in existence. It was incapable of contracting. The acts to be performed by the commissioners were merely preparatory to its creation. To give effect to their acts, their power must be strictly pursued. * * * They were directed to exact from the persons who were to be admitted members of the corporation, both subscription and payment, as a condition precedent to their admission. If they omitted either to subscribe or to pay, they did not come within the terms of admission." 1 Caine's Cases in Error 94.

Tilghman, C. J., in the case of The Hibernia Turnpike Company v. Henderson, 8 Serg. & Rawle 219[1] (which was a subscription to commissioners before the organization of the corporation), enlarged upon the principles of public policy, which required a rigid adherence to the letter of the law and strict compliance with the requisition of prepayment in all subscriptions made to commissioners. "If (he says) persons are permitted to subscribe without the previous payment of $5 a share, large subscriptions may be made, which could not otherwise have been made, by those who are anxious to give a direction to the road, which may benefit themselves at the expense of the public. * * * The case will be reduced to this simple question: Can a contract be enforced in a court of justice which was made in violation of an act of assembly? It is not the first time this question has been asked in this court, and it has received but one answer: it can not be enforced." He refers to the decision of the court of errors in New York, 1 Caine's Cases in Error, as settling the law in that state.

Gibson, J., concurred, replying to the argument (which has been urged in this case), that prepayment was a condition which might be waived, it being intended only for the benefit of the corporation. He

[1] 11 Am. Dec. 593.

asks, "What was the consideration for the charter? Undoubtedly the benefit which was expected to result to the public, not the profit that might be made by the stockholders. The state, therefore, was a party, and had an interest in preventing the scheme from being turned into a bubble," etc., Hibernia Turnpike Co. v. Henderson, 8 Serg. & R. p. 225. "The design of the deposit was to prevent the subscription list from being filled with the names of nominal stockholders and the creatures of others." *Id.* 226. * * *

"Every contract, where the consideration is promise—for promises must be obligatory on both parties, or both will be at liberty to recede—and the promise which is the consideration of that on which the action is brought, must be such as the plaintiff had power by law to perform. I do not say there was an express promise here that the defendant should enjoy the rights and privileges of a corporator; but certainly that was understood as being the consideration on which he subscribed. But the company could introduce no one as a member in any other way than that pointed out in the act of incorporation," *id.* p. 227; "if they could, it would be requisite that the defendant's title should have been good when he subscribed; otherwise the contract would be without mutuality; and if he acquired no right which he could enforce against the will of the plaintiffs, he incurred no responsibility," *id.* 228.

In Crocker v. Crane, 21 Wend. 211, the question being whether the commissioners, appointed to open books to receive subscriptions, were authorized to receive checks of subscribers in payment of the sum required to be paid at the time of subscription, Cowan, J., said: "I am, therefore, strongly inclined to the opinion that the check in question was void, as contrary to the policy of the statute. Nor can there be any doubt, I imagine, that the contemplated corporation, if I am right as to the facts, failed of going into existence for want of the proper payments as a *condition precedent.*" Such is the doctrine laid down by Chancellor Lansing, in Jenkins v. Union Turnpike Company, 1 Caine's Cases in Error 94, and recognized by this court in Goshen Turnpike Co. v. Hurtin, 9 Johns. Rep. 217, and Highland Turnpike Co. v. McKean, 11 Johns. Rep. 98; Dutchess Cotton Manf'y v. Davis, 14 Johns. Rep. 238.

These cases go further; each subscriber must pay as a condition to his own liability attaching. Payment was a requisite which the commissioners could not waive. Starr v. Scott, 8 Conn. Rep. 483.

The case in 21 Vt. Rep. 30,[1] cited by the appellee, to the contrary, has several peculiar features which distinguish it from the class of cases requiring prepayment of the deposit, as essential to the contract. The defendant, in that case, was one of the original associators, and had signed an instrument prior to the act of incorporation, by which the subscribers agreed to take, and did take, the number of shares affixed to their respective names. The defendant subscribed for fifty shares of the stock. The note in question was given for the first $5 payable on each respective share, which was received in settlement of the first installment; by the subscription paper it appears

[1] Vermont C. R. Co. v. Clayes.

there were several subscribers for stock prior to the defendant, and by the act of incorporation each subscriber *per se* became a corporator.

These facts were deemed sufficient to show the corporation was "*in esse* at the time of taking the note, and capable of taking the promise through their agents, the commissioners." Upon all these peculiar circumstances, it was held the action on the note was maintainable.

The learned judge delivering the opinion of the court, though questioning whether the opinion of the supreme court or court of errors, in the case 1 Caine's Cases 86, was the better opinion, distinguishes that case from the one under his consideration.

The case in 16 B. Monroe 5,[1] declaring prepayment of the deposit to the commissioners, is not essential to the validity of the subscription, presents the anomaly of a decision founded on a case previously and notoriously reversed without apparent knowledge of the reversal. The judge in delivering the opinion says: "The decision of the court in the case of the Union Turnpike Company v. Jenkins, 1 Caine's Rep. 381, sustains the views expressed in this opinion, and it is only the opinion of the dissenting judge that is cited in Angell & Ames on Corporations, and referred to by the counsel for the appellants." He seems wholly unaware that the opinion of the dissenting judge had been affirmed by the court of errors, and that of the majority of the supreme court on which he relied, overruled.

The 20th Ill. 656,[2] deciding in the same way, relies only on 16 B. Monroe 5 and 21 Vt. Rep. 30, which we have before shown was marked by very peculiar features, distinguishing it from the Union Turnpike Company v. Jenkins, and therefore not in point.

The case in 17th Ohio 191 [3] cited to the same point by the appellee is a mere dictum, sustained by neither authority nor reason.

It would appear from this comparison of the cases cited, that Jenkins v. the Union Turnpike Company, 1 Caine's Cases 86, has not been overruled, or abandoned in principle, in succeeding cases within the same category; but it has been questioned, criticised and departed from, where the facts would warrant a departure.

It is still recognized as a leading case, not only in the state of New York, but in several other states, with such weight of authority and reason as commands our respect in similar cases.

If not expressly adopted in this state, it has been referred to in terms which recognized the principles on which it was decided as properly applied under the circumstances.

In the case of Elysville Manufacturing Co. v. Okisko Company [4] it was objected that the appellant had no power under its charter to subscribe to the stock of the appellee, and if it had, the one before the court was not binding, because at the time of the subscription, the cash payment was not made, In support of the latter proposition the case 1 Caine's Rep. 381 [5] was relied on. This court said that case is

[1] Wight v. Shelby R. Co., 63 Am. Dec. 522, *infra*, p. 536.
[2] Illinois R. Co. v. Zimmer.
[3] Henry v. Vermillion & A. R.
[4] 5 Md. 151.
[5] Union Turnp. Co. v. Jenkins.

clearly distinguishable from the one before us. There, no payment was made either at the time of subscription or thereafter by the person whom it was attempted to make responsible on his subscription, while here the whole amount of the subscription was paid; in other words, it is a completely executed contract. In the case referred to, the court evidently founded their decision on the want of mutuality. "The subscriber, not having paid in conformity with the authorized terms of the subscription, could not have compelled the transfer of the stock to himself, he not having in any way, in part or in whole, performed the contract." 5 Md. Rep. 159.

The preponderance of authority in favor of a strict compliance with the provisions of the charter, in cases of subscription, prior to the organization of the company, is such as is not to be disregarded. This court has said, "there is no doubt that in general a strict compliance must be shown with the provisions of the charter, but in some cases a compliance will be presumed and in others it may be waived." 16 Md. Rep. 444.[1] *The distinction between subscriptions prior and subsequeut to organization is clearly recognized in 9 Md. Rep. 568,*[2] *in this language:*

"*Commissioners are appointed to receive subscriptions to stock for the purpose of giving the subscribers a right to organize as a corporation under the charter. So soon, however, as the organization takes place, the authority of the commissioners ceases; and all corporate powers conferred by the charter, vest in the body politic. Such, at least, is the general rule, applying in every case where there is no special provision to the contrary. It was further held, that in that case there were no provisions requiring the corporation after organization, to have subscriptions taken by commissioners and in no other mode.*"

Hence, in this case the corporation being organized by the subscription of the necessary proportion of stock, and election of officers, succeeded to the power previously vested in the commissioners, to sell and dispose of the remaining shares, without regard to the conditions imposed on them. The act of the agent taking the subscription, being recognized by the corporation by receiving and registering the subscription, among the conditional subscriptions, was equivalent to a previous appointment of the agent for that purpose.

The objection that the subscription was void because conditional and contrary to public policy is strongly supported by the authority cited by the appellant. 1 Hill 518;[3] 18 Barbour 318.[4] But these cases turn upon the provisions of the local statutes, and the subscriptions were made to commissioners prior to the formation of the companies, for the most part. The first ground upon which the validity of conditional subscriptions has been impeached in the cases before cited, viz., that a contract to be binding must be "concurrent and obligatory upon each at the same time" (as decided in 18 Barb. 318, *supra*,

[1] Maltby v. Northwestern Va. R.
[2] Plank R. Co. v. Hoffman.
[3] Butternuts T. Co. v. North, *infra*, p. 525.
[4] Macedora P. R. Co. v. Lepham.

and 21 Wend. 139 [1]) has been in more recent cases abandoned, and it is said that such a subscription is a continuing offer until withdrawn.

But when the offer was accepted the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiff constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting in order to perfect a valid contract on the part of the defendants. It was precisely the same as if the parties had met at the time of the acceptance, and the offer had then been made and accepted, and the bargain completed at once. Boston & Maine R. v. Bartlett, 3 Cush. 227; Conn. & Pass. R. v. Baily, 24 Vt. Rep. 478; Troy Academy v. Nelson, 24 Vt. Rep. 189.

The second objection, that conditional subscriptions are contrary to public policy, is said to be peculiar to New York, and not followed in other states. *Vide* Pierce on Railways, p. 71. In 15 B. Monroe, 235,[2] the court finds the power of the corporation to accept such conditional subscriptions under the clause of the charter of the company in that case, authorizing the president and directors to dispose of their unsubscribed stock for the benefit of the company, and declares it does not seem to be prohibited by sound policy; that such construction is sanctioned by general usage under similar provisions in other charters. *Vide* also, 16 B. Monroe 364,[3] to the same effect. This conclusion seems to follow necessarily, from the doctrine that a conditional subscription is but a continuing offer, which is final and absolute when accepted; all subscriptions becoming thus ultimately unconditional and absolute.

If the corporation after organization may dispose of their stock without limitation, except so far as expressly restrained by their charter, and a conditional agreement when accepted is equivalent to an absolute contract, it would seem a necessary consequence that all contracts for stock in consideration of a particular location, when complied with by the company, would be as binding on both parties as if the contract had been absolute and unconditional.

For however adverse to public policy such conditions prior to the formation of the corporation, the location and construction of the road is the peculiar province and duty of the president and directors, and a contract made by them in execution of their corporate power must be presumed to be made in promotion of the public interest, unless shown to the contrary. * * *

Judgment affirmed.

Note. As to theories in regard to payment of deposits, see Boyd v. Peach Bottom R. Co., 90 Pa. St. 169, *infra*, p. 522; Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4, *infra*, p. 536; Webb v. B. & E. R., 77 Md. 92, *infra*, p. 528. There is much conflict as to the necessity of paying the statutory deposit upon subscriptions at the time the subscriptions are made. One line of authorities, and perhaps the best, holds that *payment is unnecessary*, the theory being that

[1] Utica & S. R. Co. v. Brickerhoff.
[2] McMillan v. Maysville & L. R. Co., 61 Am. Dec. 181.
[3] Henderson & N. R. Co. v. Leavell.

the provision is for the benefit of the corporation only, and so may be waived by it: 1843, Red River Co. v. Young, 6 Rob. (La.) 39; 1858, Illinois R. Co. v. Zimmer, 20 Ill. 654; 1864, Chamberlain v. Painesville, etc., R. Co., 15 O. S. 225; 1874, Minnesota & St. L. R. v. Bassett, 20 Minn. 535; 1882, Pittsburgh W. & K. R. Co. v. Applegate, 21 W. Va. 172; 1893, Bibb v. Hall, 101 Ala. 79; 1893, Union Water Co. v. Kean, 52 N. J. Eq. 111; 1895, Albright v. Texas, etc., R. 8 N. M. 110, 422, 42 Pac. 73; 1898, Yonkers Gazette Co. v. Taylor, 30 App. Div. (N. Y.) 334. On the other hand, many other authorities hold that *payment is necessary*, on the theory that the provision is for the protection of the public from "*bubble*" schemes by irresponsible parties. 1804, Jenkins v. Union T. P. Co., 1 Caines Cas. (N. Y.) 86; 1814, Highland T. Co. v. McKean, 11 Johns. (N. Y.) 98; 1822, Hibernia T. R. Co. v. Henderson, 8 Serg. & R. 219, 11 Am. D. 593; 1856, Fiser v. Miss. & T. R. Co., 32 Miss. 359; 1861, Wood v. Coosa, etc., R. Co., 32 Ga. 273; 1880, State Ins. Co. v. Redmond, 3 Fed. R. 764; 1887, Perry v. Hoadley, 19 Abb. N. C. (N. Y.) 76; 1892, Burlington v. Bur. W. Co., 86 Iowa 266; 1896, Gen'l Elec. Co. v. Wightman, 3 App. Div. (N. Y.) 118; 1896, First Nat'l Bank v. Cornell, 8 App. Div. (N. Y.) 427. See, also, Beach, § 515; Boone, § 112; Clark, § 116; Cook, §§ 172–5; Elliott, § 355; Morawetz, §§ 71–2, 739, 742–3; Taylor, §§ 98, 516; I Thompson, §§ 1216–32.

Sec. 118. Same. (1) Prior to incorporation, theories:

(*a*) Subscription valid, condition void.

BOYD v. PEACH BOTTOM RAILWAY CO.[1]

1879. IN THE SUPREME COURT OF PENNSYLVANIA. 90 Pa. St. Rep. 169–172.

May 6, 1879. Before SHARSWOOD, C. J.; MERCUR, GORDON, PAXSON, WOODWARD, TURNKEY and STERRETT, JJ.

Error to the court of common pleas of Lancaster county, of May term, 1879, No. 58.

Assumpsit by the Peach Bottom Railway Co. v. Samuel Boyd, on a subscription to the capital stock of said company. The company was incorporated by the act of March 24, 1868, Pamph. L. 778, with all the powers and subject to all the restrictions prescribed by the act regulating railroads, enacted February 19, 1849. The proviso to the first section of the latter act is as follows:

"*Provided, always*, That no subscription for such stock shall be valid unless the party or parties making the same shall, at the time of subscribing, pay to the said commissioners $5 on each and every share subscribed, for the use of the company."

Commissioners were named in the act of incorporation to open books, receive subscriptions and organize the company. At the trial the plaintiff offered in evidence a subscription book, in form as follows:

"We, the undersigned, agree with one and another and bind ourselves, our heirs, executors and administrators to the Peach Bottom Railroad Company to the number of shares of stock set opposite our respective names in the capital stock of said company, provided the

[1] Arguments omitted.

road be constructed upon what is known as the Northern route, connecting with Philadelphia and Baltimore Central Railroad at Oxford, Chester county, and passing near Hopewell, Pine Grove, White Rock, King's Bridge, Smedley's Mill, Centreville, Chestnut Level and along Fishing creek to its mouth, and provided these subscriptions be spent on the east side of the Susquehanna river. * * * Samuel Boyd, two shares."

There was no evidence to show that the defendant had signed his name thereto. The signature produced was in ink.

John A. Alexander, the treasurer of the company, called by the plaintiff, testified: "The name, as it first appeared there, was in leadpencil; there was a number of names written in leadpencil, and they were becoming defaced by carrying the book in my pocket, and I afterward wrote them in ink over the pencil marks." He further said: "I went to Mr. Boyd's on the 29th of October, 1870, and told him that, to secure our letters-patent, it was necesary for the commissioners to certify to the governor that 10 per cent. of the subscriptions were paid in; that we, not collecting any money, and, as the work had not yet begun, were taking demand notes; Mr. Boyd gave me his demand note for 10 per cent. of his two shares of stock, and I gave him a receipt for the same.

This note was delivered, by Mr. Alexander, to the commissioners, and they afterward certified to the governor a list of subscribers, including the name of Samuel Boyd for two shares. Letters-patent were issued to the company, in which he appeared for two shares. Whether Samuel Boyd wrote the leadpencil name or not was not shown.

He never paid any money on this alleged subscription, nor did he ever pay said note or any part of it. The subscription produced contained a condition that the road should be built on a particular route. It was not built on this route, but on an entirely different one. The original route would have been of great advantage to Boyd, while the one on which the road was built was of no benefit to him.

The defendants offered no evidence, but asked for a nonsuit, which the court, Patterson, J., refused and directed a verdict for plaintiff. The defendant took this writ, alleging that the court erred: First, in overruling the motion for a nonsuit, and, second, in directing the jury to find for plaintiff.

Mr. Justice Sterrett delivered the opinion of the court, June 16, 1879.

The commissioners appointed to open books and receive subscriptions to the capital stock of the defendant in error were public agents, clothed with limited powers and duties of a purely ministerial character, clearly defined by law. By the act of March 24, 1868, incorporating the company, it was invested with all the powers, and made subject to all the provisions and restrictions prescribed by the general act of 1849, regulating railroad companies. One of these provisions is that no subscription shall be valid unless the party making the same shall, at the time of subscribing, pay the commissioners $5 on each

and every share, for the use of the company. The language is plain and emphatic, and the manifest object of the requirement was to protect the public against fictitious corporations, with capital stock subscribed perhaps by irresponsible persons, and not a dollar thereof paid or intended to be paid in. The commissioners, acting as ministerial agents of the public, before the issuing of letters patent, had no authority whatever to dispense with the actual payment of the required sum. Giving a note for the amount was not payment within the meaning of the law. In Leighty v. The Turnpike Co., 14 S. & R. 434, under a similar charter, it was held that actual payment in money was required. The doctrine of that case, for reasons given at length in the opinion, is sound, and should be adhered to. A demand note, such as was given by the plaintiff in error in this case, is not money; it is only a promise to pay money at a future time, and perhaps may never be complied with.

The testimony was quite sufficient to establish the fact of defendant's subscription, on which the suit was based. Afterwards, when the book was presented to him by Mr. Alexander, he impliedly admitted the subscription, by giving his note for the 10 per cent. which should have been paid in cash, but this was before the letters-patent were obtained.

The conditional feature of the subscription furnished no ground of defense. *It is scarcely necessary to repeat what has been so often said that a subscription to the stock of a public corporation, made before letters-patent are issued and an organization effected, must be considered absolute and unqualified, and any condition attached thereto void. Commissioners have no authority to receive conditional subscriptions. If they do, the subscription itself is valid and binding, and the condition null and void.* Caley v. The Railroad Co., 30 P. F. Smith 367.

The only available defense presented in the court below was the non-payment of the 10 per cent. required by the act; and it was technical, rather than meritorious. Aside from making the subscription, in the first instance, and afterward giving his note for the 10 per cent. when called on by the collector, the plaintiff in error appears to have been entirely passive. If he had acted as commissioner or director, or participated in stockholders' meeting, or performed any act recognizing his membership of the company, or tending to fasten liability on other subscribers, he should be held to the payment of his subscription, notwithstanding the failure of the commissioners to exact the payment required by law to make it valid and binding; but he appears to have stood aloof and did nothing, by which he was estopped from insisting on the technical defense which he has seen fit to interpose. Legally, he is entitled to the benefit of it; and the second and third assignments of error must be sustained

Judgment reversed.

Sec. 119. Same. Prior to incorporation:

(*b*) Subscription and condition both void.

BUTTERNUTS AND OXFORD TURNPIKE COMPANY v. NORTH.

1841. IN THE SUPREME COURT OF NEW YORK. 1 Hill's (N. Y.) Reports 518–519.

Error from the Chenango common pleas. The action was upon a subscription for stock of the plaintiffs, containing an engagement to take stock "upon condition that said road shall be laid by Fayette village and Guilford Centre." The commissioners for receiving subscriptions had obtained several signatures to this, and also to another absolute in its terms. The court below held that the defendant's signature to the subscription in question did not bind him, and nonsuited the plaintiffs. They excepted, and after judgment in the court below, sued out a writ of error.

By the court, COWEN, J. Subscriptions for stock under the turnpike act (1 R. S. 581, 2d ed.) to which the plaintiffs were subject, Sess. L. of 1834, p. 137,[1] must be absolute. This act confers no power to make conditions, and to allow such a thing would be contrary to public policy. Divers men would, perhaps, have their divers routes, and endeavor improperly to influence the course of the road. If the general subscription should contain a condition of this kind, there would be no stockholders till the road should be laid out accordingly, and separate subscriptions containing various conditions might work a fraud upon those who subscribed absolutely. The court below decided correctly.

Judgment affirmed.

Note. To same effect. 1871, People v. Chambers et al., 42 Cal. 201. (Payment by check insufficient, must be by cash.)

[1] The act provided: Sec. 2. Each of the persons, who shall be named * * * as a commissioner for receiving subscriptions, shall furnish himself with a book for that purpose, which shall be kept open for two years, unless one-sixth of the whole number of shares shall be sooner subscribed. Sec. 3. Each subscriber shall pay to the commissioners receiving his subscription, and at the time, on each share that he shall subscribe one-tenth of the sum fixed in the act of incorporation as the amount of one share. * * * Sec. 4. Provided that as soon as one-sixth of the whole number of shares shall have been subscribed, the commissioners shall call a meeting for election of directors. Sec. 5. That commissioners should preside, and the subscribers present, or their proxies, by plurality of votes shall elect directors. Sec. 6. The commissioners shall then deliver subscription books to directors and pay over money.

Sec. 120. Same. (2) After incorporation. Theories:

(*a*) Valid contract, to await time of performance.

ARMSTRONG v. KARSHNER.[1]

1890. IN THE SUPREME COURT OF OHIO. 47 Ohio St. Rep. 276–30.

[Suit by Karshner to enforce payment of a subscription which had been assigned to plaintiff for construction of the railroad mentioned in the subscription. The subscription was as follows:

"We, the undersigned, agree to pay the number of shares annexed to our respective names, of fifty dollars each, to the capital stock of the Cincinnati, Hocking Valley and Huntington Railway Company, and we hereby bind ourselves, our heirs, executors or administrators to pay the same to the authorized agent of said company; but it is expressly provided as follows: That no part of said subscription shall be due until a railroad track shall be laid ready for the running of cars from some point of the Scioto Valley Railroad to a point at or near Adelphi, in Ross county, and when said railroad track is so laid, we, the undersigned, mutually agree that we will each, on demand, pay the amounts set opposite our respective names to such authorized agent of said company in full payment for such shares of capital stock.

"Names. ——October, 1881, —— No. of shares. Amount.

"It is distinctly agreed and understood that all the within stock subscriptions are binding, providing the road is built on the north of Adelphi, otherwise they are void.

"Ten shares, $50 each. $500. MILTON ARMSTRONG."]

WILLIAMS, J. * * * The principal question in the case arises from the second defense, the substance of which is, that the defendant's subscription is a conditional one, and, at the time it was made, the capital stock of the company had been increased, and actual *bona fide* subscriptions to the amount of 20 per centum of the capital stock, so increased, had not then been obtained, nor had 10 per centum of such capital stock been expended in the construction of the road.

The claim is, that the railroad company had no corporate power to receive the defendant's subscription, because it had not then obtained unconditional subscriptions to the amount of 20 per centum of its capital stock, or expended 10 per centum of its authorized capital in the construction of its road. This claim is based upon section 3298 of the Revised Statutes, which provides: "The directors of a company which has expended in the construction of its road 10 per centum of its authorized capital and has obtained actual *bona fide* subscriptions to its capital stock to the amount of at least 20 per centum thereof, may receive subscriptions to its capital stock, payable in such installments, dependent upon the completion of the whole or any part of its road so that cars may pass over the same, as its directors may deem expedi-

[1] Only so much of the opinion is given as relates to the character of the subscription.

ent, and upon full payment thereof may issue certificates of stock therefor."

Unless restrained by statute, corporations may receive conditional subscriptions to their stock at any time after their actual incorporation. "A conditional subscription to stock, taken and accepted by a corporation after its incorporation, is legal by the common law of all the states." Cook on Stock and Stockholders, § 82. And it is said by White, J., in Ashtabula and New Lisbon R. Co. v. Smith, 15 Ohio St. 336, that, "Except in New York, conditional subscriptions, in the absence of a special prohibition, so far as we have observed, have been sustained, as authorized, and not in conflict with public policy.

No special prohibition is found in section 3298 against a railroad corporation receiving conditional subscriptions. The most that can be claimed from the section is that, it having specified the cases in which such conditional subscriptions may be received, there is want of authority to receive them otherwise than as therein provided. If this be admitted, does it necessarily follow that a subscription not in all respects in conformity to the statute may not be enforced? "The rule seems well established," says Boynton, J., in Hays v. Galena Gaslight and Coal Co., 29 Ohio St. 340, "that where a contract has been executed and fully performed, on the part either of the corporation or of the other contracting party, neither will be permitted to insist that the contract and such performance by one party were not within the corporate power of the company."

Generally, after the acceptance by the corporation of a conditional subscription which it is authorized to take, the subscriber is bound until performance of the condition to await such performance; he can not withdraw the subscription unless the performance is unreasonably delayed. Cook on Stock and Stockholders, § 84. But a conditional subscription, which is not a present valid contract, may be a continuing offer to subscribe upon the specified conditions, and when those conditions are performed, if the offer be not before withdrawn, it may then become an absolute and unconditional subscription. The difference between the two classes of subscriptions is that the former becomes binding when accepted, and the latter only when the condition is performed, and it may, at any time before then, be withdrawn. If not so withdrawn, it becomes an absolute subscription. In Ashtabula and New Lisbon R. Co. v. Smith, *supra*, White, J., speaking of the conditional subscription to the capital stock of the railroad company involved in that case, and the effect of the performance of the conditions by the company, said: "The subscription was designed as, and was in fact, a standing or continuing proposition, upon which the plaintiff was not expected to act until the time arrived for the final location of its road. Having been delivered for this purpose, and acted on by the plaintiff, after the condition has been complied with, it became an absolute subscription." In the case of The Mansfield, Coldwater and Lake Michigan R. Co. v. Stout, 26 Ohio St. 254, it is said by McIlvaine, J.: "There has been some contention whether the instrument sued on is to be regarded as a subscription of stock,

subject to a condition precedent, or as a mere offer to subscribe, when the conditions named might be performed. This question we deem to be immaterial in this case, as there is no pretense that the offer, if a mere offer it be, was at any time withdrawn. The important question is, have the conditions been performed?"

The conditions expressed in the defendant's subscription, it is alleged in the petition, were fully performed, and upon this no issue is raised by the answer. If it be conceded, therefore, that the instrument executed by the defendant was not, by reason of the provisions of the statute, a valid and binding subscription to the capital stock when subscribed and delivered to the company, it was, at least, a continuing offer to pay the amount stipulated upon the performance of the conditions therein specified; and, while the defendant at any time before such performance might have withdrawn his offer, he did not, and the conditions having been fully complied with by the railroad company, he can not now, we think, defend against the payment of the subscription on that ground that the company was without corporate authority to receive it. It is not important whether the subscription is enforced on the ground that on the performance of the conditions it became an unconditional subscription, or on the ground of estoppel. The legal result is the same.

Affirmed.

Note. See citations *supra*, § 116, p. 514.

Sec. 121. Same. After incorporation.

(*b*) Mere offer until performance.

WEBB v. THE BALTIMORE AND EASTERN SHORE R. CO.

1893. IN THE COURT OF APPEALS OF MARYLAND. 77 Md. Rep. 92–99, 39 Am. St. Rep. 396, 26 Atl. Rep. 113.

Appeal from the circuit court of Dorchester county.

The case is stated in the opinion of the court.

The cause was argued before ALVEY, C. J., ROBINSON, BRYAN, FOWLER, PAGE, MCSHERRY and BRISCOE, JJ.

ALVEY, C. J., delivered the opinion of the court.

This action was brought to recover of the defendant for certain stock subscribed in the plaintiff company. The declaration contains several of the common *indebitatus* counts, but the fifth count is special, and it alleges that the defendant subscribed for and agreed to take twenty shares of the capital stock of the plaintiff company, and to pay $1,000 therefor on the completion of the railroad of the company to the town of Vienna, Md., and that, although the said railroad has long since been completed to the said town of Vienna, and that the said subscription is due and demandable, the defendant has not paid the same, or any part thereof. By the pleas, the defendant denied the legal existence of the contract alleged, or that he was in any manner bound thereby.

The questions presented on this appeal are simply as to the admissibility of evidence and are presented by two bills of exception taken by the defendant.

At the trial it was admitted that the plaintiff was a corporation, duly organized and existing under the laws of the state, and that the plaintiff had constructed its railroad from Easton Bay, in Talbot county, to the town of Vienna, in Dorchester county, before the 1st of January, 1891; and that, in the construction of its road the plaintiff had expended large sums of money, and created a large indebtedness, still outstanding at the time of this suit brought, to wit, the 12th day of August, 1891. It was also admitted that before this was brought, the defendant received from the secretary of the plaintiff, a letter calling on him to pay the money alleged to be due on the stock, and, further, that before the bringing of this suit neither the plaintiff, nor any one on its behalf, ever offered or tendered the certificates for the stock subscribed for by the defendant. The plaintiff then offered in evidence a subscription book, purporting to be a subscription book for the stock of the plaintiff, and proved by an agent of the company, to whom the book had been intrusted to procure subscriptions, that it was the subscription book of the plaintiff, and that the entry in that book, to which the name of the defendant was subscribed, was made and signed by the defendant. In that book there is this heading: "We, the undersigned, agree to subscribe to and pay for the number of shares of the capital stock of the Baltimore and Eastern Shore Railroad Company, set opposite our names, provided the said road shall be built on the Vienna route; said shares of stock to be of the par value of $50, and the same to be paid for on installments of twenty per cent. as any ten miles of road are completed." This heading had appended to it about sixty signatures; and then follows this entry:

"I hereby agree to take twenty shares of the Baltimore and Eastern Shore Railroad Company stock when completed to Vienna.

"$1,000.00. ALBERT WEBB."

To the offer of this subscription book, with the entry therein signed by the defendant, the latter objected, and in support of his objection has assigned several grounds: First, that there was no evidence of a tender of certificates of stock to the defendant, and that this suit could not be maintained without such tender, and that the subscription was invalid because the statutory installment was not paid. Secondly, that there was no contract of a present subscription for stock, but, at most, nothing more than a mere promise to subscribe when the road was completed to Vienna. Thirdly, that if the entry signed by the defendant be treated as a present subscription to stock, the contract is within the provisions of the Statute of Frauds, 29 Car. 11, ch. 3, § 17, and that it is fatally defective in omitting to name the vendor of the stock, and that there is no sufficient consideration for the defendant's undertaking shown on the face of the subscription paper. There is also a general objection taken to the admissibility of the subscription

book in evidence. The objection to the admissibility of the evidence was overruled.

In the opinion of this court none of the grounds assigned in support of the objection taken can be sustained.

1. There is clearly no valid ground for the objection that the certificates for the stock should have been tendered to the defendant as a condition precedent to the right to maintain this action for the money due on the subscription. This would seem to be well settled. 1 Mor. on Corp., § 61, and cases there cited. Scarlett v. Academy of Music, 43 Md. 203. Nor is the objection well taken that the subscription is not binding upon the defendant because it is not shown that an installment of $5 in cash on each share of stock subscribed had been paid at the time of making the subscription, under section 163 of article 23 of the code. The omission of such payment does not invalidate the subscription. That construction of this provision of the statute has been settled by the decision of this court, in the case of Oler v. Baltimore and Randallstown Railroad Co., 41 Md. 583. And with respect to the necessity for showing that the amount of the subscription had been called for by the directors of the company, before suit brought, it was admitted that the defendant had received a letter, before suit brought, purporting to be from the secretary of the plaintiff, calling upon him to pay the money due on the stock, as being then due, but that payment was refused. Whether that call or demand was made by the authority of the directors of the company, was a question of fact for the jury, upon all the evidence in the case.

2. The subscription in the form in which it was made was inchoate and conditional. It was such, however, as the company had a right to accept. Taggart v. The West Maryland Railroad Company, 24 Md. 595; Phil. & West Chester Railroad Co. v. Hickman, 28 Pa. St. 318. *It was simply a conditional offer by the defendant to become a stockholder after the condition specified had been performed by the company. The performance of the condition precedent on the part of the company was necessary to a valid acceptance of the offer thus made by the subscriber; and before this acceptance, by the performance of the condition precedent, the defendant did not, by virtue of such subscription, become a member of the company. His subscription was a mere offer, and unless withdrawn before the condition performed by the company, it became final and absolute immediately upon the performance of the condition; or, as was said by this court in Taggart v. West Maryland Railroad Co., supra, such conditional subscription, upon the performance of the condition, thus became ultimately an unconditional and absolute subscription.* And that being the effect and operation of the subscription made by the defendant, it is quite clear that no other or further act of subscription was necessary, or contemplated by the parties in order to convert the original conditional subscription into an unconditional and absolute subscription. The defendant appears to have declined the conditional terms embraced in the heading of the preceding subscriptions, which required the amount of the subscriptions to be paid in installments of twenty

per cent. as any ten miles of the road should be completed; and he preferred to make his subscription separate, and to make it depend upon the completion of the road to Vienna; and when the road was so made, which is admitted to have been done before this action was brought, the subscription of the defendant for the twenty shares of stock became absolute, and the price therefor thence became payable on demand of the directors of the company. This is the clear import of the subscription of the defendant. No particular form of subscription is made essential, and the present subscription is not of a formal character, yet there is enough in the paper, when read in connection with what precedes it in the same book, to show what was really intended by the parties to the contract.

3. The contention that this contract of subscription is within the statute of frauds, 29 Chas. II, ch. 3, § 17, is not maintainable, either upon reason or authority. *A subscription for shares of stock in an ordinary corporation, is not a contract for the sale of "goods, wares and merchandise"; words which comprehend only corporeal movable property.* Shares of stock are but *choses in action*, and are not within statute; and this is the established construction of the statute by the English courts, as shown by the collection of cases by Mr. Benjamin in his admirable work on Sales, pp. 90–91; and the same construction has been adopted by decisions of high authority in this country, (Browne on Statutes of Frauds, § 298; Ang. & Ames on Corp., § 563; Clark v. Burnham, 2 Story C. C. Rep. 15) though there are some decisions, especially of an earlier date, entitled to great respect, to the contrary. In the absence of a binding authority, such as an express decision of this court, we are not disposed to adopt and follow the decisions of the American courts, holding that the statute does apply in such cases, being as they are in conflict with the English courts upon this subject. We think the English decisions furnish the better and more reasonable construction of the statute.

In the case of Colvin v. Williams, 3 H. & J. 38,[1] the only case in this state supposed to give any support to the contention of the defendant, the question presented was quite different from that presented in this case. In that case there was a sale of bank stock by a broker, and the broker became the agent of both seller and buyer, and in whose name as vendor a memorandum of sale was made out and delivered to the defendant, who filled up the blank in the memorandum with the number of shares he desired, and accepted the same as purchaser of the number of shares sold. Upon this memorandum the court below held the plaintiff to be entitled to recover; and upon appeal, this court held the court below right in its ruling, and affirmed the judgment. There was no opinion delivered; but it is stated at the conclusion of the case, whether by the authority of the court or by the reporters of the case without such authority, does not appear, that it was said by the court "that the sale of bank stock is within the statute of frauds; and that the broker was the common agent of both the appellee and appellant." If such was the case, as we must take it to

[1] 5 Am. Dec. 417.

be, it is very clear that the declaration made at the conclusion of the case, "that the sale of bank stock was within the statute of frauds," was wholly unnecessary to the decision of the case, and was purely a *dictum*, if in fact it be assumed to have emanated from the court at all. The statute did not avail as a defense to the defendant, if it was in fact relied on as a defense, which does not appear to have been the case. There have been many cases since that decision in which such defense could have been taken, if the statute was applicable in such cases as this, but which passed without question as to the application of the statute.

Upon both exceptions, therefore, we are of opinion that the court below was correct in its rulings, and that the judgment appealed from should be affirmed.

Judgment affirmed.

Note. See citations, *supra*, § 116, p. 514. As to statute of frauds, see 1898, Rogers v. Burr. 105 Ga. 432, 70 Am. St. Rep. 50, and note, *supra*, p. 459.

Sec. 122. Subscriptions may be upon conditions precedent or subsequent.

RAILROAD (PADUCAH AND MEMPHIS) v. PARKS.[1]

1888. IN THE SUPREME COURT OF TENNESSEE. 86 Tenn. Rep. 554–565, 8 S. W. Rep. 842.

Appeal in error from circuit court of Dyer county, T. J. Flippin, J.

LURTON, J. These four suits at law against subscribers to the stock of the Paducah and Memphis Railroad Company were tried by consent together, and, a jury being waived, the issues of law and fact were submitted to the circuit judge, who has filed his special findings of fact and law as part of the record. There was a judgment in favor of each of the defendants, and an appeal by the plaintiffs.

The contract of subscription upon which the suit was brought was as follows:

"July 31, 1872.—We, the subscribers, agree and bind ourselves, our heirs and legal representatives, to pay to the Paducah and Memphis Railroad Company the sums by us subscribed, to be stock in said railroad company, upon the following terms and conditions, to wit: One-fourth to be paid when the road is completed to the north or south line of Dyer county, the remainder of the amount subscribed to be paid in four equal installments of four months, as the work progresses through the county: *Provided*, The company establish a depot on said road within fifteen hundred feet of G. B. Tinsley's corner store, supposed to be the center of Newbern. It is further provided that certificates of stock issue to said subscribers as to other stockholders in said company, upon the payment of their subscription."

The proof shows that there was a gap in the line of a road projected between Paducah, Ky., and Memphis, Tenn., each end of the

[1] Part of opinion, upon other points, omitted.

road being in operation and owned by different companies. The new company was the result of the consolidation of the two old companies, and it undertook the completion of the missing link. Dyer county, of which Newbern is a flourishing village, would be crossed by the finished road.

The assignments of errors are so defective as to raise no question of fact, but the second assignment is sufficient to raise a question of law. We have, therefore, treated the facts as found by the circuit judge as the facts of the case, and will test the soundness of the result he reached by the law applicable. The facts necessary to be stated, as found by his Honor, are as follows:

"That work was commenced on said unfinished part of the road early in 1872, and the Dyer county line was reached on the north in April, 1873, and on the 28th of that month it ran its train of cars into Trimble Station, in said county. On the 15th of May thereafter, the company made a call for one-fourth of the subscription, according to contract." This call, together with the second and third calls, were likewise paid by each of the defendants. "The company did work on the road in Dyer county until the last of July or first of August, 1874, at which time it ceased operations and work of all sort. The work principally done in Dyer county was between Dyersburg and Trimble Station; the road was mostly graded, or a great deal of it, from Trimble Station to Newbern, and between Newbern and Dyersburg, and in places bridges were constructed, and cross-ties were collected in one or more places to be placed on the road. The road was widened at the place where the depot now stands (in Newbern) as if for side track, but the company owned no property or land outside of the right of way upon which a depot could be located."

He further held that the proof did not show any further preparations for the establishment of a depot at Newbern than the widening of the grade at that point for side-track purposes. He further found that shortly after cessation of work in August, 1874, foreclosure proceedings were instituted by bond creditors, and the property and franchises of the corporation sold at public sale, and acquired by the Chesapeake and Ohio Railroad Company, and this company, being an entirely new and independent organization, has since finished the projected road through Dyer county. That to induce location of depot at Newbern, citizens of that place had been compelled to make a new contract with the successor company, who had assumed none of the contracts or liabilities of the old company. He further found that the old corporation was utterly insolvent at the time it abandoned work, and that at the time of trial it had no property, franchises, and practically no existence.

The subscription list was accepted by the Paducah and Memphis Railroad Company, and on the 12th of September, 1873, after payment of first call by subscribers, was assigned to Childs, Stephens & Co., contractors for work in Dyer county, in part payment for work done and to be done by them. The suit is by these assignees and creditors of the insolvent company. Three of the suits are for the

fourth call, which matured in May, 1874, and before work had ceased, and the fourth defendant is sued alone upon the fifth and last call, which did not mature, in point of time, until September, 1874, which was after all effort to complete the road had been abandoned. The question is as to whether defendants are liable for any of the unpaid calls. His honor, the circuit judge, was of opinion that the construction of the road to the line of the county was a condition precedent to any liability, and that this condition had been met. He was further of opinion that the stipulation requiring the establishment of a depot at Newbern was an independent provision, and not a condition precedent to liability upon the contract of subscription. This latter provision, he held, required and meant the erection of a depot building, with reasonable facilities for freight and passengers. Upon these facts, and upon the contract as thus construed, the circuit judge held that, although the stipulation as to a depot was not a condition precedent, yet it was a part of the agreement of the corporation which, at some reasonable time, it was bound to carry out, and that as it was now obvious that the utter insolvency of the company, and the sale of its property and franchises, had rendered the performance of this contract impossible, that it, therefore, followed that the defendants were released from liability upon their stock, both as to calls accruing before and after the abandonment of work upon the road.

In this conclusion we think he erred. If it be conceded that the proviso concerning a depot at Newbern is not a condition precedent, as his honor does, then it must follow that a breach of an independent covenant will not discharge the other party of the contract, but that the party damaged by such breach must rely upon his remedy at law for damages, or his remedy in equity, by bill for a specific performance. Such breach will not defeat a right of action upon those parts of the contract not dependent upon it. Before such right of action for a breach of this covenant arose the stock list was assigned to creditors of the company, and hence such breach can not, as against such assignees, be set up to defeat or abate their legal right of recovery. If the construction of a depot had been made a condition precedent to the subscription, or to liability for calls upon stock, then it would devolve upon plaintiff to show performance of such precedent condition: but, on the other hand, if the parties have not chosen to make responsibility depend upon performance of this stipulation, then, clearly, defendants must rely upon their independent remedy against the company.

We agree with his honor that this proviso as to a depot was not a condition precedent, but a mere independent stipulation.

The capital of stock companies consist of their stock subscriptions. This is the basis of credit, and an essential to organization. This is a trust-fund for the benefit of creditors in case of insolvency. *Conditional subscriptions to the stock of corporations are unusual, and often operate to defeat subscribers who become such absolutely and upon the faith that all the stock is equally bound to contribute to the hazards of the enterprise. It misleads creditors, and is the fruit-*

ful source of litigation and disaster. Tending to the ensnarement of creditors, and contrary to a sound public policy, conditional subscriptions to corporate shares ought not to be encouraged. Their validity, however, is too firmly fixed by a long line of decisions, to be now overturned, yet the courts will not strain, where creditors are concerned, to convert independent covenants into conditions precedent. If a subscriber desires to make his liability depend upon the performance of some stipulation by the corporation, it is very easy for him to do so in express terms. In the case now under consideration, it is obvious that the subscribers did not intend to make the building of a depot at Newbern a condition upon which their liability should depend. *They expressly provide that one-fourth of their subscriptions shall fall due when the line of the road is completed to the county line. Now, this was a condition precedent, but when it was complied with the subscription became absolute*, and one-fourth payable at once, and the remainder as the work progressed through the county, in four installments, four months apart. Now, a depot at Newbern would be folly without a railroad in operation, and every installment might fall due by lapse of time and continued work within the county, before a depot would be of any practical value. The fact that the first call became payable when the road reached the county line, settles the meaning attached to this stipulation. The acts stipulated to be done are to be done at different times. Hence they are independent of each other, and the remedy of the subscriber for breach of such a stipulation is in damages. Goldsborough v. Orr, 8 Wheat. 217.

The defendants have pressed upon us the case of Railroad v. Curtis, 80 N. Y. 219, s. c. 1 Eng. and Am. Railroad Cases, as sustaining the conclusion of the circuit judge.

This case has been carefully examined, and we are of opinion that it in no way supports the contention of defendants. The contract in that case was one between subscribers, whereby they agreed to *become* subscribers to the stock of the railroad company upon certain conditions. They did not, as held by the court in that case, become shareholders *in præsenti*, but only pledged themselves to one another to *thereafter* subscribe, and upon condition that the road should be actually constructed by the Lake Shore Company through the town of Parmer. The court held that the actual building of the road by the Lake Shore Company was a condition precedent, and that this condition had never been complied with.

The case of N. & N. W. R. Co. v. Jones, 2 Cold. 574, is likewise relied upon. It decides nothing that is in conflict with our view of this case. That case was action by the company against the subscriber who had subscribed upon the express stipulation that his subscription should be void unless the road was constructed upon a certain line. The directors did locate the road upon the agreed line, but afterwards abandoned this line and constructed the road upon a totally different line. This court properly held that, by the very terms of the subscription, it became void by this action of the company.

The view we have taken as to the construction of this contract, and

the effect of the insolvency of the company upon the stipulation as to a depot at Newbern, is supported by a number of well-considered cases in the courts of other states.

Berryman v. Trustees, Southern Railway, 14 Bush 755; Winkler v. Railroad, 29 Mo. 218; McMillen v. Railroad, 15 B. Monroe 218; Swartwout v. Railroad, 24 Mich. 389; Miller v. Railroad, 40 Pa. St. 237; Chamberlain v. Railroad, 15 Ohio St. 225.

This brings us to a consideration of the question as to whether a suit for the last installment of these stock subscriptions can be now maintained. The subscription provided for the maturity of the calls subsequent to the first in the following language:

"The remainder of the amount subscribed to be paid in four equal installments of four months, *as the work on the road progressed through the county.*" The work was progressing at the time the second, third and fourth calls were made, and there can be no doubt but that they were rightfully called and properly demanded. But when the last installment was called all work had been abandoned and has never been since resumed. We are of opinion that this last installment has never matured. The requirement that the calls subsequent to the first should be made in equal installments "as the work progressed through the county," is a condition precedent to the maturity of each installment; and the abandonment of the work before it was finished, and before, in a point of time, the last call could have been made if the work had been carried on in good faith, defeats the action of this installment. No right to call for or sue upon this installment exists by reason of the failure of the company to show that the road was finished, or work going on, within the county at the time it was demanded. The objection is made by defendants that these suits can not be maintained because no tender of stock certificates has been made.

This assignment of error is not tenable. This is not a case of the purchase of stock certificates as negotiable securities. The tender in such a case might be necessary to maintain suit for the price. But no tender is necessary to maintain suit upon an ordinary subscription for stock. Morawetz on Corporations, §§ 61 and 148 (2d ed.). * * *

Judgments as to Parks and Harris reversed.

Note. See citations, §116, *supra*, p. 514.

Sec. 123. Conditional delivery of subscriptions. Escrows, theories of:

(*a*) Delivery can not be to company's agent.

WIGHT v. SHELBY RAILROAD COMPANY.[1]

1855. IN THE COURT OF APPEALS OF KENTUCKY. 16 B. Mon. (Ky.) Reports, 4–8, 63 Am. Dec. 522.

Judge SIMPSON delivered the opinion of the court.

As the same questions are involved in both these cases, and as the

[1] Part of opinion on other points omitted.

validity of the defense presented in both, has to be examined in each case, we will proceed to consider and decide such questions as arise upon the record in either case.

The defense, relied upon by Wight, that the subscription of stock made by him was left with one of the commissioners in the nature of an *escrow*, is wholly invalid. The commissioners were the persons appointed by the charter to receive and accept subscriptions of stock, a subscription received by them, even if such a writing could, under any circumstances, be made to assume the nature and attributes of an *escrow*, could not take that character, inasmuch as, when it was received by them, it became just as obligatory on the party making it as a promissory note would be upon the maker who left it with the payee, or his agent. *The well-settled doctrine is that to make a writing an escrow merely, it must be placed in the hands of a third person by the party making it, to be delivered to the other party, on the happening of a specified contingency. Here the subscribers were the parties on one side, and the commissioners on the other. A subscription when made and received by the commissioners could not, therefore, be a mere escrow, but became in law an absolute undertaking for the payment of the stock subscribed according to the provisions of the charter.*

So far as the defendants, or either of them, alleged that their subscription was conditional, and was not to be obligatory upon them, unless the road was located on a certain route, it is only necessary to remark that, *the contract being in writing, parol proof is inadmissible to alter its terms or to show that, instead of being absolute, as it purports to be, it was in reality conditional.* The subscribers might have annexed a condition to the terms of their subscriptions, if they had thought proper to do so, and it would then have been with the commissioners to determine whether such conditional subscriptions of stock would be received; but, not having done so, they can not, according to the well-established doctrine on the subject, allege or prove that the contract was different from that which is evidenced by the writing, unless they can establish fraud or mistake in its execution. * * *

The failure to pay the sum of $1 on each share of stock subscribed can not certainly be relied upon by the subscribers as exonerating them from their liability for their subscriptions. *It was their duty to pay it at the time the stock was subscribed, but they should not be allowed to take advantage of their own wrong, and release themselves from their whole obligation by a failure to perform a part of it.* Even if the commissioners might have refused to receive the stock, unless the payment had been made, yet, as they did not do it, the contract was, after the stock had been received without the payment, binding upon both sides.

The decision of the court in the case of the Union Turnpike v. Jenkins, 1 Caine's Reports 381, sustains the views expressed in this opinion, and it is only the opinion of the dissenting judge that is cited in Angell & Ames on Corporations, and referred to by the counsel for the appellants.

The decisions of the Massachusetts courts, on some of the questions involved in these cases, have not been followed by this court.

In our opinion none of the defenses presented by either of the appellants was a sufficient answer to the plaintiff's action.

Wherefore, the judgment in both cases is affirmed.

Note. See note at end of next case.

Sec. 124. Same.

(*b*) Delivery may be to company's agent.

CASS v. PITTSBURGH, VIRGINIA AND CHARLESTON RAILWAY CO.[1]

1875. IN THE SUPREME COURT OF PENNSYLVANIA. 80 Pa. St. Rep. 31–38.

MR. JUSTICE SHARSWOOD delivered the opinion of the court May 29, 1876.

The subscription of the plaintiff in error to the stock of the defendants was upon condition "that in the judgment of the board of directors of said company a sufficient amount is subscribed to the capital stock of said company on or before the first day of April, 1871, to grade and bridge the road, including the right of way from South Pittsburgh to West Brownsville." The board of directors, on the first day of April, 1871, passed a resolution, "that, in the judgment of this board, the conditions named are fully complied with; that sufficient stock has been subscribed to grade and bridge the road, including the right of way from South Pittsburgh to West Brownsville." * * *

The third assignment of error is to the rejection of an offer to prove, in substance, that the agent of the defendants by whom the subscription had been procured before it was reported to or accepted by the company, at the request of the plaintiff, agreed to hold back the subscription until he should authorize him to hand it to the company, and that afterward a third person, not a member of the board, obtained possession of the paper, under pretense of merely wishing to look at it, put it into his pocket, and without consent of the agent or defendant, delivered it to the company. We think this evidence ought to have been received. It is true, as a general rule, that delivery of a bond or deed as an escrow can not be made to the obligee or grantee. That principle, however, does not apply in this case. When a delivery of an absolute deed is made to the party, his acceptance is presumed *prima facie*, because it is for his benefit. Then subsequent acceptance relates to the first delivery. So it might have been now, had the subscription been absolute, but it is different when the condition imposes a burden upon the other party. He must then expressly or impliedly accept before the contract becomes completely binding on both parties. *When such contract is made with an agent*

[1]Only the part of opinion relating to the one point given.

he may well agree to hold it as an escrow. Until both sides agree, if irrevocable by one it must be also by the other. Martin, the agent, had no authority to accept the conditions, and was not incapacitated from making such an agreement by his relation to the company.

Reversed.

Note. See, also, 1889, Minneapolis Threshing Machine Co. v. Davis, 40 Minn. 110, *supra*, p. 492; 1897, Gilman v. Gross, 97 Wis. 224; 23 Am. & Eng. Ency., p. 790; Beach, § 510; Clark, § 113; Cook, § 60; Elliott, § 357; Morawetz, §§ 69, 851; II Thompson, § 1253.

ARTICLE V. FRAUD AND MISTAKE IN SUBSCRIPTIONS.

Sec. 125. Fraud.

MARTIN ET AL. v. SOUTH SALEM LAND CO. ET AL.[1]

1896. IN THE SUPREME COURT OF APPEALS OF VIRGINIA. 94 Va. Rep. 28–59, 6 Am. & Eng. Corp. Cas. (N. S.) 312.

[Suit by various parties against the land company, among others being one by the Bank of Salem, a judgment creditor suing on behalf of itself and others, the land company and its stockholders to enforce their stockholders' liability for unpaid stock. Many of the stockholders answered that their subscriptions had been obtained fraudulently, and they had promptly repudiated them, and asked to have them rescinded. Decree of a *pro rata* assessment against the stockholders to pay the debts was rendered, from which an appeal was taken.]

BUCHANAN, J. * * * Another ground on which the appellants claim that they are not liable for their subscription contracts is, that they were induced to become subscribers by the false and fraudulent representations of the company or its agents. One of the false and fraudulent representations which it is alleged was made to certain of the appellants was, that there was no promoter's fund except $10,000 of the paid-up stock of the company, when, in fact, two of the promoters of the scheme, Crabtree and Bowman, were to receive the sum of $20,000 additional, in money, and that they did receive the greater part thereof. To others it was represented that among the subscribers to the stock of the company were two well-known business men, of much experience and large wealth, when, in fact, one of them had made no subscription at all, and the other had subscribed for a much less sum than was represented. And to others still both these representations were made.

If it be assumed that these representations were made and relied on; that they were not true, and were sufficient to entitle the appellants to have their contracts rescinded, and the money paid by them refunded, as between themselves and the Land Company, did they

[1] Statement of facts abridged, arguments omitted and the part of the opinion relating to the one point only given.

show themselves entitled to such relief as against the creditors of the Land Company, whose debts were decreed to be paid in the court below?

It appears that a meeting of the stockholders had been called for the 17th of May, 1892, to consider the affairs of the company. A majority of the stock not being represented on that day, a committee was appointed to prepare a statement in regard to its affairs, and the secretary was instructed to send a copy of that statement to each stockholder, and urge him to be present at an adjourned meeting of the company, to be held on the 9th of June, following. Pursuant to that resolution, the following statement was prepared and sent to the stockholders:

"A CIRCULAR OF INFORMATION FOR STOCKHOLDERS OF THE SOUTH SALEM LAND COMPANY."

"The following is a copy of the prospectus under which the stock to the South Salem Land Company was subscribed:

"The South Salem Land Company, of Salem, Virginia, owns 306 acres of land, lying on the east side of the Salem Development Company, south of the Salem Improvement Company, and southwest of the Riverside Land Company, and is known as the Colonel Jack farm.

"This land cost the company $81,200 in cash, and $10,000 in paid-up stock. The capital stock of the company is $300,000, divided into shares of $10 each, only $250,000 of which shall be issued unless necessary for the special betterment of the land in the future, and $10,000 of which is the paid-up stock referred to above. It is proposed to sell $240,000 of the stock on the following terms: Ten per cent. payable on March 20, and ten per cent. on April 20, 1890, and ten per cent. payable on March 20, 1891. It is guaranteed that only the above-named assessments will be made.

"We, the undersigned, subscribe to the amounts opposite our names upon the above-named conditions.

"Under the above prospectus subscription lists were sent by the several agents for the whole amount of the $240,000 stock, but only on 19,541 shares have the three assessments been nearly all paid. On the remaining 5,088 shares on the list nothing has been paid, and the stock advertised and offered for sale was withdrawn for want of bidders. While every effort will be made to collect, it is found that a large per cent. of the lists is insolvent. If we had $3 per share on those shares, this amount, $15,440, would be sufficient for our necessities, and enable us to carry on the affairs of the company successfully.

"We now absolutely need about $12,000 for present pressing dues. If this amount can not be raised now, a forced trustee's sale of the property will be the inevitable result.

"The stockholders can not be further assessed by the company, unless the stockholders themselves vote to make the assessment.

"A single ten per cent. assessment would relieve the condition of things now and secure the stockholders further advantages.

"Be sure to come or send your proxy to the meeting.

"Salem, Va., June 1, 1892."

The indebtedness of the land company at that time was more than $40,000. Its assets, independent of its stock subscriptions, consisted of the tract of land mentioned in the prospectus, which, it seems, had never been assessed for the purposes of taxation at more than $18,000, and which, when sold in December, 1893, only brought $10,000, and upon a resale in February, 1894, $9,000. Upon its stock subscriptions, on which no part of the 30 per cent. called for had been paid, there was a little over $15,000 due, but the larger part of it was due from insolvent parties. There was also a small balance due from stockholders belonging to the class who had made payments on their stock subscriptions. The land company was not only unable to meet its debts as they became due, but assets were altogether insufficient to pay its liabilities. Unless the stockholders were willing to make additional payments upon their stock, which the company admitted it had no right to call for under its guarantee to them, the land of the company, which was its principal asset, and the development and sale of which was the chief object of its creation, would be sold at a trustee's sale for the residue of the purchase price.

No provisions having been made by the company or its stockholders to meet the indebtedness, the trustee gave notice that he would, on the 18th day of August, 1892, sell the land. On the 10th of that month the sale was enjoined by an order entered in the case of the South Salem Land Co. v. Hansbrough, Trustee, etc. The bill in that case did not claim that the debt for which the land was advertised to be sold was not just, due or unpaid, but alleged that there were clouds upon its title which ought to be removed before sale, and that the notice of sale was not in conformity with the provisions of the deed of trust.

At the October term following of the circuit court, two judgments were rendered against the land company, one in favor of the Bank of Salem, and the other in favor of the Pittsburg Bridge Company, for sums aggregating more than $11,000. Upon these judgments executions were issued and returned "no property found."

In December of the same year the Bank of Salem and the bridge company instituted suit against the land company and its stockholders for the purpose of subjecting its assets, including the unpaid subscription of its stockholders, to the payment of their debts and the debts of the other creditors of the company who would come in and contribute to the expenses of the suit.

In that case the appellants (except in three cases, which will be hereafter considered) for the first time took steps to have their subscription contracts rescinded.

A party who has been induced to subscribe for stock in a corporation by false or fraudulent representations as to a material fact upon which he had the right to rely, and did rely, is entitled to have the contract rescinded in the same manner as if the question had arisen between two natural persons, provided the question arises between

the contracting parties and the rights of third persons are not involved. 1 Morawetz on Corporations, § 108; 2 Thompson on Corporations, § 1361; 1 Cook on Stock and Stockholders, etc., §§ 151–161.

A contract procured by a fraud is not void, but voidable only, at the option of the party defrauded. It is binding upon him until rescinded, and, if before he exercises the option to rescind, innocent third parties have, in reliance of the fraudulent contract, acquired rights which would be prejudiced by its rescission, they may generally have it enforced for their benefit, although the party by whose fraud it was procured could not do so. Oakes v. Turquand, etc. (House of Lords), 2 English and Irish Appeal Cases, L. R. 325; Tennent v. City of Glascow (House of Lords), 4 Appeal Cases, L. R. 615; 2 Thompson on Corporations, § 1363; 2 Morawetz on Corporations, § 839.

This principle is founded in reason and justice. If one of two innocent persons must suffer from the misconduct of a third, the burden must fall upon the one whose conduct enabled the third person to perpetuate the wrong complained of.

If a person is induced by fraud to sell his property, and it passes into the hands of an innocent purchaser for value before his contract by which he sold has been rescinded, he must bear the loss rather than the innocent purchaser.

In an ordinary partnership it is impossible for one partner to retire from or to repudiate the partnership to the prejudice of the partnership creditors. He may have been induced to enter into the partnership by the false or fraudulent representations of the other partners, and this may be a sufficient ground for relief against them, but it is no ground for getting rid of the firm's liabilities to its creditors.

The shareholders in a corporation are the real parties in interest. They furnish the capital and receive the profits. As was said by Mr. Justice Miller, in Sawyer v. Hoag, 17 Wall. 610, the corporation "is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through officers whom they elect, and the interest and power of legal control of each shareholder is in exact proportion to his amount of stock."

In the case of Oakes v. Turquand, etc., cited above, it was held by the House of Lords that, after the winding up of a joint stock company had commenced, a stockholder could not have his contract rescinded for fraud in its procurement. The decision was based upon the ground that innocent third parties acquired rights which would be defeated by the rescission. In that case the decision of Lord Campbell, in Henderson v. Royal British Bank (7 E. & B. 356), was approved. Lord Campbell said in that case: "This is an application by a creditor, who, upon the faith of the party who was then a shareholder, and who held himself out to the world as a shareholder, and, being one, gave credit to the bank. He has obtained judgment against the bank. There was no assets of the bank as a company, and the application now is that execution may issue against the party individually. It would be monstrous to say that he, having become a

partner and a shareholder, and having held himself out to the world as such, and having so remained until the concern stopped payment, could, by repudiating the shares on the ground that he had been defrauded, make himself no longer a shareholder, and thus get rid of his liability to the creditors of the bank, who had given credit to it upon the faith that he was a shareholder. It would be a monstrous injustice, and contrary to all principle." Tennent v. City of Glascow Bank, 4 Appeal Cases (H. L.) 615; Stone v. City and County Bank, 3 C. P. Div. 282; Wright's Case, L. R. 7 Chy. 60; Pugh & Sharman's Case, L. R. 13 Eq. 572; 2 Thompson on Corp., §§ 1441, 1442; 1 Cook on Stock and Stockholders, § 163.

In this country, in the absence of statutory provisions upon the subject, the rule seems to be, says Morawetz, in his work on Corporations, "that a shareholder whose contract of subscription was obtained by fraud would be liable to contribute his share of the capital upon the insolvency of the company, so far as this may be required, in order to satisfy those creditors whose claims attached before he elected to disaffirm the contract." Section 840.

Thompson says: "It may be concluded from a number of American cases that no rescission will be allowed after the bankruptcy or insolvency of the corporation has supervened unless under very exceptional circumstances, if at all; and further, that the fact that the stockholder was induced to take stock by false representations is no defense in an action by judgment-creditors of the corporation on his statutory liability." 2 Thompson on Corp., § 1450.

Cook says upon this subject: "In this country the effect of corporate insolvency upon the right of a subscriber to rescind his contract for fraud has not been passed upon as often as in England. The decisions, however, clearly hold that corporate insolvency is a bar to such rescission." 1 Cook on Stocks & Stockholders, §§ 163, 164.

The decisions of the courts, we think, sustain the doctrine laid down in the text-books, that a person who has, to all external appearances, become a stockholder, can not, as to creditors who may have trusted the company upon the faith of his membership, have his contract of subscription rescinded upon the ground of fraud, where he did not repudiate the contract and take steps to have it rescinded before the company stopped payment and became actually insolvent; certainly not, where it does not appear that he was diligent in discovering the fraud, and prompt in repudiating his contract after it was discovered. Upton v. Tribilcock, 91 U. S. 45; Webster v. Upton, 91 U. S. 65; Sanger v. Upton, 91 U. S. 56; Chubb v. Upton, 95 U. S. 665; Ogilvie v. Knox Ins. Co., 22 How. 380; Tennent v. City of Glascow Bank, 4 Appeal Cases (H. L.), 615; Turner v. Granger, etc., (Ga.), 38 Am. Rep. 801; Howard v. Glenn (Ga.), 11 S. E. 610; Saffold v. Barnes, 39 Miss. 399; Duffield v. Barnum, 59 Mich. 272.

Before the appellants had repudiated their contracts the land company was insolvent. It was insolvent, whether that word be used in its restricted sense to indicate the inability of an individual to pay his debts as they become due in the ordinary course of business, or in its

general or popular meaning, to denote that the entire assets of a debtor are insufficient to pay his debts. Toof v. Martin, 13 Wall. 40. Not only was this true, but its real estate had been advertised for sale for the purchase-money yet due upon it, which was more than it was worth. Judgments had been obtained against the company, as before stated, executions issued and returned "no property found," and a creditor's bill filed to subject its assets to the payment of its debts, in which it was alleged that independent of its unpaid stock subscriptions (which the company admitted it had no right to collect, except so much of the *thirty per cent.* called for as remained unpaid) the company was insolvent. This was more than two years and a half after their subscriptions had been made. The excuse given for this delay is that they did not discover the fraud complained of earlier. There is nothing in the evidence to show that any diligence was exercised by them to discover whether the alleged false representations made to them were true or not.

It is not sufficient in a case like this, where the rights of creditors are involved, that a stockholder should be prompt in repudiating his contract of subscription and in seeking to have it rescinded after the fraud had been discovered, but he must be diligent also in discovering the fraud. Where a party has the means of knowledge or discovery in his power, he will be deemed to know all that with ordinary care and diligence he might have obtained knowledge of. A delay which might be of no consequence in an ordinary case, may be amply sufficient to bar the title to relief where the property is of a speculative character, or is subject to contingencies, or where the rights and liabilities of third parties have been in the meantime varied. Parties, it is said, who are in the position of shareholders in companies, if they come to the court to be relieved from their shares on the ground of fraud, must come with the utmost diligence and promptitude. Kerr on Fraud & Mistake, 306, etc.; Morawetz on Corp., §§ 108, 839; Chubb v. Upton, 95 U. S. 665; Upton v. Tribilcock, 91 U. S. 45; II Thompson on Corp., § 1438, etc. * * *

Affirmed.

Note. As to subscriptions obtained by fraud, see, 1852, Connecticut, etc., R. Co. v. Bailey, 24 Vt. 465; 1856, Hester v. Memphis, etc., R. Co., 32 Miss. 378; 1859, Anderson v. New Castle, etc., R. Co., 12 Ind. 376, 74 Am. Dec. 218; 1867, Central R. Co. v. Kisch, L. R. 2 H. L. 99; 1867, Oakes v. Turquand, L. R. 2 H. L. 325; 1869, Smith v. Reese River Co., L. R. 4 H. L. 64; 1874, Upton v. Englehart, 3 Dill. (C. C. U. S.) 496; 1875, Upton v. Tribilcock, 91 U. S. 45; 1877, Getty v. Devlin, 70 N. Y. 504; 1878; Vreeland v. N. J. Stone Co., 29 N. J. Eq. 188; 1878, Jewett v. R. Co., 34 Ohio St. 601; 1883, City Bank v. Bartlett, 71 Ga. 797; 1884, Mont. S. R. Co. v. Matthews, 77 Ala. 357; 1893, Howard v. Turner, 155 Pa. St. 349; 1893, Ramsey v. Mfg. Co., 116 Mo. 313; 1896, Hunter v. French, etc., Co., 96 Iowa 573; 1896, Newton Nat'l Bank v. Newzegin, 74 Fed. Rep. 135, 33 L. R. A. 727; 1897, Chicago Bldg. & Mfg. Co. v. Summerour, 101 Ga. 820; 1897, Garrison v. Electrical Works, 55 N. J. Eq. 708; 1898, Barcus v. Gates, 89 Fed. Rep. 783, 32 C. C. A. 337; 1898, Franey v. Park Co., 99 Wis. 40; 1898, Reyener v. Hubbard, 56 N. Y. Sup. 173; 1896, Re International Soc., etc., 1 Ch. 110, 77 L. T. R. 523. *Compare*, 1849, Dodgson's Case, 3 De G. & S. 85; 1865, Felgate's Case, 2 De G. J. & S. 456; 1869, Custar v. Titusville Gas & W. Co., 63 Pa. St. 381; 1880, Turner v. Ins. Co.,

65 Ga. 649; 1895, St. John's, etc., Co. v. Munger, 106 Mich. 90; 1897, Tradesman's Nat'l Bank v. Looney, 99 Tenn. 278, 38 L. R. A. 837.

See, also, Boone, § 111; Beach, §§ 109, 163; Clark, § 101; Cook, §§ 136–170; Elliott, §§ 369–376; Morawetz, §§ 94–117; Taylor, §§ 103, 523–26; II Thompson, §§ 1360–1506; VII Thompson, §§ 8635–40.

Sec. 126. Mistake.

ROCKFORD, ROCK ISLAND AND ST. LOUIS R. CO. v. SHUNICK.[1]

1872. In the Supreme Court of Illinois. 65 Ill. Rep. 223–230.

Mr. Justice McAllister. This was a proceeding instituted by appellant to condemn the lands of the appellee for the uses of a railroad. The land was situated in the township of Spring Grove, Warren county, and this appeal is from the judgment of the circuit court of that county in favor of appellee for compensation and damages on account of land taken and damaged.

To defeat appellee's right to compensation and damages, appellant introduced in evidence on the trial a certain instrument in writing, to which appellant was only a beneficial party, if any, purporting to have been executed by fifty-seven persons, including the appellee, and embracing two distinct subjects: (1) That of conditional subscription to the stock of appellant's corporation. (2) That of securing to appellant the right of way through said township.

The part of the instrument relating to subscription has no relevancy whatever to this controversy. But it is claimed by appellant's counsel that the other part of the supposed agreement cut off appellee's entire claim for either compensation or damages, and this is urged upon the ground of estoppel *in pais*.

The terms of this part of the agreement are in substance: That in order that the right of way might be made secure to said company, free of all charge and expense, and that the company might not be delayed in the construction of its line through said township, in consideration of one dollar to the undersigned paid, the receipt thereof acknowledged, they, the undersigned, jointly and severally agree to secure to the company, free of charge and expense to the same, the right of way on, over, and across the lands in said township, such right of way to include a strip of land one hundred feet in width, to be described as a strip of land fifty feet in width on each side of the center line of the established survey of said railroad, on, over, and across the lands in said township of Spring Grove. * * *

The appellant's road was so located as to run through appellee's orchard and a part of his dwelling-house. Appellee, as appears, without controversy, is an unlettered man, being unable to either read or write. While at work in his field he was approached by a man

[1] Only so much of the report is given as relates to the single point.

of the name of Holloway with this paper. Holloway knew that the man was unlettered. He did not read the paper to him, and stated only that part which related to the subscription. He not only did not read or state that part of the instrument relating to the right of way, but assured appellee that he could obtain compensation for his land if taken. Holloway testifies that he signed appellee's name to the paper by his direction. From this fact appellant's counsel insist that Holloway was appellee's agent, and that being so, appellee could not avail himself of the misrepresentations of his own agent to avoid the instrument. On this ground the court below made an indefinite exclusion of the evidence showing the circumstances under which the paper was executed, but refused to give an instruction asked by appellant directing the jury to disregard it, and appellant now complains of such refusal. Holloway does not state when or where he signed appellee's name; but only that he did it by his direction. It must have been done then and there in the presence of appellee, the latter merely using Holloway's hand, as it were, to write his own name, or at some other time and place, in the absence of appellee, Holloway acting in that behalf upon an alleged authority to make a contract for appellee. If he so acted in executing it, and the instrument itself amount to a contract with appellant, it was one virtually for the sale of an interest in land, and the authority to execute it as agent of appellee should have been in writing. If the name was signed by Holloway in appellee's presence and at his request, then the only reason which could be urged why it was not within the statute of frauds requiring the authority of the agent to be in writing, would be that appellee merely employed the hand of Holloway to write his name, and that in such case the doctrine of agency in its legal sense would not apply. But assuming that to be the case, would anybody be heard to contend that although Holloway was not an agent in such sense as would require his authority to be in writing, yet he must be regarded as one to the extent of precluding appellee from setting up his misrepresentation for the purpose of avoiding the instrument in the hands of appellant? We think not. Such a rule would snatch the shield of law from the wronged and bestow it upon the wrong-doer; would take it from the unlettered, who need it most, and give it to those against whom it ought to be used. The appellant could not seek to take the fruits of the contract without adopting the means by which it was obtained. Besides, if the execution of the instrument was obtained in the manner disclosed by the evidence, it was void *ab initio*. It is laid down in Pigot's case, 11 Rep. 27, that if three distinct bonds are written upon one piece of parchment, and one of them only is read to the obligor, and he, being a man not lettered, seals and delivers this deed, it is good for that which was read, and *ab initio* void for the others: and it is further said, "that every deed ought to have writing, sealing and delivering, and when anything shall pass from them who had not understanding but by hearing only, it ought to be read also; and it is true that he who is not lettered is reputed in law as he who can not see, but hear only, and all his understanding is by hearing; and so a

man who is lettered and can not see, is, as to this purpose, taken in law as a man not lettered; and therefore if a man is lettered and is blind, if the deed is read to him in any other manner, he shall avoid the deed, because all his understanding in such case is by hearing." There is nothing in the evidence upon which to predicate negligence on the part of the appellee. The mind of the signer did not accompany the signature, and the agreement in the particular in question, at least, was void. Leach v. Nichols, 55 Ill. 273.

We are of the opinion that the supposed agreement was not sufficient in any view to cut off appellee's right to compensation and damages; that substantial justice has been done and that the judgment should be affirmed.

Judgment affirmed.

Note. As to mistake of fact, generally, see: 1431, 2 Rolle's Abr. 28, l. 5, 9 H. 6, 59*b*; 1506, Keilway's Reports, 70; 1584, Throughgood's Case, 2 Co. Rep. 9*b*, 1 And. 129, Moore 148; 1808, Putnam v. Sullivan, 4 Mass. 45; 1819, Taylor v. King, 6 Munf. (Va.) 358; 1829, Salem M. D. Co. v. Ropes, 9 Pick. (Mass.) 187, 19 Am. D. 363; 1858, Cunningham v. Edgefield, etc., R. Co., 2 Head (39 Tenn.) 23; 1858, Diman v. Providence, etc., R. Co., 5 R. I. 130; 1863, Swan v. North B. A. Co., 2 Hurls. & C. 175, 32 L. J. R. (N. S.) Exch. 273; 1868, Four Mile Valley R. Co. v. Bailey, 18 Ohio St. 208; 1869, Foster v. McKisson, L. R. 4 C. P. 704, 38 L. J. R. (N. S.) 310; 1870, Leach v. Nichols, 55 Ill. 273; 1871, County of Schuylkill v. Copley, 67 Pa. St. 386; 1871, Rovegno v. Defferari, 40 Cal. 459; 1873, Payson v. Withers, 5 Biss. 269; 1877, Gibson v. Pelkie, 37 Mich. 380; 1883, Shelton v. Ellis, 70 Ga. 297; 1885, Wood v. Boynton, 64 Wis. 265; 1887, Sherwood v. Walker, 66 Mich. 568; 1888, Hecht v. Batcheller, 147 Mass. 335; 1893, Brintnall v. Briggs, 87 Iowa 538; 1898, Keene v. Demelman, 172 Mass. 17; 1898, Deseret Nat'l Bank v. Burton, 17 Utah 43; 1898, Gaffney Mercantile Co. v. Hopkins, 21 Mont. 13; 1898, Rogers v. Pattie, 96 Va. 498; 1899, Hochstein v. Berghauser, 123 Cal. 681.

As to mistakes of law, see: 1822, Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166, 10 Am. D. 316; 1828, Hunt v. Rousmaniere, 1 Pet. (26 U. S.) 1; 1838, Bank of U. S. v. Daniel, 12 Pet. (37 U. S.) 32; 1845, Trigg v. Read, 5 Humph. (Tenn.) 529, 42 Am. D. 447; 1858, New Albany & S. R. Co. v. Fields, 10 Ind. 187; 1860, Goodenow v. Ewer, 16 Cal. 461, 76 Am. D. 540; 1872, Bailey v. Hannibal, etc., R. Co., 17 Wall. (U. S.) 96; 1876, Selma, etc., R. Co. v. Anderson, 51 Miss. 829; 1895, Loftus v. Fischer, 106 Cal. 616; 1898, Deseret Nat'l Bank v. Burton, 17 Utah 43, 53 Pac. 215. See, also, Beach, § 105; Clark, § 196; Cook, § 196; Morawetz, § 97; Taylor, § 527; II Thompson, §§ 1379, 1393, 1719.

ARTICLE VI. PARTIES TO THE AGREEMENT.

Sec. 127. Infants.

FOSTER v. CHASE ET AL.

1896. IN THE UNITED STATES CIRCUIT COURT, DISTRICT OF VERMONT. 75 Fed. Rep. 797.

This was a suit in equity by Edwin L. Foster against Henry Chase and others to recover an assessment upon the stock of a national bank.

WHEELER, District Judge. The defendant bought stock in the names of his minor children in the First National Bank of Silver City, N. M., of which the plaintiff is receiver, and this suit is brought for an assessment upon it made by the comptroller of the currency. The plaintiff claims that the defendant made himself liable for the assessment because of the incapacity of his children to take the stock and make themselves liable for it. He insists that they only are the shareholders, and liable, if any one is. Assent is necessary to becoming a shareholder, subject to this liability, in a national bank. Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290. Minors do not seem to have anywhere the necessary legal capacity for that. The principles upon which this disability rests are elementary and universal. 1 Bl. Comm. 492; 2 Kent Comm. 233. In buying and paying for this stock, and having it placed on the books of the bank, the defendant acted for himself; in having it placed there in the name of his children, as with their assent, he assumed to act for them. As they could not themselves so assent as to be bound to the liabilities of a shareholder, they could not so authorize him to assent for them as to bind them. To the extent that they could not be bound he acted without legal authority, and bound only himself. Story Ag., § 280. This liability has been sought for defendant to be likened to that of married women becoming shareholders; but that has been incurred where, and because, the law of the place authorized them to become such. Keyser v. Hitz, *supra;* Bundy v. Cocke, 128 U. S. 185, 9 Sup. Ct. 242. No law confers that capacity upon infants, but the banking law seems to refer this liability to their estates in the hands of their guardians. Rev. Stat. U. S., § 5152.

Decree for plaintiff.

Note. Infants as shareholders. In the case of Foster v. Wilson, 75 Fed. Rep. 797, it was held that where the father of a minor had subscribed in the minor's name, the father remained liable upon an assessment made before the minor came of age, though suit for its collection was not begun till after he had become of age and assented to holding the stock. See, 1847, Cork, etc., R. v. Cazenove, 10 Q. B. 935; 1849, Newry, etc., R. v. Coombe, 3 Ex. 565; 1850, Northwestern R. Co. v. McMichael, 5 Ex. 114; 1852, Dublin, etc., R. Co. v. Black, 8 Ex. 181; 1868, Robinson v. Weeks, 56 Maine 102; 1868, Lumsden's Case, L. R. 4 Ch. 31; 1868, Hart's Case, L. R. 6 Eq. 512; 1869, Castello's Case, L. R. 8 Eq. Cas. 504; 1870, Mitchell's Case, L. R. 9 Eq. Cas. 363; 1870, Symon's Case, L. R. 5 Ch. App. 298; 1870, Weston's Case, L. R. 5 Ch. App. 614; 1870, Ebbett's Case, L. R. 5 Ch. App. 302; 1871, Baker's Case, L. R. 7 Ch. 115; 1872, Gooch's Case, L. R. 8 Ch. App. 266; 1876, Re Nassau Phos. Co., L. R. 2 Ch. D. 610; 1877, Indianapolis Chair Co. v. Wilcox, 59 Ind. 429; 1886, Crummey v. Mills, 40 Hun. (N. Y.) 370; 1886, Hamilton, etc., R. v. Townsend, 13 Ont. App. 534, 16 Am. & E. C. C. 645; 1889, Chicago, etc., Assn. v. Hunt, 127 Ill. 257; 1892, Re Globe Mut. Ben. Assn., 63 Hun. (N. Y.) 263; 1892, Re Laxon, etc., Co., 3 Ch. D. 555. See, also, 10 Am. and Eng. Ency., 634, n. 2; Beach, §§ 128, 138, 303; Clark, § 98; Cook, §§ 63, 250; Elliott, § 366; Morawetz, § 855; Taylor, §§ 95, 515 n., 586; I Thompson, § 1095; II Thompson, §§ 1238, 2307, 2493; III Thompson, §§ 3271-4; VII Thompson, §§ 8162, 8708; n. 18 Am. St. Rep. 615.

Sec. 128. Married women.

HAHNS & BROS'. APPEAL.[1]

1886. In the Supreme Court of Pennsylvania. 15 Am. & Eng. Corp. Cas. 537, 18 Weekly Notes of Cases 294.

[Appeal by complainants from a decree of the common pleas court dismissing a bill in equity to charge defendant Arndt upon unpaid subscription to the stock of an iron company. The iron company being authorized to increase its capital stock, called for subscriptions upon the express condition that none were to be binding unless $175,000 were subscribed. This sum was subscribed, but $1,350 of it were by married women. Dr. Arndt had subscribed for twenty shares, but had paid nothing and attended no meetings.]

Trunkey, J. * * * In this case no fraud is alleged. The subscriptions of the married women were carelessly accepted as valid by those who were active, but Mr. Arndt in no instance was an active party. It does not appear that he knew that the amount of the subscriptions of the married women was necessary to make up the requisite sum prior to the beginning of this suit. Married women can hold stock and transfer it, but the statute does not empower them to contract to pay for stock. Their subscriptions create no obligations on their part. As to them the contracts are void. * * *

Affirmed.

Note. See note to next case, p. 552.

Sec. 129. Same.

NATIONAL COMMERCIAL BANK v. McDONNELL.[2]

1890. In the Supreme Court of Alabama. 92 Ala. Rep. 387–399, 9 So. Rep. 149.

Appeals from the chancery court of Mobile.

There are four appeals embraced in this one record—all involve similar questions, are included in one cause of action, and are decided by one decree of the chancellor.

The bill was filed by the appellees as creditors, and sought to subject the stockholders of the Alabama Gold Life Insurance Company, an insolvent corporation that had made a general assignment, to a personal liability to the extent of the stock owned by them in said insolvent corporation. The answers, contentions and accompanying facts, as well as the effect of the decree rendered, are sufficiently shown in the opinion. The chancellor held in his decree that the complainants were entitled to the relief prayed for, and so ordered.

[1] Only so much as refers to the single point is given.

[2] Only the part of the opinion relating to the one point is given.

It is from this decree that the present appeal is prosecuted, and the same is here assigned as error.

CLOPTON, J. * * * In the cases of A. P. Bush and L. C. Dorgan, the facts are substantially alike, and the questions raised are identical. The amendment of the bill, filed September 5, 1887, exhibited a list of the stockholders on October 6, 1886. In this list Mrs. Bush, wife of A. P. Bush, and Mrs. Dorgan, wife of L. C. Dorgan, appear as the holders of twenty shares each; and they were made parties to the amended bill. Having filed pleas of coverture, the bill was dismissed as to them, and amended so as to aver that the wife of the appellant, Bush, did not own any of the property as her equitable separate estate, and did not personally subscribe for or purchase any of the shares, but that her husband subscribed for or purchased them, and caused them to be placed on the books of the company in her name. The amendment of the bill makes substantially the same allegations as to the shares in the name of Mrs. Dorgan. The answers of appellants, which are sworn to, deny that they ever owned the stock held by their wives, or furnished the money to pay for them, and also that the stock was purchased with funds belonging to the wife's statutory separate estate. It will be observed that the bill fails to allege that the wives had no statutory separate estate. The evidence shows that a certificate for ten shares of stock was issued December 1, 1868, and certificates for the other ten shares were issued February 18, 1882, to Mrs. Bush; and a certificate for twenty shares was issued April 19, 1875, to Mrs. Dorgan; which stood thereafter on the books of the company in their names, respectively. Bush and Dorgan each owned thirty-five shares, for which certificates were issued in their names, and the books showed that they were the holders of such shares. On the pleadings and evidence, the chancellor rendered a decree against each of the appellants for the aggregate amount of the stock held in his own name, and that which stood in the name of his wife. What follows will be understood as the expression of my individual views as to the personal liability of the husbands.

It is conceded that, at common law, when the husband subscribes for stock in the name of his wife, he will be held liable for the subscription as the real owner. The rule rests on the incapacity of a married woman to subscribe for stock, and as she can not make a binding contract, whoever subscribes in her name becomes personally liable. At common law a married woman has no material rights as regards shares of stock subscribed for or purchased by her. The statutes in force at the time of the purchase of the stock in question abrogated the marital rights of the husband as to the wife's statutory separate estate. By the statute her property was vested in him, not as husband, but as her trustee, and as such he was clothed with large discretionary powers to invest her funds as he deemed most beneficial for her, and if he purchased personal property with her money, taking the title in her name, while as trustee he was entitled to the possession and income, she was the legal owner. Evans v. English, 61 Ala. 416; Daniel v. Hardwick, 88 Ala. 557. The husband may invest

her money in the stock of incorporated companies, which thus becomes her separate estate, as well as other personal property.

The supreme court of the United States, in a recent case, held that a married woman, in the District of Columbia, may become a holder of stock in a national banking association, assuming all the liabilities of a shareholder, though the consideration may have proceeded from the husband, and that coverture does not prevent the recovery of a judgment against her for the amount of an assessment levied upon the shareholders to pay the corporate debts. Keyzer v. Hitz, 133 U. S. 138. This conclusion is based on the fact that the statute imposing liability on the stockholders makes no exception in favor of married women. Whether, under our statutes, the rules of the common law are displaced so far as to render a married woman individually liable for the debts of the corporation and authorize a personal judgment against her, are questions not before us and as to which we express no opinion. In Simmons v. Dent, 15 Mo. App. 288, it was held that, under a statute whereby a married woman may become a stockholder, a transfer of stock from the husband to the wife is valid and relieves him from liability on the stock the same as though he had transferred it to another person.

That a married woman may become, by a purchase of shares, a stockholder in an incorporated company under our statute, can not well be questioned. The liability of the shareholders, additional to the common law liability for unpaid subscriptions, is statutory. Imposing a liability which did not exist at common law, the statute will not be extended by construction so as to include persons who are not the equitable or real owners of the stock, or in whom the legal title is not vested—who are not stockholders, neither equitably nor legally. Cook on Stock and Stockholders, § 214. When money of the wife's statutory separate estate is invested by her husband as a trustee in the purchase of stock, he is not the owner, has no beneficial interest therein, and enters into no contractual relations, express or implied, with the corporation. It is true that, under the statutes in force at the time of the purchase of the stock, a married woman had no capacity to make contracts subjecting her to personal liability, or charging her statutory separate estate. But whether the husband, subscribing for stock in the name of his wife, would be liable for the unpaid subscriptions, is not the question presented for decision. It may be that he would be liable, under the rule laid down in Wilder v. Abernethy, 54 Ala. 644, that no title to property purchased on her credit passes to her, the contract of purchase not being a charge on her separate estate, and if purchased by the husband on the credit of the wife, it becomes his property. A different question arises where property is purchased with the separate money of the wife, paid for a real investment of her funds by the husband as her statutory trustee. In such case the contract of purchase, the investment, bound the wife. It appearing that, in each case, the stock was purchased by the husband for the wife in his capacity of trustee under his statutory powers, paid for with the moneys of her separate estate, the certificates issued in

her name, standing on the books of the company as the owner holding the legal title, and the husband's name not appearing on the books as the owner, or as holding the stock in trust, he can not be regarded, in my opinion, as a stockholder, in the meaning of the constitutional and statutory provisions imposing the additional individual liability. But as to this conclusion, the other members of the court differ with me, holding that, as a married woman was incapable under the statute of making a contract binding her personally, or charging her statutory separate estate, the common law rule, which makes the husband, when he subscribes for stock in the name of his wife, personally liable on the subscription, applies, and subjects him to the additional liability imposed by the statute on the stockholders to the extent of their stock.

As to Bush and Dorgan, affirmed.

Note. Married women as shareholders. See, 1847, Porter v. Bank of Rutland, 19 Vt. 410; 1849, Angas' Case, 1 De G. & Sm. 560; 1849, Slaymaker v. Bank of Gettysburg, 10 Pa. St. 373; 1850, White's Case, 3 De G. & Sm. 157; 1853, Dalton v. Midland, etc., R., 13 C. B. 474; 1860, Luard's Case, 1 De G., F. & J. 533; 1860, In matter of Reciprocity Bank, 22 N. Y. 9; 1864, Hill v. Pine River Bank, 45 N. H. 300; 1866, Matthewman's Case, L. R. 3 Eq. Cas. 781; 1868, Butler v. Cumpston, L. R. 7 Eq. Cas. 16; 1872, Pugh & Sharman's Case, L. R. 13 Eq. 566; 1879, Brown v. Bokee, 53 Md. 155; 1880, Anderson v. Line, 14 Fed. Rep. 405; 1886, Sayles v. Bates, 15 R. I. 342; 1887, Witters v. Sowles, 32 Fed. Rep. 767; 1890, Keyser v. Hitz, 133 U. S. 138; 1894, Robinson v. Turrentine, 59 Fed. Rep. 554; 1896, Re Married Women's, etc., 18 Pa. Co. Ct. 492.

See, also, 14 Am. & Eng. Ency. 680; Beach, § 139; Cook, §§ 66, 250, 319, 396, 538; Clark, § 98; Elliott, § 346; I Thompson, §§ 1096-7; II *Ib.*, § 2493; III *Ib.*, §§ 3103, 3211, 3275; VII *Ib.*, §§ 8163, 8708.

Sec. 130. Aliens. See Regina v. Arnaud, 9 Adolpl. & E. 886, *supra*, p. 58.

Notes. Aliens as shareholders. See, 1806, *Ex parte* Boussmaker, 13 Ves. Jr. 71; 1844, Cammeyer v. U. G. L. Churches, 2 Sandf. Ch. (N. Y.) 186; 1847, Commw. v. O'Donnell, Brightly N. P. (Pa.) 111; 1869, Hobbs v. Manhattan Ins. Co., 56 Maine 417, 96 Am. Dec. 472; 1871, *In re* Journalist's Fund, etc., 8 Phila. (Pa.) 272; 1873, *In re* Charter, etc., 10 Phila. (Pa.) 19; 1879, *In re* Charter, etc., 1 Leg. Rec. (Pa.) 133; 1880, Humphreys v. Mooney, 5 Colo. 282; 1890, Commw. v. Hemmingway, etc., 131 Pa. St. 614, 7 L. R. A. 357; 1895, Re Italian Mut. Ben. Assn., 15 Pa. Co. Ct. 644; 1897, Re Charter St. Ladislaus, 19 Pa. Co. Ct. 25; 1899, Blien v. Rand, 77 Minn. 110, 79 N. W. 606, 46 L. R. A. 618 note.

State statutes frequently provide that incorporators, or a part of them, shall be citizens of the state granting the charter. Such provisions are undoubtedly valid, for the state can grant or withhold its corporate franchises at its pleasure. It, however, perhaps is questionable whether a state can confine the stockholders or subscribers to the stock to residents or citizens of the state creating the corporation, without violating section 2, article iv, of the United States constitution, providing that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

But see, 1890, Commw. v. Hemmingway, 131 Pa. St. 614; 1898, State v. Travelers' Ins. Co., 70 Conn. 590; 1899, Blien v. Rand, 77 Minn. 110, 79 N. W. 606.

Sec. 131. Private corporations.

THE DENNY HOTEL CO., APPELLANT, v. JOHN SCHRAM, RESPONDENT.[1]

1893. IN THE SUPREME COURT OF WASHINGTON. 6 Wash. Rep. 134–138, 36 Am. St. Rep. 130.

DUNBAR, C. J. * * * Second. Can a corporation under the laws of this state become an incorporator by subscribing for shares in another corporation? * * *

As to the second proposition, a corporation can only be formed in the manner provided by law, and has only such powers as the law specially confers upon it. We do not think that a corporation was within the contemplation of the legislature when they used the expression, "two or more persons," in § 1498, Gen. Stat. It is true that § 1709, Code Proc., provides that the term "person" may be construed to include the United States, this state, or any state or territory, or any public or private corporation, as well as an individual. But it does not follow, by any means, that the term "person" is always to be construed as a private corporation, any more than it is always to be construed as the United States.

Morawetz on Private Corporations, § 433, says: "A corporation can not, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation; nor can it do this indirectly through persons acting as its agents or tools;" citing Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475. The author, continuing, says, "The right of forming a corporation is conferred by the incorporation laws only upon persons acting individually, and not upon associations."

This, it seems to us, for manifest and manifold reasons, is in accordance with public policy, and we therefore decide that under the existing laws of this state one corporation can not subscribe to the capital stock of another corporation. And, in any event, in this case the amount of the capital stock of the building company was so exceedingly small, compared with the amount of the liability which it sought to assume (its subscribed stock being $64,000 and its capital stock only $54,000), that there was no apparent ability to pay the amount subscribed; and while it may be true that a party's contract will not be held void if it is not apparent that he is worth the entire amount of money necessary to carry it out at the time it is made, yet the disparity here is too great, and there is not only not "an apparent ability to pay," but there is an apparent inability to pay.

We find no error in the proceedings in the court below, and the judgment is therefore affirmed.

STILES, ANDERS and SCOTT, JJ., concur.

HOYT, J., disqualified.

Note. See, *infra*, under Powers of Corporations, p. 1051, *et seq.*

[1]Only that part of opinion relating to the one point given.

Sec. 132. Municipal corporations.

COLE v. LA GRANGE.[1]

1884. In the Supreme Court of the United States. 113 U. S. Rep. 1–9.

This was an action to recover the amount of coupons for interest from January 1, 1873, to January 1, 1880, attached to twenty-five bonds, all exactly alike, except in their numbers, and one of which was as follows:

"United States of America.
State of Missouri, City of La Grange.

"No. 23. $1,000

"Know all men by these presents, that the city of La Grange doth, for a good, sufficient and valuable consideration, promise to pay to the La Grange Iron and Steel Company, or bearer, the sum of $1,000 in current funds, thirty years after the date thereof, at the Third National Bank, city of New York, together with interest thereon, at the rate of eight per cent. per annum, payable annually in current funds on the first day of each January and July ensuing the date hereof, on presentation and surrender of the annexed interest coupons at said Third National Bank.

"This bond is issued under an ordinance of the city council of the said city of La Grange, passed and approved September 22, 1871, under and in pursuance of an act of the legislature of the state of Missouri, entitled 'An act to amend an act entitled an act to incorporate the city of La Grange,' approved March 9, 1871, which became a law and went into force and effect from and after its said approval.

"This bond to be negotiable and transferrable by delivery thereof.

"In testimony whereof, the city council of the city of La Grange hath hereunto caused to be affixed the corporate seal of said city, and these presents to be signed by the mayor and countersigned by the clerk of the city council of said city this 14th day of December, 1871.

[Seal]

"J. A. Hay, *Mayor.*
"R. McChesney, *Clerk.*"

The petition alleged that the city of La Grange, on the 14th of December, 1871, executed the twenty-five bonds, and delivered them to the La Grange Iron and Steel Company, under and by virtue of the authority contained in section 1 of article vi of the city charter, as amended by an act of the legislature of Missouri, approved March 9, 1871 (which section, as thus amended, was set forth in the petition), and under and by virtue of an ordinance of the city, dated September 22, 1871, by which an election was authorized to be held in the city on October 4, 1871, to test the sense of the people of the city upon the question of issuing bonds;

[1] Arguments omitted.

that in compliance with the ordinance and with the city charter, an election was held, at which the proposition was adopted by a two-thirds vote of the qualified voters; and that on September 1, 1872, the plaintiff bought the twenty-five bonds, for value, relying upon the recitals on their face, and without knowledge of any irregularity or defect in their issue; of all which the defendant had notice, by means whereof the defendant became liable and promised to pay to the plaintiff the sum specified in the coupons, according to their tenor and effect.

The answer denied all the allegations of the petition; and for further answer averred that the act of the legislature mentioned in the petition, approved March 9, 1871, attempted to give, and in terms did give, to the city authority to make gifts and donations to private manufacturing associations and corporations; that the city council, purporting to act under such authority, by an ordinance adopted September 22, 1871 (which was referred to in the answer), did submit to a vote of the citizens a proposition to give or donate to the La Grange Iron and Steel Company, a private manufacturing company, formed and established for the purpose of carrying on and operating a rolling-mill, the sum of $200,000; that, in accordance with that ordinance, the bonds of the city were issued to said manufacturing company, which was a strictly private enterprise, formed and prosecuted for the purpose of private gain, and which had nothing whatever of a public character; and that it was incompetent for the legislature to grant authority to cities or towns to make donations and issue bonds to mere private companies or associations having no public functions to perform, and the act of the legislature and the ordinance of the city were void; wherefore, the bonds and coupons were issued without any legal authority, and were wholly void.

To this answer the plaintiff filed a general demurrer, which was overruled by the court, and the plaintiff electing to stand by his demurrer, judgment was entered for the defendant. 19 Fed. Rep. 871. The plaintiff sued out this writ of error.

Mr. Justice GRAY delivered the opinion of the court. He recited the facts as above stated and continued:

The general grant of legislative power in the constitution of the state does not enable the legislature, in the exercise either of the right of eminent domain or in the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract for private objects debts which must be paid by taxes. It can not, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject.

In Loan Association v. Topeka, 20 Wall. 655, bonds of a city, issued, as appeared on their face, pursuant to an act of the legislature of Kansas, to a manufacturing corporation, to aid it in establishing shops in the city for the manufacture of iron bridges, were held by

this court to be void, even in the hands of a purchaser in good faith and for value. A like decision was made in Parkersburg v. Brown. 106 U. S. 487. The decisions in the courts of the states are to the same effect. Allen v. Jay, 60 Maine 124; Lowell v. Boston, 111 Mass. 454; Weismer v. Douglas, 64 N. Y. 91; *In re* Eureka Co., 96 N. Y. 42; Bissell v. Kankakee, 64 Ill. 249; English v. People, 96 Ill. 566; Central Branch Union Pacific Railroad v. Smith, 23 Kan. 745.

We have been referred to no opposing decision. The cases of Hackett v. Ottawa, 99 U. S. 86, and Ottawa v. National Bank, 105 U. S. 342, were decided, as the chief justice pointed out in Ottawa v. Carey, 108 U. S. 110, 118, upon the ground that the bonds in suit appeared on their face to have been issued for municipal purposes, and were therefore valid in the hands of *bona fide* holders. In Livingston v. Darlington, 101 U. S. 407, the town subscription was toward the establishment of a state reform school, which was undoubtedly a public purpose, and the question in controversy was whether it was a corporate purpose, within the meaning of the constitution of Illinois. In Burlington v. Beasley, 94 U. S. 310, the grist mill held to be a work of internal improvement, to aid in constructing which a town might issue bonds under the statutes of Kansas, was a public mill which ground for toll for all customers. See Osborne v. Adams County, 106 U. S. 181, and 109 U. S. 1; Blair v. Cuming County, 111 U. S. 363. Subscriptions and bonds of towns and cities, under legislative authority, to aid in establishing railroads, have been sustained on the same ground on which the delegation to railroad corporations of the sovereign right of eminent domain has been justified. the accommodation of public travel. Rogers v. Burlington, 3 Wall. 654; Queensbury v. Culver, 19 Wall. 83; Loan Association v. Topeka, 20 Wall. 661, 662; Taylor v. Ypsilanti, 105 U. S. 60. Statutes authorizing towns and cities to pay bounties to soldiers have been upheld because the raising of soldiers is a public duty. Middleton v. Mullica, 112 U. S. 433; Taylor v. Thompson, 42 Ill. 9; Hilbish v. Catherman, 64 Pa. St. 154; State v. Richland, 20 Ohio St. 362; Agawam v. Hampden, 130 Mass. 528, 534.

The express provisions of the constitution of Missouri tend to the same conclusion. It begins with the Declaration of Rights, the sixteenth article of which declares that "no private property ought to be taken or applied to public use without just compensation." This clearly presupposes that private property can not be taken for private use. St. Louis County Court v. Griswold, 58 Mo. 175, 193; 2 Kent Com. 339 note, 340. Otherwise, as it makes no provision for compensation except when the use is public, it would permit private property to be taken or appropriated for private use without any compensation whatever. It is true that this article regards the right of eminent domain, and not the power to tax; for the taking of property by taxation requires no other compensation than the tax-payer receives in being protected by the government, to the support of which he contributes. But, so far as respects the use, the taking of private prop-

erty by taxation is subject to the same limit as the taking by the right of eminent domain. Each is a taking by the state for the public use, and not to promote private ends.

The only other provisions of the constitution of Missouri having any relation to the subject, are the following sections of the eleventh article:

"Sec. 13. The credit of the state shall not be given or loaned in aid of any person, association or corporation, nor shall the state hereafter become a stockholder in any corporation or association, except for the purpose of securing loans heretofore extended to certain railroad corporations in the state.

"Sec. 14. The general assembly shall not authorize any county, city, or town to become a stockholder in, or loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election, to be held therein, shall assent thereto."

Both these sections are restrictive and not enabling. The thirteenth section peremptorily denies to the state the power of giving or lending its credit to or becoming a stockholder in any corporation whatever. The aim of the fourteenth section is to forbid the legislature to authorize counties, cities or towns, without the assent of the tax-payers, to become stockholders in or to lend their credit to any corporation however public its object; State v. Curators State University, 57 Mo. 178; not to permit them to be authorized, under any circumstances, to raise or spend money for private purposes.

It is averred in the answer, and admitted by the demurrer, that the La Grange Iron and Steel Company, to which the bonds were issued, was "a private manufacturing company, formed and established for the purpose of carrying on and operating a rolling-mill," and "was a strictly private enterprise, formed and prosecuted for the purpose of private gain, and which had nothing whatever of a public character." The ordinance referred to shows that the mill was to manufacture railroad iron; but that is no more a public use than the manufacture of iron bridges, as in the Topeka case, or the making of blocks of stone or wood for paving streets. There can be no doubt, therefore, that the act of the legislature of Missouri is unconstitutional, and that the bonds expressed to be issued in pursuance of that act are void upon their face.

As for this reason the action can not be maintained, it is needless to dwell upon the point that the answer demurred to, besides the special defense of the unconstitutionality of the act, contains a general denial of the allegations in the petition. That point was mentioned and passed over in the opinion of the circuit court, and was not alluded to in argument here, the parties in effect assuming the general denial in the answer to have been withdrawn or waived, and the case submitted for decision upon the validity of the special defense.

Judgment affirmed.

Note. Subscriptions by municipal corporations. There is no implied authority to subscribe. 1863, Gelpcke v. Dubuque, 1 Wall. (U. S.) 175; 1873, State v.

Saline Co. Ct., 51 Mo. 350; 1880, Weightman v. Clark, 103 U. S. 256; 1883, City of Jonesboro v. Cairo, etc., 110 U. S. 192; 1888, Kelley v. Milan, 127 U. S. 139.

The legislature may authorize the municipal corporation to subscribe. 1837, Goddin v. Crump, 8 Leigh (Va.) 120; 1852, Slack v. Maysville & L. R., 13 B. Mon. (Ky.) 1; 1853, Sharpless v. Mayor, etc., 21 Pa. St. 147, 59 Am. D. 759; 1858, Knox Co. v. Aspinwall, 21 How. (U. S.) 539; 1871, Leavenworth Co. v. Miller, 7 Kan. 479; 1871, Walker v. Cincinnati, etc., 21 Ohio St. 14, 8 Am. Rep. 24; 1871, *Ex parte* Selma, etc., 45 Ala. 696, 6 Am. Rep. 722; 1873, Harcourt v. Good, 39 Tex. 456; 1873, Pine Grove Tp. v. Talcott, 19 Wall. (86 U. S.) 666; 1874, Loan Assn. v. Topeka, 20 Wall. (87 U. S.) 655; 1876, Williams v. Duanesburg, 66 N. Y. 129; 1877, Quincy, etc., R. v. Morris, 84 Ill. 410; 1882, Lyons v. Chamberlain, 89 N. Y. 578; 1892, Doon Tp. v. Cummins, 142 U. S. 366; 1893, Barnum v. Okolona, 148 U. S. 393; 1895, Folsom v. Ninety Six, 159 U. S. 611.

But see, *contra*, 1868, McClure v. Owen, 26 Iowa 243; 1870, People v. Salem, etc., 20 Mich. 452; 1871, People v. State Treas., 23 Mich. 499.

Sec. 133. State or national government.

BANK OF THE UNITED STATES v. PLANTER'S BANK OF GEORGIA.[1]

1824. IN THE SUPREME COURT OF THE UNITED STATES. 9 Wheat. (U. S.) Rep. 904–913.

[Suit by plaintiff upon promissory notes of defendant payable to a person named or bearer and duly transferred to plaintiff. The defendant bank pleads to the jurisdiction of the United States Circuit Court of Georgia (where the case was tried and certified to the supreme court on a division of opinion), alleging that the state of Georgia was a stockholder, and raising the question as to whether the state was therefore a party defendant in the case.]

MARSHALL, C. J. * * * It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union, who have an interest in banks, are not suable even in their own courts, yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act.

[1] Only so much of opinion given as relates to the character of a state as a stockholder.

The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank in the sense of the constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty so far as respects the transactions of the corporation and exercises no power or privilege which is not derived from the charter. We think, then, the Planter's Bank of Georgia is not exempted from being sued in the federal courts by the circumstance that that state is a corporator.

CHAPTER 7.

ORGANIZATION AND COMPLIANCE WITH CONDITIONS.[1]

ARTICLE I. SCHEMES OF ORGANIZATION.

Sec. 134. (1) *Under the King's Charter:* This usually provides the original organization in the charter itself. See *supra*, The Charter of Dartmouth College, p. 426, and *infra*, p. 711.

Sec. 135. (2) *In special acts:*

(*a*) The act itself provides the original organization: Illustration,—Charter of Michigan Central R. Co.

"Sec. 1. Be it enacted, etc., That William Sturgess (and twenty-five other persons named) and such other persons as shall associate with them for that purpose, are hereby made and constituted a body corporate and politic by the name and style of the Michigan Central Railroad Company, with perpetual succession, etc. (enumerating various powers conferred).

"Sec. 22. The corporate stock * * * shall be $5,000,000 * * * divided into shares of $100 each. * * * *Provided*, The company may commence business whenever $2,000,000 of stock shall have been subscribed.

"Sec. 23. The nine persons first named in the first section * * * shall be the first directors of said company; and at their first meeting they shall elect by ballot one of their number to be president, a majority of whom shall be competent to manage the affairs of the company; such first meeting of the directors shall be held at a time and place to be fixed by a written agreement signed by all of said directors. * * *

"Sec. 24. Said directors, or a majority of them, may open books to receive subscriptions to the capital stock, * * * at such times and places as they or a majority of them may appoint, etc. * * *

"Sec. 25. To continue the succession of president and directors, nine directors shall be chosen annually, on the second Monday in June, at such time and place as may be appointed by the directors. * * *

"Sec. 27. A general meeting of the stockholders of said company shall be

[1] See Angell & Ames, ch. 2 and 3; Beach, §§ 9–16, 159–162; Boone, §§ 26–34; Clark, §§ 19–27, 41–45; Cook, §§ 5, 183–6, 231–5; Elliott, §§ 21–50; Field, § 29; 1 Kyd, ch. 3; Morawetz, ch. 2 and 9; Taylor, §§ 72–90; Thompson, ch. 1–18.

holden annually at the time and place appointed for the election of directors. * * *

"Sec. 31. The directors shall have full power to conduct the affairs of said company, and to exercise any powers which said company might exercise, except where provision is made by this act for the exercise of such powers by the stockholders at their annual or special meetings, or where the powers of the directors may be restrained by the by-laws of said company. * * * See 6 Laws of Mich. (1846) No. 42, p. 37, *et seq.*

Sec. 136.

(*b*) The law provides for the organization to be made by the persons subscribing for the stock. See *supra*, the charter of the Baltimore and Ohio R. Co., p. 427.

Sec. 137. (3) *Under general incorporation laws:*

(*a*) By deed of settlement; this method, when used, provided the organization in the deed itself. See forms in 2 Coke's Inst. 720, and Wordsworth, Stock Companies, Part II.

Sec. 138. Same.

(*b*) License plan: Illustration,—The Illinois law.

This provides that "whenever any number of persons, not less than three nor more than seven, shall propose to form a corporation * * * they shall make a statement to that effect, under their hands, and duly acknowledged, * * * setting forth name, * * * object, * * * capital stock," shares, location of office and duration, not exceeding ninety-nine years, which statement shall be filed with the secretary of state, "who shall issue to such persons a license as commissioners to open books for subscription to the capital stock of said corporation at such times and places as they may determine. * * *" As soon as the capital stock shall be fully subscribed, "the commissioners shall convene a meeting of subscribers for the purpose of electing directors or managers and the transaction of such other business as shall come before them." Certain notice of election is to be given, and voting may be by proxy or cumulative. "The commissioners shall make a full report of their proceedings, including therein a copy of the notice, * * * a copy of the subscription list, * * * the names of the directors or managers elected, and their respective terms of office, which report shall be sworn to by at least a majority of the commissioners, and shall be filed in the office of the secretary of state. The secretary of state shall thereupon issue a certificate of the complete organization of the corporation, making a part thereof a copy of all papers filed in his office in and about the organization of the corporation, and duly authenticated under his hand and seal of the state, and the same shall be recorded in a book for that purpose, in the office of the recorder of deeds of the county where the principal office of such company is located. Upon the recording of said copy, the corporation shall be deemed fully organized, and may proceed to business." Revised Statutes of Illinois, 1895, act of April 18, 1872, in force July 1, 1872, §§ 2, 3 and 4.

Sec. 139. Same.

The *new Kansas law* (Laws of 1898, ch. 10, approved January 7, 1899) creates a charter board, composed of the attorney-general, the secretary of state and the state bank commissioner, to whom application (on blanks to be furnished) shall be made. "The board shall make a careful investigation of each application with reference to the character of the business in which the proposed corporation is to engage, and if the board shall determine that the business is one for which a corporation may lawfully be formed, and *that applicants are acting in good faith*, the application shall be granted, and the secretary of the board (the secretary of state) shall issue a certificate setting forth the fact that the persons named in the application have been authorized by the charter board to form a private corporation, as set forth in the application, reciting the proposed name and character thereof." §§ 3*a*-3*j*. A charter must be prepared stating name, purpose, place of business, term of existence, *number of its directors or trustees* and the names and residences of those who are appointed for the first year, amount of capital stock, number of shares, names and addresses of shareholders and number of shares held by each. *Ib.* Charter must be subscribed and acknowledged by five persons, three to be citizens of the state, and shall then be filed with the secretary of state, and be recorded by him. See, also, Alabama Civil Code, §§ 1139-42.

Sec. 140. Same.

(*c*) Organization completed before application made: Illustration,—Massachussets law.

Any number of persons may associate by an agreement "which shall set forth the fact that the subscribers thereto associate * * * with the intention of forming a corporation," name, purpose, location, capital stock, and number of shares. The first meeting shall be called by a notice signed by one or more of the subscribers, stating time, place and purpose, served seven days before time fixed for meeting. At such meeting "an organization shall be effected by the choice by ballot of a temporary clerk, who shall be sworn, and by the adoption of by-laws and the election (by ballot for one year) of directors, treasurer, clerk and such other officers as the by-laws may provide; but at such first meeting no person shall be eligible as a director who has not subscribed the agreement of association. The temporary clerk shall make and attest a record of the proceedings until the clerk has been chosen and sworn, including a record of such choice and qualification." "The president, treasurer and a majority of the directors, shall forthwith make, sign and swear to a certificate setting forth a true copy of the agreement of association with the names of the subscribers thereto, the date of the first meeting * * * and shall submit such certificate and also the records of the corporation to the commissioner of corporations, who shall examine the same, and who may require such other evidence as to the facts of the case as he may judge necessary. The commissioner, if it appears that the requirements * * * have been complied with, shall certify that fact and his approval of the certificate by indorsement thereon. Such certificate shall thereupon be filed by said officers in the office of the secretary of the commonwealth, who * * * shall issue a certificate," in a form prescribed, under his signature and the seal of the commonwealth, and "such certificate shall have the force and effect of a special charter, and shall be conclusive evidence of the existence of such corporation. He shall also cause a record of such certificate to be made, and a certified copy of such record may be given in evidence with like effect as the original certificate." Public Stat. of Mass. 1882, ch. 106, §§ 16-21.

In many of the states it is required or customary for the organization for the first year, or at least the first directorate, to be provided for in the articles of association, when they are filed with the required officer.

See forms in American Corp. Legal Manual for 1899, Arkansas, California, Colorado, Connecticut, District of Columbia, Idaho, Indiana, Iowa, Kansas, Maine, Maryland, Michigan (Mining Companies), Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, Wyoming, Dominion of Canada, Prince Edward's Island.

Sec. 141. Same.

(*d*) Organization by subscribers to stock after the articles of incorporation are filed.

See note to State v. Fidelity, etc., Ins. Co., 49 Ohio St. 440, *supra*, p. 406. In the following states, it seems from the approved forms in use that the organization is to take place after the stock is subscribed, and is to be determined by the subscribers: Arizona, Delaware, Florida, Hawaii (§ 2028, Civil Code), Louisiana, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, West Virginia, Wisconsin. See forms in the American Corporation Legal Manual for 1899; Appendix, *infra*, Charter of U. S. Steel Corp.

ARTICLE II. PROOF OF ORGANIZATION.

Sec. 142. General presumption of regularity.

PACKARD ET AL. v. OLD COLONY RAILROAD COMPANY.[1]

1897. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 168 Mass. Rep. 92–99.

[In 1848 the ancestor of plaintiff executed a deed conveying the land, for the taking of which damages were asked, to Perkins and constituting "a committee of and in behalf of Village Cemetery, a corporation," for the use and behoof of said corporation, "except that the ground shall never be used for other purposes than as a cemetery." Respondent introduced the corporation record book showing that in 1848 eleven persons desirous of forming a cemetery corporation under the act of 1841, had a meeting called according to the statute, at which a secretary, president and treasurer were chosen and a committee appointed to draft a constitution and by-laws; the record did not show how many were present. In 1848 the name was chosen, and sixteen meetings in all were held prior to 1854, when the corporation seemed to become dormant. In 1883 a meeting of the proprietors was called to elect officers and adopt by-laws, and several meetings followed, at

[1] Statement of facts abridged. Only part of opinion relating to the one point given.

one of which it was suggested that the original corporation was illegal because the records did not show the number present at the organization meeting, and at a subsequent meeting it was suggested that the legislature be petitioned to re-establish the corporation, but nothing was done. Records showed that twenty-nine burial lots had been deeded between 1849 and 1854. The act of 1841 provided that: "Any ten or more may organize a corporation for the purpose," etc., and, "When such persons are organized, etc., they shall become a corporation." Plaintiff claimed there had been no valid corporate organization.]

ALLEN, J. It will be seen that there is no provision in the statute requiring the presence of any particular number of persons at the first meeting. Eleven persons signed the application, and thus expressed their wish and intention to be members of the corporation. This was a proceeding analogous to the signing of the articles of agreement, which was deemed essential mostly relied on by the petitioners. Utley v. Union Tool Co., 11 Gray 139. Having done this, it was not necessary that all should attend the first meeting.

Moreover, even if it were necessary for ten to be present, there would be a presumption that this requirement had been complied with. The presumption of regularity extends to the proceedings in the organization of corporations. In Narragansett Bank v. Atlantic Silk Co., 3 Met. 282, 287, it was said: "The maxim of law is, that all things shall be presumed to have been rightly and correctly done, until the contrary is proved. This maxim is stated and explained, and many instances given of its application to corporations, and to acts and doings of their members, officers and agents, in Bank of United States v. Dandridge, 12 Wheat. 64, 70. As the corporation could not proceed lawfully until duly organized, and as they did proceed to act as a corporation, this presumption has its effect." This doctrine is often applied, and it is to be assumed that ten persons were present at the first meeting, if that number was necessary. Wallace v. First Parish in Townsend, 109 Mass. 263; Platt v. Grover, 136 Mass. 115; Commonwealth v. Carr, 143 Mass. 84; Commonwealth v. Woelper, 3 S. & R. 29; Graves v. Lynchburg & Salem Turnpike Co., 4 Rand. 378; Lauderdale Peerage, 10 App. Cas. 692.

Petition dismissed.

Note. 1827, United States Bank v. Dandridge, 25 U. S. (12 Wheat.) 64, 70, *infra*, p. 854; 1841, Wescott v. Silk Co., 3 Metcalf (Mass.) 282, 287; 1844, Sasser v. State, 13 Ohio 453 (criminal suit); 1858, President and Trustees, etc., v. Thompson, 20 Ill. 197 (charter and user); 1864, Holmes v. Gilliland, 41 Barb. (N. Y.) 568 (general reputation); 1872, Wallace v. First Parish, 109 Mass. 263; 1883, Platt v. Grover, 136 Mass. 115; 1886, Commonwealth v. Carr, 143 Mass. 84; 1888, Braintree Water Supply Co. v. Inhabitants of Braintree, 146 Mass. 482, on 488; 1891, Jeffries Neck Pasture Propr's v. Ipswich, 153 Mass. 42; 1900, Fish v. Smith, 73 Conn. 377, 84 Am. St. R. 161.

See, also, Angell & Ames, §§ 238–241, 284; Beach, §§ 873–4; Boone, § 34; Clark, pp. 34, 36, 51, 129; Cook, §§ 606–7; Elliott, §§ 49–50; Morawetz, §§ 25, 36, 324, 775; Taylor, §§ 128, 203–6, 251, 263; I Thompson, §§ 495–500; III Thompson, § 3927; IV Thompson, § 5029; VI Thompson, §§ 7689–7713; VII Thompson, § 8214.

ARTICLE III. WHEN DOES CORPORATE BIRTH OCCUR? THEORIES:

Sec. 143. (*a*) Only upon complete organization.

WALTON v. OLIVER.[1]

1892. IN THE SUPREME COURT OF KANSAS. 49 Kan. Rep. 107–114, 33 Am. St. Rep. 355, 38 Am. & Eng. C. C. 342.

Opinion by GREEN, C. This action was commenced in the district court of Cowley county by the defendants in error, to recover the sum of $295 debt, and $45.40 costs, from the plaintiffs in error, who were alleged to be the directors of the Arkansas City Athletic Association. The petition charged that, after making and filing a charter in the office of the secretary of state, the defendants never perfected the organization of the corporation by opening the books for the purpose of receiving subscriptions; that they did not levy and collect any money from themselves, nor adopt any by-laws or other rules for the government of the corporation; that no meeting had ever been called for the election of directors or other officers; that the defendants had failed to comply with any of the requirements of the law for the government of corporations after the articles of incorporation had been filed; that on the 18th day of January, 1889, the plaintiffs recovered a judgment against such corporation for the sum of $295 and $45.40 costs; that an execution was issued upon such judgment and returned "no property found." It was further alleged—

"That after the filing of the said act of incorporation, the defendants assumed to act as such corporation, and for that purpose leased real estate and purchased of the plaintiffs material and lumber, with which they erected a grand stand or amphitheater upon said leased ground to the amount and value of several hundred dollars, and paid to the plaintiffs thereon all but the amount represented by the aforesaid judgment, and in all their dealings with the plaintiffs, dealt in the name of said judgment defendant hereinbefore referred to, and the plaintiffs aver that, knowing of the filing of the aforesaid articles of incorporation, and believing that said defendants were acting in good faith, and that they were complying with the provisions of the laws of Kansas, in such cases made and provided, in all things, and having no cause to think otherwise, on the faith and credit of these men they sold said lumber and building material to them and charged it to said corporation of which they were the proprietors and incorporators, by their direction and instruction; that but for all of which the plaintiffs would not have furnished them with said materials and credit; that after said execution had been issued and returned unsatisfied, the plaintiffs applied to these defendants for the names of the officers and stockholders of said corporation, and these defendants declined to

[1] Arguments omitted.

furnish either the names or the places of residence, and insolently informed the plaintiffs that there were no officers, no books, no directors, no stockholders, and no subscriptions, and that if the plaintiffs thought they had any remedy looking to the collection of said judgment, interest and costs they were mistaken, etc., and now refuse to give the plaintiffs any information of any kind relative thereto whatsoever; the plaintiffs only learned the foregoing facts after the rendition of the aforesaid judgment."

The defendants filed a demurrer to this petition, which was overruled by the court, and judgment was rendered for the amount prayed for in the petition. The defendants elected to stand upon the demurrer, and bring the case here for review.

It is first urged by the plaintiffs in error that the petition did not state a cause of action; that the petition did not show that the goods furnished, for which the original judgment was rendered, were furnished at the request of the plaintiffs in error before the Arkansas City Athletic Association became a body corporate; but that the petition showed upon its face that the goods were sold upon the credit of the corporation, and that part of the purchase price of the goods was paid by the corporation. It is further insisted that the Arkansas City Athletic Association was legally incorporated, and that the organization became complete upon the filing of the charter with the secretary of state. This contention is not sound. The statute only provides that the existence of the corporation shall date from the time of filing the charter, and the certificate of the secretary of state shall be evidence of the time of such filing. (Gen. Stat. of 1889, ¶ 1166.) The statute is silent as to the organization.[1] *The rule is well established that a corporation must have a full and complete organization and existence as an entity, and in accordance with the law to which it owes its origin, before it can assume its franchise or enter into any kind of contract or transact any business; and whatever be the mode prescribed by the act of incorporation, a substantial compliance with all the provisions of the law under which it is created is required before the corporation can be said to have such an existence as will entitle it to do business.* (4 Am. & Eng. Ency. of Law, 197,

[1] The statutes under which this apparent corporation was formed provided: "*Sec. 1155.* Private corporations may be created by the voluntary association of five or more persons, * * * in the manner mentioned in the following sections. *Sec. 1161.* A charter prepared setting forth name, purpose, place of business, term of existence, the number of directors or trustees *and the names and residences of those who are appointed for the first year*, capital stock, if any, and the number of shares. *Sec. 1164.* Charter must be subscribed and acknowledged. *Sec. 1165.* Such charter shall thereupon be filed in the office of the secretary of state, who shall record the same at length in a book kept for that purpose, and retain the original on file in his office. A copy of the charter, or of the record thereof, duly certified by the secretary of state, under the great seal of the state, shall be evidence of the creation of the corporation. *Sec. 1166. Period of existence.* Sec. 10. The existence of the corporation shall date from the time of filing the charter, and the certificate of the secretary of state shall be evidence of the time of such filing. [G. S. 1868, ch. 23, § 10, October 31.]"

and authorities there cited.) Now it is conceded in this case that nothing was done to perfect the organization after the charter was filed. *A corporation can not act without officers and agents, and it is powerless to do anything until its incorporators or promoters give it the means whereby it can act. The words "organize" or "organization" have a well understood meaning; and as we construe them they mean the election of officers, providing for the subscription and payment of the capital stock, the adoption of by-laws, and such other steps as are necessary to endow the legal entity with the capacity to transact the legitimate business for which it was created.* In this sense the corporation was not fully organized. While it had an existence, the organization was never completed so that the corporation could do business.

In the case of Hurt v. Salisbury, 55 Mo. 310, which was an action brought upon a note purporting to have been executed by the directors of an agricultural association, the suit was brought against the directors, upon the ground that the association was not incorporated at the time the note was given, and that the directors were, therefore, individually liable. It appeared that the association was not fully incorporated when the note was executed. The law required the charter to be filed with the recorder of the county where the corporation was located, and also in the office of the secretary of state. The charter was only filed with the recorder. The court held that the officers of the corporation had no power to issue the note, and that a note issued and signed by them would bind them personally, and not the corporation. The court said, in speaking of the attempted organization of that corporation:

"It had organized under section 2, chapter 69, General Statutes of 1865, page 367, by signing and acknowledging, and recording in the recorder's office of the proper county the articles of association. This step being taken, it was an organized corporation, not for the transaction of business, but for the purpose of taking the next and last step to complete its authority to transact business and give date to its legal existence. Until the officers took this final and necessary step by depositing and filing in the office of the secretary of state a copy of the articles of association, as they stood recorded in the county, this corporation had no power to issue the note sued upon. As it had no power to issue this note, the defendants are undoubtedly liable."

"If a corporation be illegally formed, its members or stockholders are liable as partners for its acts and contracts, and directors, officers and agents acting and contracting in its name render themselves personally liable." (Beach Priv. Corp., § 16; Marshall v. Harris, 55 Iowa 182; Kaiser v. Savings Bank, 56 Iowa 104; Coleman v. Coleman, 78 Ind. 344.)

While, in this case, the charter was filed with the secretary of state, the corporation had no officers outside of the directors named for the first year. No portion of the capital stock had been subscribed and no books opened, as required by ¶ 1173 of the General Statutes of 1889. In fact, nothing had been done to complete the preliminary

business of organizing the corporation. We do not understand that a corporation can proceed to the transaction of business without any portion of its capital stock being subscribed or paid. It may have been the English rule, but in the United States it is otherwise. (Boone Corp., § 113). The corporation has no means or capacity to act until some portion of the capital stock named in the charter has been subscribed and paid. Some states have, by a legislative rule, made directors of certain corporations jointly and severally liable for all the debts of the corporation, until the whole amount of the capital stock has been paid in. (Rev. Stat. of Wis. 1878, § 1901.)

It is unnecessary for us to consider the other assignments of error, as the view we take of the liability of the plaintiffs in error is not that of stockholders, and hence the rule laid down in the case of Abbey v. Dry Goods Company, 44 Kan. 415, has no application in this case.

The question as to whether or not two of the defendants below were served with summons is not properly raised by the record. The summons is not in the record, and we can not say whether these two defendants were served or not.

We advise an affirmance of the judgment.

By the court: It is so ordered.

All the justices concurring.

Note. See note to next case, and also to State v. Fidelity Ins. Co., 49 Ohio St. 440, *supra*, p. 406.

Sec. 144. Same.

GENT v. MANUFACTURERS' AND MERCHANTS' MUTUAL INSURANCE COMPANY.[1]

1883. In the Supreme Court of Illinois. 107 Ill. Rep. 652–660, 8 Am. and Eng. Corp. C. 306.

[The insurance law under which defendant was incorporated provided that those desiring to incorporate should file with the auditor of public accounts a declaration signed by them declaring their intention to form an insurance company, and that no mutual company should commence business until agreements had been entered into with at least 200 applicants, the premiums on which should be not less than $100,000, of which $20,000 should be paid in cash, and notes of solvent parties, founded on *bona fide* applications for insurance, should have been received for the remainder, no note to be considered as capital stock unless a policy for one year was issued upon the same within thirty days after organization. Under this law a number of parties, in July, 1880, met, determining to form such a

[1] Statements of facts abridged. Arguments omitted. Only so much of the opinion as relates to the one point given.

company, published the notice required, filed the declaration with the auditor, with copy of proposed charter; this was approved and certified to the auditor by the attorney-general on July 7, and certain persons were designated to solicit insurance. Gent agreed to take $1,000 insurance, accepted a draft drawn by the secretary of the company, dated Aug. 10, for $30 payable on demand, and gave his note for $150 February 3, 1881; application was made to the auditor to have the notes examined; this was done and some of the notes were found informal and rejected by the auditor; immediately they proceeded to obtain others, and on the 9th of February filed the list with the auditor, received his certificate, and filed it with the county clerk February 11; on the 5th of February plaintiff's property burned, and he notified the secretary February 7. Plaintiff's note was among those upon which the company secured the final certificate of approval of the auditor; on February 11 the company canceled the note, draft and application of plaintiff, who sues for the loss.]

MR. JUSTICE WALKER. * * * That a corporation should have a full and complete organization and existence as an entity before it can enter into any kind of a contract or transact any business would seem to be self-evident. This is unconditionally true, unless the act of incorporation authorizes the corporators to perform acts and enter into contracts to bind the company when it shall be organized. As well say a child *in ventre sa mere* may enter into a contract, or that its parents may bind it by contract. A corporation, until organized, has no being, franchises or faculties. Nor do those engaged in bringing it into being have any power to bind it by contract, unless so authorized by the charter. Until organized as authorized by the charter there is not a corporation, nor does it possess franchises or faculties for it or others to exercise until it acquires a complete existence. By its birth, so to speak, it for the first time acquires its faculties to transact its business and perform its functions. Then, do these sections authorize the corporations to issue policies to individuals who apply for insurance, and give their premium notes? They are authorized to take such applications and notes as a fund or capital to authorize the granting of the charter, and to enable the company to transact its business when organized. This is manifestly the true construction, as the statute provides that if a policy of insurance running at least twelve months is not issued in thirty days after the organization of the company, the premium note shall not represent a portion of the capital stock of the company. If it was intended that the application for the policy and the giving of the premium note should constitute a contract to insure, such a provision would not have been enacted; but by its adoption it is manifest that the general assembly intended that the application and note should be held simply to be acted upon after the organization should be completed. If such was the purpose, and of it we have no doubt, then there can be no claim that there was a contract of insurance, but simply that if the property was still in existence when the company should be organized, the applicant would be entitled to a policy on the terms proposed. It was simply a proposition or an application

for a policy after the organization should be had, and the company authorized to take risks and issue policies. Beyond that the company had no power to bind the future company. Nor does the statute authorize the corporators to contract for and issue policies. Had they issued a policy in form, would any one claim that a suit could be maintained on it against the company? Surely not, because no power to do so is conferred by the statute. And if a formal written policy would be invalid, how can it be said that a mere verbal agreement for insurance can be held binding?

In the case of Rockford, Rock Island and St. Louis R. Co. v. Sage, 65 Ill. 328, it was held that a railroad incorporation was not liable for services rendered before its organization, unless the company promised to pay after it was organized. In Stowe v. Flagg, 72 Ill. 397, it was held that the agreement of parties intending to and engaged in forming a manufacturing corporation to put in property as stock, but which never was subscribed, did not bind the corporation, nor did the property become that of the corporation, although it was used by the company. In the case of Western Screw and Manufacturing Co. v. Cousley, 72 Ill. 531, it was held where the corporators, before the organization of the company was completed, employed a superintendent, and he entered upon the duties of the place, and rendered services for the inchoate company, it, when organized, was not liable to pay for such services.

This statute only authorizes the company to transact business upon filing the certificate of the auditor of public accounts with the proper county clerk. The transaction of business in the name of the corporation before that certificate shall be thus filed is unauthorized. But in this case no policy was issued, or intended to be issued, when the application and note were executed, and the case falls within the principles announced in the cases above referred to, and they are conclusive of the question.

We perceive no error in the record, and the judgment of the appellate court is therefore affirmed.

Judgment affirmed.

Note. See, 1891, McVicker v. Cone, 21 Ore. 353; 1894, Nemaha Coal & M. Co. v. Settle, 54 Kan. 424; 1894, Aspen Water Co. v. City of Aspen, 5 Colo. App. 12, 1 A. & E. C. C. (N. S.) 12; 1894, Owen v. Shepard, 19 U. S. App. 336; 1896, Loverin v. McLaughlin, 161 Ill. 417. See Elliott, § 44; I Thompson, §§ 40, 217.

Sec. 145. Same.

(*b*) Immediately upon filing articles of incorporation, without stock subscription or organization.

SINGER MANUFACTURING CO. v. PECK.[1]

1896. IN THE SUPREME COURT OF SOUTH DAKOTA. 9 S. Dak. 29, 4 Am. & Eng. C. C. (N. S.) 591, 67 N. W. Rep. 947–48.

[Appeal from the circuit court, Minnehaha county; Joseph W. Jones, Judge.

Action by the Singer Manufacturing Company against Porter P. Peck. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.]

CORSON, P. J. This is an appeal from an order sustaining a demurrer to the complaint. The allegations in the complaint are in substance as follows: That the plaintiff is a corporation; that the Wohlgemouth Shirt Company is a duly organized corporation of the state of South Dakota; that said last named corporation was organized and incorporated by five persons named, of whom the defendant was one; that said corporation was one *de facto* only, and had no legal rights to transact business or obtain credit; that it did obtain a large amount of credit, and that it purchased of the plaintiff a large number of sewing machines, of the value of six hundred dollars ($600); that said corporation had no capital, and none of its capital stock was paid for, and that said defendant Peck was the treasurer of said corporation; that an action was duly commenced by this plaintiff, and prosecuted to judgment, against the said Wohlgemouth Shirt Company, execution issued thereon, and the same returned unsatisfied, "and that said corporation has no property, and is totally and wholly insolvent. (4) And the said plaintiff further complains and alleges that said corporation never had any funds, * * * and that the holding out of said corporation as a legal corporation, and one that had complied with the law by the said corporators, was a fraud upon the persons from whom they obtained goods upon credit, and especially upon this plaintiff, all of which was well known to the incorporators and organizers of said company, and especially to the above named defendant. (5) And the plaintiff further alleges that it has no way of collecting said indebtedness unless the incorporators of said company shall be made to pay such indebtedness. Plaintiff, therefore, demands judgment against the defendant, Porter P. Peck, for the amount due on plaintiff's judgment against the Wohlgemouth Shirt Company, together with the costs and disbursements of this action, and such other and further relief as to the court may seem just and equitable."

[1] Arguments omitted.

Only the substance of such part of the complaint as we deem material under the stipulation hereinafter referred to has been given. To the complaint a demurrer was interposed by the defendant, one of the grounds of which was that the complaint did not state facts sufficient to constitute a cause of action. The parties in the court below entered into a stipulation, the material part of which is as follows: "On said appeal the question on which the case shall be decided is the question as to whether the complaint states facts sufficient to constitute a cause of action against said defendant, on the ground that he was one of the incorporators of the Wohlgemouth Shirt Company, and that the said complaint shall be construed solely as attempting to constitute a cause of action against him; not upon contract for liability upon an unpaid stock subscription, but upon his being one of said incorporators, and upon his alleged liability, on the ground that the holding out of said corporation as a legal corporation was a fraud upon the plaintiff." Section 2905, Comp. Laws,[1] provides: "Upon the filing of articles of incorporation with the secretary of the territory he shall issue to the corporation, over the great seal of the territory, a certificate that the articles containing the required statement of facts have been filed in his office; and thereupon the persons signing the articles, and their associates and successors, shall be a body politic and corporate by the name and for the purposes stated in said articles." *When the certificate specified in this section is issued, the corporation would seem to be perfected, and possess all the powers of a corporation. There seems to be no provision in the statutes of this state requiring any part of the capital stock to be paid in or subscribed as a condition precedent upon which the corporation is authorized to transact business.*

In most of the states their incorporation acts provide for the subscription and payment of a certain proportion of the capital stock as a condition to the right of the corporation to transact business. When such is the case, incorporators who proceed to incur debts in the name of the corporation before such funds are provided have been held liable for such debts. In Wechselberg v. Bank, 12 C. C. A. 56, 64 Fed. 90, and Burns v. Beck (Ga.), 10 S. E. 121, incorporators were held liable. In the former case the court says, in the majority opinion:

[1] Section 2902 of the Civil Code of Dakota Territory (still in force in South Dakota when above case was decided) provides that the articles of incorporation shall state the name, purpose, place of business, terms, number of directors, names and residences of such of them who are to serve until the election of such officers and their qualifications, and if there be a capital stock, its amount and the number of shares. Section 2904 requires the articles to be subscribed by three or more, and acknowledged. Section 2905 is given in the case above. Section 2907 makes a certified copy of the articles *prima facie* evidence of the existence of the corporation. Section 2913 provides that after the secretary of the territory issues the certificate of incorporation, "the directors named in the articles of incorporation must proceed in the manner specified or provided by their by-laws, or if none, then in such manner as they may by order adopt, to open books of subscription to the capital stock then unsubscribed and to secure subscriptions to the full amount of the fixed capital, and to levy assessments and installments thereon, etc."

"By the common law there was no individual liability of the members of a corporation for corporate debts beyond the enforcement of their agreed contributions to the capital stock. * * * Therefore, if complete corporate existence was obtained and perfected by the act of filing the articles of association without compliance with any of the requirements of § 1773, the associates are not subject to common law liability. On the other hand, it is well settled that an attempted or pretended incorporation, not perfected as the enabling act requires, does not confer this immunity, and all who are parties to the simulated corporation as associates or shareholders are held liable at common law for debts contracted under the corporate guise. While the courts have differed in naming this liability—whether in the nature of co-partners or resting 'upon the ordinary principles of contract and agency,' or upon fraud—they agree in holding liable in some form all who are engaged in the defective corporate enterprise." The court then proceeds to discuss the various provisions of the Wisconsin statute and arrives at the conclusion that the incorporators, having proceeded to contract the debt before the fund required by the statute to perfect the corporation had been provided, were liable, as the act provided that the corporation should not exercise corporate functions, that is, "the transaction of business with any others than its members, until it should have provided a capital stock in conformity with §1773."

In the case of Burns v. Beck, *supra*, two of the corporators held the corporation out to the world as being duly organized, while according to the allegations of the complaint all the stock had not been subscribed and 10 per cent. paid in, as required by the statute of Georgia, as conditions precedent to the right to the transaction of business by the corporation. Neither these nor any other conditions precedent to the corporation transacting business in this state have been imposed. The credit, therefore, in the two cases cited—and they seem to be all the cases bearing upon this question that the researches of counsel have been able to bring to our attention—was obtained by the wrongful acts of the corporators in holding out the corporation as authorized to transact business as a corporation, when, in fact, the corporation was not so authorized. The corporators in these cases committed a fraud upon the creditors. *But in the case at bar it does not appear that the corporators did any act that they were not fully authorized to do under the statute, or that they, by act or word, made any representations they were not legally authorized to make.* This being so, we can discover no principle of law by which the defendant would be liable under the allegations of the complaint. In holding out the corporation as legally incorporated, the defendant committed no fraud, as the plaintiff alleges, and correctly, that the corporation was duly organized. It is true, it is further alleged that it was only a *de facto* corporation, but that is a mere conclusion of law. The fact that our statute does not require of corporations the subscription to and payment of a certain per cent. of its capital stock before the corporation can transact business imposes upon persons dealing with corporations organized under the laws of this state greater caution and

vigilance, but this court can not impose upon corporations a greater liability than is imposed upon them by law, and the law not having specially prescribed that corporators shall be liable in such a case as that described by the complaint, and no actual fraud or misrepresentation being alleged, this court can not discover any ground upon which the defendant can be held liable. He can not be held liable at common law. He can not be held liable on the ground of misrepresentations, as he has made none, nor upon the ground of fraud, as none is alleged. We are of the opinion, therefore, that the court properly sustained the demurrer to the complaint, and the order of the circuit court appealed from is affirmed.

Note. See, also, 1889, National Bank of Jefferson v. Texas Investment Co., 74 Tex. 421, 27 A. & E. C. C. 358; 1890, Vanneman v. Young, 52 N. J. Law 403, 32 A. & E. C. C. 8; 1894, State of Missouri, *ex rel.*, etc., v. American Med. Col., 59 Mo. App. 264.

Sec. 146. Same.

(*c*) At the time of filing the articles of association with the proper officer, but perfect or adult corporate capacity does not exist until the capital stock is provided as required.

WECHSELBERG v. FLOUR CITY NATIONAL BANK.[1]

1894. In the U. S. Circuit Court of Appeals, 7th Circuit, Eastern District of Wisconsin. 24 U. S. Appeals Rep. 308–330.

Before Woods, circuit judge, and Bunn and Seaman, district judges.

This was an action at law by the Flour City National Bank against Julius Wechselberg, the plaintiff in error, Ernest S. Moe and Clarence H. Williams, as defendants below, for the recovery of the amount due upon a promissory note for $3,000, dated September 18, 1889, made by the Northwestern Collection Company to the Northwestern Collection, Loan and Trust Association, and indorsed to said bank. The alleged liability of the defendants below is based upon their acts in the incorporation of the Northwestern Collection Company as a corporation under the laws of Wisconsin, and the transaction at large of business thereunder, without having capital paid in as required by the statute, whereby it is asserted that they became personally obligated to pay the indebtedness so contracted. * * *

Seaman, District Judge, after stating the case as above, delivered the opinion of the court.

The plaintiff in error was held by the circuit court to be jointly liable with the other defendants below for the indebtedness contracted by their assumed corporation, the Northwestern Collection Company, in the absence of any capital stock. This liability was based upon

[1] Statement of facts abridged. Dissenting opinion of Woods, J., omitted.

the facts found, in his relation and conduct as a corporator, and the court did not undertake to determine at the trial whether it arose under the statute or at common law.

Corporations are entirely the creatures of statute, and when duly formed, one of their chief characteristics, distinguishing them from partnerships and other joint ventures, is the exemption of the individual associates from liability for the corporate obligations, except as the enabling act may impose liability. This immunity, which is an important advantage of membership, can only be secured by compliance with the statutory requirements for incorporation. In the case of corporations organized for a purpose, and under a law requiring capital stock, the capital becomes a fund to which creditors must look for satisfaction of debts; it is a substitute for individual liability, and constitutes a trust fund for the benefit of the creditors. Upton, Assignee, v. Tribilcock, 91 U. S. 45; Alder v. The Milwaukee Patent Brick Manufacturing Company, 13 Wis. 57; 1 Beach on Private Corporations (1891), § 116. Capital stock is, therefore, the vital requirement of every business corporation, and its actual existence is usually placed by enabling statutes as a condition precedent to corporate existence.

It is found and conceded in this case that there was no capital stock in fact, and no capital paid in or subscribed; that the articles of incorporation which were entered into by the plaintiff in error with the other defendants below prescribed $5,000; that these articles were duly executed by the three parties, and duly filed and recorded; that without capital and without the actual taking of any further steps toward organization, business was opened by Moe and Williams as actors in the name of the assumed corporation; that this was known to the plaintiff in error, but that he did not take part in their operations, or receive any profit or emolument; that printed matter was used and distributed, wherein the plaintiff in error was named as its vice-president; and while "the evidence does not establish that he had actual knowledge" of this use of his name, it is found that "under the circumstances, if he did not know it, he could have ascertained the fact by merely slight attention to the matter, and was guilty of negligence in not knowing it." Furthermore, it is recited in the articles which were entered into that "the corporators should compose the first board of directors," and, although such a provision would not control an organization effected by stockholders, who are empowered by the statute to elect directors, it may be considered as a fact tending to show intention or knowledge. The debt in question was incurred in the business so carried on, and in the line apparently contemplated by the articles of incorporation.

The statute which authorizes incorporation for the purposes stated in these articles in chapter 86, in title 19 of the Revised Statutes of Wisconsin, contained, with amendments, in 1 Sanborn & Berryman's Annotated Statutes, 1052. Section 1771 provides that "three or more adult persons, residents of this state, may form a corporation in the manner provided in this chapter," for objects there named. Section 1772 provides that "in order to form such a corporation, the persons.

desiring so to do shall make, sign and acknowledge written articles," with declarations of (1) purpose, (2) name and location, (3) capital stock, if any, and number and amount of shares thereof, (4) designation of general officers and number of directors, (5) duties of officers, (6) conditions of membership, (7) "such other provisions or articles, if any, not inconsistent with law, as they may deem proper." The section further provides that the original articles, or a true, verified copy thereof, must be filed for record with the register of deeds of the county, "and no corporation shall, until such articles be so left for record, have legal existence." It also declares that "in stock corporations, persons holding stock, according to the regulations of the corporation, and they only, shall be members." A verified copy of the articles must also be filed with the secretary of state, or penalty is incurred. There was in this case formal compliance with the foregoing requirements, but entire failure to complete incorporation under the succeeding section.

By section 1773 it is prescribed that until directors are elected the signers of the articles shall "have direction of the affairs of the corporation, and make such rules as may be necessary for perfecting its organization, accepting members or regulating the subscription to the capital stock," and that in stock corporations the first meeting may be held when half of the capital stock is subscribed, and may be called by any two of the signers of the articles upon certain notice, or be held without notice when all subscribers for stock are present. It then further provides: "No such corporation shall transact business with any others than its members, until at least one-half of its capital shall have been duly subscribed, and at least 20 per centum thereof actually paid in; and if any obligation shall be contracted in violation hereof, the corporation offending shall have no right of action thereon; but the stockholders then existing of such corporation shall be personally liable upon the same."

Section 1775 declares that "every such corporation, when so organized, shall be a body corporate," and have "the powers of a corporation conferred by these statutes," etc.

The question of common-law liability presents itself at the threshold of this inquiry, whether considered as a primary ground or for the purpose of interpreting the statute. As a primary ground the plaintiff in error contends that it must be excluded here for two reasons, (1) because the complaint is manifestly based upon the statute and intends a charge of statutory liability, and (2) because there is a finding by the trial court of the existence of incorporation. It is sufficient answer to the first objection that it is raised here in the first instance, that the evidence was all received without exception for variance, and that the facts are clearly established by the findings. Under the rule stated in Wasatch Mining Company v. Crescent Mining Co., 148 U. S. 293, approving the rule pronounced under the New York Code of Procedure, in Tyng v. The Commercial Warehouse Company of New York, 58 N. Y. 308, 313, the objection can not now stand "to shut out from consideration the case, as proved." In Wisconsin, section

2669 of the Revised Statutes provides that no "variance between the allegation in a pleading and the proof shall be deemed material, unless it shall actually mislead," and the decisions under it, in accord with the doctrine above stated, hold that "the variance may be wholly disregarded," and that "the pleadings may at any time be amended to conform with the issue really tried," or will be regarded on appeal as so amended. Stetler v. The Chicago and Northwestern Railway Company, 49 Wis. 609, 613. With reference to the force of the finding, all of the facts are clearly stated, and it remains for the court of review to determine their legal effect. An expression of opinion by the trial court has suggestive value, but is not conclusive, where the facts are undisputed. The case is, therefore, open for any liability which may result from the facts established, and the only question on the writ of error is, Do the facts found support the judgment?

By the common law there was no individual liability of the members of a corporation for corporate debts, beyond the enforcement of their agreed contributions to the capital stock. Terry v. Little, 101 U. S. 216; United States v. Knox, 102 U. S. 422; 1 Beach on Private Corporations (1891), § 143. Therefore, if complete corporate existence was obtained and perfected by the act of filing the articles of association, without compliance with any of the requirements of § 1773, the associates are not subject to common law liability. On the other hand, it is well settled that an attempted or pretended incorporation, not perfected as the enabling act requires, does not confer this immunity, and all who are parties to the simulated corporation as associates or shareholders are held liable at common law for debts contracted under the corporate guise. While the courts have differed in naming this liability, whether in the nature of copartners, or resting "upon the ordinary principles of contract and agency," or upon fraud, they agree in holding liable, in some form, all who are engaged in the defective corporate enterprise. Fuller v. Rowe, 57 N. Y. 23; Pettis v. Atkins, 60 Ill. 454; Hill v. Beach, 12 N. J. Eq. 31; Coleman v. Coleman, 78 Ind. 344; Abbott v. Omaha Smelting and Refining Company, 4 Neb. 416; Kaiser v. Lawrence Savings Bank, 56 Iowa 104; Lawler v. Murphy, 58 Conn. 294, 313; Johnson v. Corser, 34 Minn. 355; Hospes v. Northwestern Manuf'g & Car Co., 48 Minn. 172.

This statute does not, in terms, declare that compliance with § 1773 shall be a condition precedent to corporate existence. If there were a decision by the supreme court of Wisconsin construing the statute with reference to the time or event, in the proceeding upon which the incorporation is perfected, that construction would be controlling; but the only case called to our attention in that view is Harrod v. Hamer, 32 Wis. 162. That arose under a previous act (act of April 2, 1853, Rev. Stat. of 1858, ch. 73, §17), which differs essentially from the instant statute in its method of incorporation and in the status of the incorporators (who are thereby constituted stockholders), and therefore is not applicable here.

The statute must be considered in its entirety to ascertain its meaning, and that exposition ought to be adopted, as stated by Mr. Justice Story, in Minor v. The Mechanics' Bank of Alexandria, 1 Pet. 46, 63, "which carries into effect the true intent and object of the legislature in the enactment." The purpose is clear, that corporate being shall be dated from and conferred through the act of filing the executed articles of incorporation for record, as one of the conditions precedent, but while the statute refers to it as a corporation at that stage, a limitation is added that it shall not exercise corporate functions, viz., "the transaction of business with any others than its members," until it shall have provided capital stock in conformity with section 1773. Such is the view recognized in Anvil Mining Company v. Sherman, 74 Wis. 226, 232, where it is said that this statute "provides for the preliminary organization of the corporation, and then limits its power to enter upon its general business" by § 1773. The corporation has obtained the right to exist, but can only be said to have existence in a qualified sense, for it is not possessed of the attributes or privileges of perfected incorporation; and § 1775, which declares these powers and privileges, vests them only when organized as required by the preceding sections. A quotation from the brief of one of the learned counsel for the plaintiff in error, arguing against liability as a stockholder, well defines this embryonic status, and is adopted here. It reads, including italics, as follows: "*The truth is that no corporation was formed except in a very limited and qualified sense. It is true the statute uses the word 'corporation.' It is, however, a bare, legal entity, which through organization may become a corporation, having members and capable of transacting business. * * * It may be likened to the hull of a ship, without rudder or masts or gearings.*" The public are authorized to treat it as a corporation from the recording of the articles, and may look to the recorded articles for its purposes and objects. Compliance with § 1773 is imposed upon the corporators in the first instance, and when they have provided for stockholders the duty devolves upon the latter, whose action is matter only of corporate record and not of general public record. *Until that provision of capital is furnished as a fund to take the place of personal liability, the intention is apparent to withhold the special privilege of complete incorporation which exempts the members from such liability.* The inhibition is, in effect, against any transactions except such as tend to organization, *i. e.*, perfecting incorporation, and the purpose is to protect those who may be imposed upon by premature assumption of corporate functions, and not to save the corporation or its projectors from just liability. Anvil Mining Company v. Sherman, *supra*. This is not like the technical requirement placed by a Michigan statute upon the officers to file their articles of association in a certain place, simply forbidding business until compliance, without declaring any effect for non-compliance, of which it was held, in Whitney v. Wyman, 101 U. S. 392, that the provision was not made a condition precedent to incorporation, and it is not like the technical requirement found in

the former Wisconsin statute that the officers should file a certificate of incorporation before transacting business, held in Harrod v. Hamer, *supra*, not a condition precedent; but the demand here is of the very essence of incorporation, that there shall be capital stock and stockholders. *A corporation can not come into existence without members, and stockholders are the only members of a stock corporation.*

In the light of the evident purposes of this enactment and of these distinctions, and considering that the requirements imposed by section 1773 are of the essence of corporate organization, and are followed by the declaration in section 1775 of complete incorporation, "when so organized," we are of opinion that it was the legislative intent that full effect as a corporation should not obtain until compliance, and that the common-law liability is preserved up to that event. While section 1773 provides that any obligations contracted before compliance shall not give a right of action to the corporation, "but the stockholders then existing" shall be personally liable, this imposition is not in derogation of the common law, but is rather declaratory of or supplements it. Even as a statutory liability, it may be remarked in passing that this is not penal in its nature, and does not call for the strict construction which is claimed in another branch of the argument for the plaintiff in error, but it is one of contract which the members take upon themselves in forming a corporation, and is primary and absolute. Flash v. Conn, 109 U. S. 371; Coleman v. White, 14 Wis. 700; Day v. Vinson, 78 Wis. 198. For the consideration here, the statute must be taken in its entirety as an enactment granting privileges; when privileges are asserted under it the interpretation of the statutory prerequisites should be reasonable, and the legislative intent should be given effect and not thwarted.

So construed, the parties who entered into the assumed corporate undertaking will be held to liability for obligations which have been incurred under that assumption. Is the plaintiff in error within that rule? He executed the agreement of articles by which he engaged with the other defendants "to form a corporation," which should have a capital stock of $5,000; he was party to every step which was taken under the statute; without his participation (or that of some third party) even the semblance of corporate existence could not have been obtained for the venture. *This act, followed by the filing of the instrument, was a solemn acceptance, by the parties jointly, of the privileges of incorporation. In the argument for the plaintiff in error it is insisted that these corporators are merely nominal parties, and should not be regarded as contractors in any sense; that it has become common practice to take, for the time being, any person who may be convenient for the purpose, leaving the real projectors to come in with the subscription for stock? Such view or practice is entirely foreign to the manifest intent of the statute, as the organization is placed entirely within control of the signers, and without their action to that end strangers can not obtain admission as stockholders. They occupy a contract relation. It is true that the relation is absolved or a new one formed when organ-*

ization is effected; that the office of corporator disappears when that of stockholder is taken on. It is also true that there may be an abandonment of the venture without any liability resting upon the corporators, but upon the condition imposed by the common law that no obligation shall have been incurred in the name of that relation, viz.: by "assuming to act in a corporate capacity." Fuller v. Rowe, 57 N. Y. 23, 26. Had these articles read that the signers agreed to form a partnership with $5,000 capital, instead of a corporation, there would have been no doubt of joint liability for contracts entered into by either in the co-partnership name and within its scope. The agreement here is to form a corporation, with capital stock of $5,000; it is made a public record, as the statute requires. So far as the public is concerned, this record is the only evidence of incorporation which comes to notice. The corporate capacity there promised was forthwith assumed, as the plaintiff in error well knew, and he can not be heard to evade liability upon the plea that they failed to put in the capital and perfect organization. McHose & Co. v. Wheeler, 45 Pa. St. 32, 40. On behalf of the plaintiff in error it is contended that he is not liable, because he did not participate in the business which was undertaken, and it is not found that he had actual knowledge of the use of his name as an officer. But it is found that "under the circumstances, if he did not know it, he could have ascertained the fact by merely slight attention to the matter, and was guilty of negligence in not knowing it." This imputes knowledge. If he remained ignorant of the use of his name in the face of such circumstances, where he had given its use for the inception of the enterprise, and where slight attention would have brought him knowledge, he is chargeable with notice. The culpable negligence bars the excuse of ignorance.

Upon this record all of the signers of the articles of incorporation have made themselves parties to the assumption of corporate powers, and they are jointly bound for the indebtedness which was therein contracted. Their liability is of the same nature which would be imposed "if the original plan had been to form a partnership." Cook on Stock and Stockholders (3d ed.), § 235. The agreement which gave color to the assumed corporate action is the foundation. The reason for holding the liability is well stated in Fredendall v. Taylor, 26 Wis. 286, 290, as springing "from the fact that there was no responsible body or corporation behind them;" having no principal they bound themselves individually. Lewis v. Tilton, 64 Iowa 220, is to the same effect.

It is not essential that parties dealing with the assumed corporation should have acted with knowledge or upon the faith of Wechselberg's relation to it. The rule stated in Thompson v. First National Bank of Toledo, 111 U. S. 529, is not applicable. There it was sought to recover upon a co-partnership debt from one who was not a partner in fact, but had been held out as such, without credit being given on the faith or with knowledge of such holding out. Recovery was denied because there was no contract relation and no ground for estoppel. In the case at bar there is primary contract liability, and it is not

dependent upon the knowledge or understanding of those dealing with the purported corporation. Pullman v. Upton, 96 U. S. 328, citing Adderly v. Storm, 6 Hill 624; Pierce v. Bryant, 5 Allen (Mass.) 91.

In view of this determination of liability at common law we are of opinion that judgment was properly entered against the plaintiff in error, and it is unnecessary to consider the question of statutory liability, which is well presented in the briefs and oral arguments.

The judgment will be affirmed.

Note. Compare, 1864, Ashtabula and New Lisbon R. Co. v. Smith, 15 Ohio St. 328; 1897, Badger Paper Co. v. Rose, 95 Wis. 145; 1898, Schofield G. & P. Co. v. Schofield, 71 Conn. 1.

Sec. 147. Same.

(*d*) As soon as its first meeting has been held and officers chosen, if not immediately upon signing the articles of association; but until the division into shares, the associated members hold the whole capital stock in common.

HAWES ET AL. v. ANGLO-SAXON PETROLEUM COMPANY ET AL.[1]

1869. IN THE SUPREME COURT OF MASSACHUSETTS. 101 Mass. Rep. 385–398.

[Bill in equity, filed February 2, 1867, to charge individual defendants as members or stockholders in a manufacturing corporation, under the statute of 1862, ch. 218, which declares, in section 2, that "the members or stockholders" in such a corporation shall be jointly and severally liable for such of its debts as may be contracted before the capital is fully paid in and certificate thereof duly recorded.

On March 16, 1865, the defendants signed certain articles bearing that date, certifying that the subscribers "hereby associate themselves together as a corporation under the provisions of the Gen. Stat., ch. 61, and the several acts in addition thereto, for the purpose of carrying on the business of mining oil, coal and other minerals; and agree," third, that "the amount of capital stock of said corporation is hereby fixed and limited at $500,000;" fourth, that "the said corporation shall be established and have its principal place of business in Boston, and may prosecute its business without and beyond the limits of the commonwealth, as the corporation elect." On April 1, 1865, the subscribers of these articles held their first meeting and chose officers.

In the superior court in Suffolk, at October term, 1866, the plaintiffs recovered judgment against the Anglo-Saxon Petroleum Company, by the default of the corporation, after filing an affidavit of merits and an answer, for $4,231.71 damages and $24.07 costs, in an action begun March 17, 1866, on an account dated March 29, 1865, for the price of three steam-engines and boilers. On this judgment

[1] Statement of facts abridged. Arguments and part of opinion omitted.

execution was issued November 16, 1866, and returned wholly unsatisfied January 15, 1867.

"The stock of said Anglo-Saxon Petroleum Company was never divided into shares, and never divided or apportioned among said subscribers. No capital was ever paid in, and no certificate of any payment of capital was ever recorded. No part of the amount due on said judgment has ever been paid, and no change has occurred among said subscribers to said articles."]

GRAY, J. All that is necessary to constitute a corporation aggregate is the grant of a franchise by the government, assented to by the grantees. In the case of the creation of a private corporation by special charter, indeed, an acceptance is ordinarily required in order to give it effect. Angell & Ames on Corporations, §§ 81, 82. *But an act of the legislature, incorporating certain persons who have applied for a charter, and their associates, may constitute the persons named a corporation at once without further action on their part, either in the admission of associates, the choice of officers, or the division of the capital stock.* Frost v. Frostburg Coal Co., 24 How. 278; Day v. Stetson, 8 Greenl. 365; Penobscot Boom Co. v. Lamson, 16 Maine 224; New York Fire Department v. Kip, 10 Wend. 266; Narragansett Bank v. Atlantic Silk Co., 3 Met. 282; Walworth v. Brackett, 98 Mass. 98; Gen. Stat. ch. 68, § 3.

By the Gen. Stat., ch. 61, § 1, "three or more persons who shall have associated themselves together by articles of agreement in writing, for the purpose of carrying on any mechanical, mining, quarrying or manufacturing business, except that of distilling or manufacturing intoxicating liquors, and shall have complied with the provisions of this chapter, shall be and remain a corporation under any name indicated in their articles of association, and which is not previously in use by any other corporation or company." The meaning and extent of the clause which requires that the associates "shall have complied with the provisions of this chapter" may be better understood by referring to the statute of 1851, ch. 133, the first general law which authorized such corporations to be formed by voluntary association, and the intervening acts in addition thereto, of all which the sixty-first chapter of the General Statutes is substantially a re-enactment. By section 1 of Statute 1851, ch. 133, persons who should "associate themselves together according to the provisions of this act" under any name by them assumed, for either of the purposes specified, and who should "comply with all the provisions of this act" were declared to be a body politic and corporate. All the provisions of that act, which such a corporation was required by its terms to comply with at any time, were, that the articles of association should state the name of the corporation, fix and limit the amount of its capital stock, and state the purpose for which and the town or city in which the corporation should be established and located; that, before the corporation should commence business, its officers should make, publish and file a certificate of those and other facts; and that the name of the corporation should indicate its corporate character, and not be the name of any other cor-

poration or company. Stat. 1851, ch. 133, §§ 1–6. And it was held that even an irregularity in the articles of association, such as the adoption of a name already belonging to another company, would not enable the corporation to defeat an action against it by a creditor. Dooley v. Cheshire Glass Co., 15 Gray 494. The direction contained in the Gen. Stat., ch. 61, § 3, as to the mode of calling the first meeting of such a corporation, was not in the original statute, but was first inserted in the statute of 1855, ch. 478, section 2, and is as consistent with holding the corporation to be already organized as with treating the first meeting as necessary to its organization. The first section of the General Statutes, ch. 61, is certainly not to be construed literally as requiring a compliance with all the provisions of the chapter as a condition precedent to the existence of a corporation; for many of them necessarily assume a corporation to have been already created, such, for instance, as making the officers of the corporation liable for its debts until they have signed and filed certain certificates. Sections 8–12, Merrick v. Reynolds Engine & Governor Co.[1] *The manifest intent of the first section, viewed in connection with the rest of the chapter, is, that a corporation shall exist at least as soon as the first meeting has been held and officers have been elected, if not immediately upon the signing of the fundamental articles of association*, by which the intention of the associates to avail themselves of the privileges conferred by the legislature is manifested, the name of the corporation determined, the amount of capital stock fixed, and the place in which and the purpose for which the corporation is established are specified. Utley v. Union Tool Co., 11 Gray 139; Perkins v. Union Button-Hole & Embroidery Machine Co., 12 Allen 273; Newcomb v. Reed, 12 Allen 363.

When a corporation has been once created according to law, the incorporated associates who hold the corporate franchise are members of the corporation, and a subscriber for shares, although he has received no certificate of stock, or the stock has not even been divided into shares, is a member of the corporation, and a stockholder within the meaning of a statute making the stockholders of the corporation personally liable for its debts. Chester Glass Co. v. Dewey, 16 Mass. 94; Narragansett Bank v. Atlantic Silk Co., 3 Met. 288, 289; Spear v. Crawford, 14 Wend. 20.

The statute of 1862, ch. 218, entitled "An act to define and regulate the enforcement of the liabilities of officers and stockholders of manufacturing corporations," contains the following provisions, upon the construction and effect of which this case depends.

By section 2, "the members or stockholders in such corporation shall be jointly and severally liable for its debts or contracts in the following cases, and not otherwise: First, for such as may be contracted before the capital is fully paid in, and a certificate thereof duly recorded."

By section 3, no stockholder in such corporation shall be held liable for its debts or contracts, unless a judgment is recovered against the

[1] 101 Mass. 381.

corporation, demand for payment made upon the corporation and not complied with for thirty days, and the execution returned unsatisfied.

By section 4, "after the execution shall be so returned, the judgment creditor, or any other creditor, may file a bill in equity in behalf of himself and all other creditors of the corporation, against it, and all persons who were stockholders therein at the time of the commencement of the suit in which such judgment was recovered," for the recovery of the sums due from said corporation to himself and such other creditors, for which the stockholders may be personally liable, by reason of any act or omission on the part of the corporation or its officers.

By section 5, "such sums as may be decreed to be paid by the stockholders in such suit in equity shall be assessed upon them in proportion to the amounts of stock by them respectively held at the time when the suit in which said judgment was recovered was begun; but no stockholder shall be liable to pay a larger sum than the amount of stock held by him at that time at its par value."

Among the purposes for which the defendants incorporated themselves were "refining oil, coal and other minerals," and "preparing them for use." They were, therefore, strictly a manufacturing corporation, and equally within the statutes of 1862, ch. 218, as a similar corporation established by special charter would be. Peele v. Phillips, 8 Allen 86; Bond v. Morse, 9 Allen 471.

The bill was held to be sufficient when this cause was before us upon the demurrer. All questions of variance between the pleadings and evidence have been waived by submitting the case to our decision upon an agreed statement of facts. Russell v. Loring, 3 Allen 121; Folger v. Columbian Insurance Co., 99 Mass. 267.

It is admitted that no part of the capital stock of the corporation has ever been paid in, and no certificate thereof recorded; and that the plaintiffs have recovered a judgment in an action against the corporation, and had the execution issued thereon duly served upon the corporation, and returned unsatisfied.

That action was brought on the 17th day of March, 1866, a year after the signing of the defendants' articles of association, and almost a year after the associates had held their first meeting and elected officers. Upon any construction of the statutes, the corporation had thus, long before the bringing of that action, been called into existence and made a legal person, capable of holding property and of suing and being sued, and had a board of officers competent to bind the corporation by a new agreement or by ratification of an old one, made before the corporation was capable of contracting. The corporation, thus fully organized and represented, filed an affidavit of merits, and afterwards submitted to a default and judgment thereon. That judgment, if not conclusive in this suit, is at least *prima facie* evidence that the debt sued on was a debt for which the corporation was liable. The mere fact that the account annexed to the declaration bears date three days before such election of officers is not suffi-

cient to rebut the evidence of liability afforded by the judgment itself.

The amount of capital stock of the corporation was fixed and limited in accordance with the General Statutes, ch. 61, section 6. *The stock not having been divided into shares or certificates issued, the associated members of the corporation were the holders of the whole capital stock in common, and would seem, upon the facts agreed, to be liable in equal proportions for such sums as may be decreed to be paid by them in this suit.* But as the question of the amount to be assessed upon each has not been argued by them, but only the question whether they are liable at all, any additional facts and considerations, bearing upon the question of the amounts and proportions in which they are to be charged, may be submitted to the master, and, on the coming in of his report, to the court.

Decree for the plaintiffs, case referred to a master.

Note. See Katavna Land Company v. Holley, 129 Mass. 540; Schofield G. & P. Co. v. Schofield, 71 Conn. 1.

Sec. 148. Same.

(*e*) Under special acts, either immediately upon acceptance of charter, or only after organization by the subscribers to the stock, depending upon the wording of the acts.

For example, it is sometimes said that where an act provides that A, B, C, etc. (who have applied for a charter), and their successors and assigns "be and the same are hereby incorporated," there is created *ipso facto et eo instanti* a corporation, and there is no condition precedent to the coming into existence of the corporation. See, 1853, Judah v. The Am. Live Stock Ins. Co., 4 Ind. 333; 1857, Stoops v. The Greenburgh & B. P. Co., 10 Ind. 47; 1859, Hammett v. L. R. & N. R. Co., 20 Ark. 204; 1880, The L. R. & N. R. Co. v. L. R., M. & T. R., 36 Ark. 663. Also, Penobscot Boom Corp. v. Lamson, *supra*, p. 283; Hawes v. Petroleum Co., *supra*, p. 581, and illustrations in §§ 135, 136, 137, *supra*.

ARTICLE IV. COMPLIANCE WITH CONDITIONS. DE JURE EXISTENCE.

Sec. 149. (1) As to *de jure* existence, conditions are

(*a*) *Precedent*, with which there must be a substantial, but not necessarily a literal, compliance, in order to make a corporation *de jure*.

MOKELUMNE HILL MINING CO. v. WOODBURY.[1]

14 Cal. 424, 73 Am. Dec. 658, *supra*, *p.* 296.

[1] See, also, cases below, on pp. 590-613.

Sec. 150. Same.

(*b*) *Subsequent*, with which compliance is not necessary in order to create a valid corporation, though necessary legally to exercise corporate functions and powers.

HARROD v. HAMER ET AL.[1]

1873. IN THE SUPREME COURT OF WISCONSIN. 32 Wis. Rep. 162–168.

Appeal from the circuit court for Outagamie county.

Section 17, ch. 73 of the Rev. Stat., entitled "of joint stock companies," provides that before any corporation, organized thereunder, shall commence business, the president and directors shall cause the articles of association to be published in the papers, make a certificate of the purposes for which the corporation is formed, the amount of capital stock, the amount actually paid in, the names of the shareholders, the number of shares by each respectively owned, and deposit the same with the secretary of state, and a duplicate with the clerk of the town, city or village where the business is to be carried on. Section 25 of the same chapter provides as follows: The stockholders of any corporation organized under the provisions of this chapter shall be jointly and severally liable for all debts that may be due or owing to all their laborers, servants and apprentices, for service performed by them for such corporation, within six months preceding the demand made for any such debt," etc.

Harrod brought his action against the defendants, who were stockholders in the Appleton Manufacturing Company, incorporated under ch. 73, R. S., to hold them liable individually for any indebtedness against the company. Plaintiff was the owner of a planing mill, and the indebtedness grew out of certain planing done at plaintiff's mill for the building of the factory of the corporation. Judgment had been obtained against the company for the amount due, and execution was returned unsatisfied. Plaintiff thereupon sued the defendants for the amount of such judgment and interest. It was admitted that section 17 was not complied with by the filing of the required statement until March 25, 1870, and it appeared in evidence that the company erected a building, ran a saw-mill, and transacted other business, some months previous to this date. Finding and judgment for plaintiff; from which judgment the defendants Hamer and Schneider appealed.

DIXON, C. J. The theory upon which this action is prosecuted is, that the subscribers to the articles of agreement and association did not, by the steps and proceedings taken, become or constitute a body politic and corporate, under the name assumed by them in their articles, but that they failed altogether of organizing and establishing a

[1] Arguments omitted.

corporation under the provisions of the statute, as they attempted and intended to do. The supposition is that no corporation was created, and hence that the subscribers, who were shareholders or owners of the supposed capital stock, became a sort of unincorporated joint stock company, or *quasi* firm or partnership, and so liable in their individual capacity, either jointly or severally, directly to the creditors of the company or association. We are of opinion that this view of the transaction is entirely erroneous, and that a corporation was organized and set in motion with which creditors and others must deal as a corporation, and against which and against the stockholders in which claims and demands must be enforced, as in case of other like corporate bodies.

The corporation was organized under the provisions of chapter 73 of the Revised Statutes. 1 Tay. Stats. 982 to 987, sections 1 to 29, inclusive. It is not objected or shown that any requirement of the statute was omitted or not complied with, except only that the certificate prescribed by section 17 (section 19, Tay. Stats.) was not made and deposited with the secretary of state, and a duplicate with the town, village or city clerk, as therein directed. The only question, therefore, is, whether this failure of the president and directors to make and deposit the certificate and duplicate operated to defeat the organization or to annul the proceedings by which the corporation had been brought into existence. The very words of the section are a sufficient answer. "Before any corporation, formed and established by virtue of the provisions of this law, shall commence business, the president and directors thereof shall cause their articles of association to be published," etc., and "shall make a certificate," etc. It would not be easy by any words to recognize the existence of the corporation without the publication and without the certificate, or before they are made, more clearly than has been done here. *The corporate existence is clearly acknowledged, and intended so to be, and the prohibition is only against its commencing business until the requirements of the section are complied with.* It is spoken of as a corporation formed and established by virtue of the provisions of law, and having officers such as the law prescribes, namely, a president and a board of directors, capable of acting for the corporation, and upon whom, in their official capacity, certain duties are therein specifically imposed, and their performance commanded.

But, if anything further be needed upon this point, it will be found in the provisions of section 23 of the same chapter. That section reads: "If the president, directors or secretary of *any such corporation* shall intentionally neglect or refuse to comply with the provisions of, and to perform the duties required of them respectively by, the seventeenth, eighteenth and nineteenth sections of this chapter, such of them so neglecting or refusing shall jointly and severally be liable, in an action founded on this chapter, *for all debts of such corporation* contracted during the period of any such neglect and refusal." The intention that the corporation should not be affected, or its powers or existence destroyed, by reason of any failure to comply with the requirements

Sec. 150. Same.

(*b*) *Subsequent*, with which compliance is not necessary in order to create a valid corporation, though necessary legally to exercise corporate functions and powers.

HARROD v. HAMER ET AL.[1]

1873. IN THE SUPREME COURT OF WISCONSIN. 32 Wis. Rep. 162–168.

Appeal from the circuit court for Outagamie county.

Section 17, ch. 73 of the Rev. Stat., entitled "of joint stock companies," provides that before any corporation, organized thereunder, shall commence business, the president and directors shall cause the articles of association to be published in the papers, make a certificate of the purposes for which the corporation is formed, the amount of capital stock, the amount actually paid in, the names of the shareholders, the number of shares by each respectively owned, and deposit the same with the secretary of state, and a duplicate with the clerk of the town, city or village where the business is to be carried on. Section 25 of the same chapter provides as follows: The stockholders of any corporation organized under the provisions of this chapter shall be jointly and severally liable for all debts that may be due or owing to all their laborers, servants and apprentices, for service performed by them for such corporation, within six months preceding the demand made for any such debt," etc.

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corporation under the provisions of the statute, as they attempted and intended to do. The supposition is that no corporation was created, and hence that the subscribers, who were shareholders or owners of the supposed capital stock, became a sort of unincorporated joint stock company, or *quasi* firm or partnership, and so liable in their individual capacity, either jointly or severally, directly to the creditors of the company or association. We are of opinion that this view of the transaction is entirely erroneous, and that a corporation was organized and set in motion with which creditors and others must deal as a corporation, and against which and against the stockholders in which claims and demands must be enforced, as in case of other like corporate bodies.

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of section 17, is here again very plainly manifested. It is again spoken of and treated as a corporation lawfully organized and still continuing, notwithstanding such failure. It is regarded as a corporation fully capable of contracting debts, and having officers, of whom the performance of certain duties has been and still may be lawfully required. And to the like effect are the provisions of section 24, and, perhaps, others. The views here expressed are sustained by the case of Holmes v. Gilliland, 41 Barb. 568.

It follows from these views that the plaintiff has misconceived his remedy, and that this action can not be maintained against the appellants as stockholders, and who hold no other relation to the corporation. The remedy of the plaintiff to enforce payment of his judgment, in addition to that given by the statute against the president and directors of the corporation, will probably be found by consulting the case of Adler v. Milwaukee Patent Brick Manufacturing Co., 13 Wis. 57.

The complaint alleges that the debt, for the non-payment of which the plaintiff recovered judgment against the corporation, accrued and became due to the plaintiff for work and labor performed by him for the corporation, but it is nevertheless not claimed that the cause of action falls within the provisions of section 25 of the statute, or that the plaintiff is pursuing the remedy given by that section. It does not distinctly appear that the debt was one of the kind therein provided for, or that the plaintiff was a "laborer." It is not shown that any demand was made, as prescribed by that section.

The judgment against the defendants Hamer and Schneider, who bring this appeal, must be reversed, with costs, and the cause remanded, with direction that it be dismissed as to them.

By the court.—It is so ordered.

Note. See Beach, § 13; Clark, pp. 59, 87; Elliott, §§ 38–44; Morawetz, §§ 744–746; 1 Thompson, §§ 215–249.

Sec. 151. Same. (2) Conditions may be also:

(*c*) Directory merely.

NEWCOMB v. REED.

1866. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 12 Allen's (Mass.) Rep. 362–364.

Contract, in which the plaintiff sought to charge the officers of the Boston Mechanical Bakery Company with a debt contracted in the name of the corporation, in consequence of their neglect to file certificates and statements of the condition of the corporation. At the trial in the superior court, before Ames, J., without a jury, the judge found for the defendants upon facts which are stated in the opinion; and the plaintiff alleged exceptions.

HOAR, J. The defense to this action rests wholly upon the assumption that the corporation, whose officers the plaintiff seeks to charge with a statute liability for its debts, never had a legal existence. The only defect suggested in the organization of the corporation is, that the call for the first meeting was signed by only one of the persons named in the act of incorporation, and not by a majority of them, as required by Statutes 1855, ch. 140.

The case of Utely v. Union Tool Company, 11 Gray 139, is the authority on which the defendants chiefly rely. That case decided that in order to charge as stockholders of a manufacturing corporation persons who had been summoned in an action against it under Statutes 1851, ch. 315, the plaintiff must prove the legal existence of the corporation.

The alleged corporation had no charter or act of incorporation from the legislature, but was an association which had undertaken to assume corporate powers under a general act for the formation of joint stock companies. Statutes of 1851, ch. 133. That statute authorized three or more persons who had entered into "articles of agreement in writing" for the transaction of certain kinds of business to organize in a manner prescribed, and thereby to become a corporation; and the court were of opinion that written articles of agreement were essential to constitute a corporation, and that these articles must fix the amount of the capital stock, and set forth distinctly the purpose for which and the place in which the corporation was established. The court say, "There is an obvious reason for making such organization by written articles of agreement a condition precedent to the exercise of corporate rights. It is the basis on which all the subsequent proceedings are to rest, and is designed to take the place of a charter or act of incorporation, by which corporate rights and privileges are usually granted." And they add that "it is not a case of a defective organization under a charter or act of incorporation, nor of erroneous proceedings after the necessary steps were taken to the assumption of corporate powers, but there is an absolute want of proof that any corporation was ever called into being which had the power of contracting debts or of rendering persons liable therefor as stockholders."

We think these reasons have no application to the case now before us. In this, there was an act of incorporation from the legislature. There is no question that the corporate powers which it conferred were assumed by the persons by whom it was intended that they should be enjoyed, so far as they chose to avail themselves of them. The organization was not strictly regular, but can hardly be considered even as defective.

And if the object of the statute is regarded, by which it is required that the first meeting shall be called by a majority of the persons named in the act of incorporation, it will be evident that it is directory merely, and only designed to secure the rights conferred by the charter to those to whom it was granted, among themselves, by providing an orderly method of organization. Thus, if all the persons

interested should come together without any notice or call whatever, and proceed to accept the charter, and do the other necessary acts to constitute the corporation, we can not doubt that their action would be valid, and that neither the public, nor any persons not belonging to the association, would have any interest to question their proceedings.

The purpose of the statute was probably to avoid such difficulties as were disclosed in the case of Lechmere Bank v. Boynton, 11 Cush. 369, where two parties had attempted to organize separately under the same charter, each claiming to be the corporation.

There is nothing in the facts found and reported to show that all persons interested were not actually notified of the meeting for organization. On the contrary, it would seem that they were. No one has questioned the regularity of the proceedings, or claimed, as in Lechmere Bank v. Boynton, a right to organize in a different manner. The evidence was ample to show that the persons named in the act of incorporation, with their associates, or at least all of them who desired to do so, have accepted the act, organized under it, issued stock, elected officers who have acted and served in that capacity, carried on business, contracted debts, and exercised all the functions of corporate existence. It is therefore too late to deny that the corporation ever had any legal existence, or for these officers to avoid the liabilities which the statutes of the commonwealth impose.

The defendant, Brackett, who was treasurer in February, 1861, appears to have been liable with the directors, under the provisions of Gen. Stat., ch. 60, sections 18, 20, 31.

Exceptions sustained.

Sec. 152. Same.

(*d*) Or mandatory, which may be,

(1) Implied—good faith in securing corporate privileges from the state.

HOLMAN v. THE STATE.

1885. IN THE SUPREME COURT OF INDIANA. 105 Ind. Rep. 569–574.

From the Huntington circuit court.

MITCHELL, J. The state, by an information in the nature of a *quo warranto*, charged that William J. Holman and ten others were assuming to act as a corporation under the name of the Fort Wayne, Warren and Brazil Railway Company; that, as such corporation, they were making contracts, incurring debts, soliciting aid from townships, towns and cities, making surveys, appropriating lands, etc., without any warrant or authority of law. They were challenged to show by what authority they assumed so to act.

By a special answer the defendants admitted that they were acting

as a railway corporation, and alleged that they were duly organized and incorporated under the law. With their answer they exhibited a copy of their articles of association, which they averred had been duly filed in the office of the secretary of state. Upon the articles thus exhibited, it appeared that fifteen persons had each subscribed for $3,400 of the capital stock, the whole amount of which was fixed at $60,000.

The reply was filed admitting the signing and filing of the articles of association and the subscription to the stock. It was, however, averred that many of the subscribers to the stock were, at the time of making such subscriptions, wholly and notoriously insolvent, and made no pretense of being able to pay their subscriptions, and that others of such subscribers were not worth half the amount subscribed by them; that the solicitor of the subscriptions and promoter of the corporation was a subscriber to the stock, was wholly and notoriously insolvent himself, and knew of the insolvency of many of the other subscribers; that one of the subscribers, in addition to being insolvent at the time of making his subscription, was also a minor, which was known to the promoters of the scheme. It was further charged that the capital stock had not been subscribed in good faith, but that the subscriptions were received for the purpose of securing a colorable organization to be made on paper. Evidence was offered tending to prove the averments contained in the reply. A judgment of forfeiture was rendered.

The statute providing for the organization of railroad corporations enacts, in substance, that whenever stock to the amount of at least $50,000, or $1,000 for each and every mile of the proposed road shall have been subscribed, any number of the subscribers, not less than fifteen, may, under certain regulations prescribed, form a railroad corporation.

The question presented for consideration is, must the $50,000 of stock, which is required to be subscribed as a condition precedent to the organization, be subscribed in good faith by persons who had a reasonable expectation that they will be able to pay, or will subscriptions, some of which are merely simulated, fulfill the purposes of the statute?

Where the information is against the corporation *eo nomine*, an inquiry such as that proposed can not be made. In such a case, the bringing of the suit against the corporation in its corporate name is an admission of its corporate existence, and it is not necessary for the corporation to show that it had performed the conditions precedent to its corporate existence. High Extra., L. Rem., section 661. So, also, where the question of the regularity of the organization is made in collateral proceeding, it is not admissible to show the insolvency of the subscribers to the stock. It was accordingly held, in Miller v. Wild Cat Gravel Road Co., 52 Ind. 51, that, in a suit upon an unconditional subscription of stock, evidence of the insolvency of some of the subscribers was immaterial.

There are cases which hold that an assessment against a subscriber to stock can not be collected until, at least, the minimum amount

required by the statute has been subscribed by persons apparently able to pay for the shares subscribed. In such cases, the subscriptions of insolvent persons, infants and married women, are not counted. Lewey's Island R. Co. v. Bolton, 48 Maine 451; Phillips v. Covington, etc., Bridge Co., 2 Met. (Ky.) 219; Morawetz, Corp., § 279; Pierce, Railroads, p. 55 and notes.

The fact that some of the subscribers to the stock of a corporation became insolvent after such subscriptions were made, will not of itself support an information in the nature of a *quo warranto*. State, *ex rel.*, v. Bailey, 16 Ind. 46.

The case before us is an information by the state challenging the right of certain individuals to act as a corporation, and asserting that by reason of the colorable character of the subscriptions they never became an incorporation. It is therefore a direct inquiry on behalf of the state, calling upon the individuals named to show by what authority they assume to act as a corporation.

In such a case, while it may be sufficient, *prima facie*, to show the filing of articles of association and a subscription of the minium amount of stock required by law, we do not think such showing is conclusive upon the state. *It is true the statute does not in terms prescribe that the subscriptions must have been made in good faith, or that the subscribers must have been at the time of making their subscriptions solvent, and apparently able to pay.*

But it must be implied that, at least between the state and the persons to whom the privilege of erecting themselves into a corporation is granted, good faith and fair dealing should be observed.

Merely simulated subscriptions, made by persons who are neither actually nor apparently able to pay the amount subscribed, can not answer the purpose of the statute. Such subscriptions are shams, and are to be denounced as a fraud upon the law. They are an attempt to acquire corporate functions, not by a compliance with the law, but by a disingenuous evasion of it. Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242.

Such subscriptions must stand upon the same basis, and be determined upon the same considerations that govern any other business transaction.

It can not be doubted that a person may in good faith become a subscriber to the stock of a corporation, as he may become the purchaser of goods, for a sum larger than he is then able to pay, and more than he is at the time actually worth in property. But such a subscriber must have subscribed in good faith, with a reasonable expectation and apparent prospect of being able to pay assessments on his stock as they might thereafter be called for.

Where, however, a subscriber is both insolvent and has no prospect or expectation of being able to pay, and such subscription is taken with knowledge, it can not be counted in making up the minimum required by statute.

When the articles of association were tendered with a subscription of $50,000 to the capital stock by fifteen persons, it was a represent-

ation that that amount was pledged and available as necessity might require. Upon the faith of that representation the state authorized the persons making it to assume the functions and franchises of a corporation.

On the same principle that one individual may reclaim his property which has been sold to another, who is insolvent, and who had at the time no intention to pay, or prospect of being able to pay for it, the state may reclaim the privilege granted by it under like circumstances.

Standing by until important interests were acquired by the corporation might estop the state, or lapse of time might cure the defect in the organization. State, *ex rel.*, v. Gordon, 87 Ind. 171. Nothing of that kind is either pleaded or proved in this case.

It is abundantly established by the evidence that most of the subscribers to the stock had not only neither the ability, actual or apparent, at the time they subscribed, to pay any calls; but it appears further that they had no purpose or expectation that they would be called upon to pay, or that they could pay anything if called upon.

As a condition to its assent to the grant of corporate powers to a railway company, the state requires that an available capital of at least $50,000 shall be provided as a security for persons with whom the corporation proposes to transact business, and as a guaranty that it will prosecute the proposed work. If obtaining merely feigned subscriptions puts it beyond the power of the state to withdraw its assent, then it is within the power of designing persons to obtain the franchise of a corporation by a merely pretended compliance with the law, and by that means exclude others who might execute a beneficial public improvement, while the existing corporation is wholly unable to do anything except to harass those who may be induced to deal with it.

We think the evidence sufficiently shows that the defendants held themselves out as a corporation.

The judgment is affirmed, with costs.

ZOLLARS, J., did not participate in the decision of this case.

Filed March 12, 1886.

Note. See, 1863, Paterson v. Arnold, 45 Pa. St. 410; 1878, Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242; 1888, Williams v. Evans, 87 Ala. 725; 1892, State v. Webb, 97 Ala. 111, 38 Am. St. Rep. 151. But see, 1898, Bristol Bank & T. Co. v. Jonesboro B. & T. Co., 101 Tenn. 545, 9 Am. & Eng. Corp. Cas. (N. S.) 790. See, also, Clark, pp. 86-94; Elliott, §§ 38-44; Thompson, §§ 226, 227.

Sec. 153. Same. (2) Express.

(*a*) A certain number of incorporators.

MONTGOMERY AND ANOTHER v. FORBES.

1889. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 148 Mass. Rep. 249–253, 19 N. E. Rep. 342.

Contract to recover the price of goods sold and delivered.

At the trial in the superior court, before Dewey, J., the only question was whether the goods were sold to a corporation called the Forbes Woolen Mills, or to the defendant doing business under that name. The plaintiffs introduced evidence tending to show that subsequently to May, 1885, they received an order for the goods by a letter, written upon paper with the printed heading, "Incorporated 1885. Forbes Woolen Mills. George E. Forbes, Treasurer," signed "Forbes Woolen Mills, by George E. Forbes, Treasurer:" that they thereupon shipped the goods to the Forbes Woolen Mills and received in payment thereof three promissory notes, together equal to the price of the goods, signed "Forbes Woolen Mills, by George E. Forbes, Treasurer;" that when they sold the goods and took the notes, they understood from their correspondence with the defendant, as well as from information gained from a commercial agency, that the Forbes Woolen Mills were a corporation, and made all charges on their books against them as a corporation, and took the notes from the defendant as the notes of a corporation; and that after they sold the goods and received the notes they became satisfied that there was no such a corporation as the Forbes Woolen Mills: and contended that they were entitled to recover the price of the goods from the defendant personally.

The defendant contended that the Forbes Woolen Mills was a corporation, and testified that he purchased the goods as treasurer of the Forbes Woolen Mills, but admitted that they had not been paid for except by the notes, which themselves had not been paid; that in May, 1885, for the purpose of limiting his personal responsibility, and because the tax laws of New Hampshire were more favorable to corporations than the Massachusetts laws, he went to Nashua, N. H., to form a corporation for the manufacture of woolen goods; that he employed an attorney at law of Nashua to incorporate the company in a legal and proper manner, under the laws of the state, and subsequently paid him for his services and disbursements in the premises: that he went to Nashua again, and, with the attorney and three other persons, selected and secured by the attorney, signed and executed an agreement of association, which was dated May 6, 1885, and was duly recorded in the office of the secretary of state of New Hampshire on May 12, 1885, and in the office of the clerk of the city of Nashua on May 13, 1885, and recited that the subscribers associated them-

selves for the purpose of forming a corporation, to be called the Forbes Woolen Mills, the amount of the capital stock to be twenty thousand dollars, divided into four hundred shares of fifty dollars each; and that the object of the corporation was to manufacture and sell woolen and other goods, and the places of business were Nashua, in New Hampshire, and East Brookfield, in Massachusetts.

The defendant further testified that, subsequently to the execution of the agreement of association, one or more meetings were held by the signers, at which he was elected president and treasurer of the corporation, and such other officers and directors were elected as were necessary under the laws of New Hampshire; that the attorney had been recommended to him as a reputable and reliable man and attorney, and he left everything in his hands, and supposed he did everything necessary and proper to establish the corporation in a legal manner; that records of the meetings were kept by the attorney, and that there was a stock-book, and certificates of stock were issued; that all the stock was issued to the defendant, and that no other person was interested in it; that fifty per cent. of the capital stock of the corporation was actually paid in by him in cash and supplies; that after the organization of the corporation he hired, as treasurer of the corporation, a mill in East Brookfield belonging to his mother, Roxanna Forbes, and himself, and began the manufacture of woolen goods; that he purchased the necessary supplies, including those named in the plaintiff's account, and placed them under the direction of a superintendent, employed to supervise the manufacture of the goods; that there was no manufacturing done in Nashua, nor any other business except the holding of corporate meetings, and possibly the sale now and then of a bill of goods in the ordinary course of business; and that the principal place of business of the corporation was in East Brookfield; that he, as president and treasurer of the corporation, continued to manufacture woolen goods for about four months, and sent the goods to commission houses in New York to be sold; and that at the end of said four months he was unable to continue the business and gave it up, and no further business was done by him or by the corporation.

The following sections of chapter 152 of the General Laws of New Hampshire of 1878 were introduced in evidence:

"Section 1. Any five or more persons of lawful age may, by written articles of agreement, associate themselves together for agricultural, educational or charitable purposes, or for carrying on any lawful business, except banking and the construction and maintenance of a railroad; and when such articles have been executed and recorded in the office of the clerk of the town in which the principal business is to be carried on, and in that of the secretary of state, they shall be a corporation, and such corporation, its officers and stockholders, shall have all the rights and powers and be subject to all the duties and liabilities of similar corporations, their officers and stockholders, except so far as the same are limited or enlarged by this chapter.

"Sec. 2. The object for which the corporation is established, the

place in which its business is to be carried on, and the amount of capital stock to be paid in, shall be distinctly set forth in its articles of agreement."

Upon this evidence the defendant asked the judge to rule that the plaintiffs were not entitled to recover, that the account in question had been paid by the notes of the Forbes Woolen Mills as a corporation, and that there was no evidence to authorize the jury to find for the plaintiffs.

The judge declined so to rule, and submitted the following questions to the jury: "1. Did the Forbes Woolen Mills and the members of the said alleged corporation, including said Forbes, at the time of its attempted organization, intend to carry on its business as a manufacturing corporation (other than holding meetings of its members and officers) in whole or in part, in the city of Nashua, N. H.? 2. Was there any attempt in good faith on the part of the defendant, Forbes, to organize the corporation of the Forbes Woolen Mills? 3d. Did said Forbes at and prior to the time the goods in controversy were ordered, namely, at all times after May 12, 1885, during his dealings with the plaintiff, believe that the organization of said Forbes Woolen Mills was a valid corporation?"

The jury answered the first two questions in the negative and the third in the affirmative.

The judge, being of the opinion that, upon the findings of the jury and the uncontradicted evidence in the case, the plaintiffs were entitled to recover, directed the jury to return a verdict for the plaintiffs, and reported the case for the determination of this court.

C. ALLEN, J. The apparent corporation was not a corporation. *The statute of New Hampshire requires five associates, and the articles of agreement must be recorded in the town in which the principal business is to be carried on, and the place in which the business is to be carried on must be distinctly stated in the articles; otherwise there is no corporation. The defendant's pretended associates were associates only in name; he alone was interested in the enterprise.* The articles of agreement were recorded in Nashua, and stated that the business was to be carried on there; but it was not in fact carried on there, and was not intended to be. The defendant took all the shares of the capital stock, and paid into himself as treasurer only 50 per cent. of the amount thereof. *This is not a case where there has been a defective organization of a corporation which has a legal existence under a valid charter. Here there was no corporation. It was just the same as if the defendant had done nothing at all in the way of establishing a corporation, but had conducted his business under the name of the Forbes Woolen Mills, calling it a corporation.* The business was his personal business, which he transacted under that name. Fuller v. Hooper, 3 Gray 334, 341. Bryant v. Eastman, 7 Cush. 111.

The jury found that he did not, in good faith, attempt to organize the corporation, but that he believed it to be a valid corporation. His belief, in view of the facts of the case, is immaterial. Under this

state of things, the defendant bought goods of the plaintiffs for his own sole benefit, adopting the name of the apparent corporation, which had no real existence, and which represented nobody but himself. He can not escape responsibility for his purchases by the device of putting such a mere name between himself and the plaintiffs. The purchase was in substance by and for himself alone. The plaintiffs might have repudiated the transaction, and maintained replevin, if they had learned the facts in time. They may also treat the transaction as a sale to the defendant personally. Fay v. Noble, 7 Cush. 188, 194; Kelner v. Baxter, L. R. 2 C. P. 174, 183, 185; 2 Kent Com. (13th ed.) 630.

Since the notes represented nothing, the plaintiffs were at liberty to treat them as void and recover on the original contract for goods sold. Melledge v. Boston Iron Co., 5 Cush. 158, 171.

Verdict to stand.

Sec. 154. Same.

(*b*) Written articles of agreement.

UTLEY v. UNION TOOL COMPANY.

1858. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 11 Gray's (Mass.) Rep. 139–142.

Actions of contract against the Union Tool Company, described in the writs as "a corporation established according to law, in Goshen," in the county of Hampshire. The principal defendants were defaulted, and several persons were summoned in as stockholders, pursuant to the statute of 1851, ch. 315, and filed answers, upon which trials were had in the court of common pleas in Hampshire.

The plaintiffs proposed to prove by the records of the Union Tool Company that the respondents were stockholders therein. The respondents objected to the admission of this evidence before the existence of the corporation had been shown, and unless it was shown that it was a manufacturing corporation whose stockholders might become liable as such for its debts. Morris, J., ruled that it was not necessary for the plaintiffs to prove the existence of the corporation, that being admitted by the default, but that it was necessary to show that it was such a corporation that its stockholders might become individually liable, and admitted evidence that the company had made by-laws and done other acts as a corporation, and the respondents had attended meetings as stockholders, without proof that the company had ever been incorporated by the legislature, or by articles of association in writing, setting forth the amount of the capital stock, and the purpose of their establishment, as required by the statute of 1851, ch. 133, §§ 1–3. Verdicts were taken for the plaintiffs, and the respondents alleged exceptions. The other facts sufficiently appear in the opinion.

Sec. 155. Same.

(*c*) Names and residence of subscribers to stock.

BUSENBACK ET AL. v. THE ATTICA AND BETHEL GRAVEL ROAD COMPANY.

1873. IN THE SUPREME COURT OF INDIANA. 43 Ind. Rep. 265–271.

From the Fountain common pleas.

BUSKIRK, J. This was an action by the appellants to enjoin the collection of certain assessments made for the construction of the Attica and Bethel Turnpike Company, upon the ground that the said company had never been legally organized.

The single question presented by the record in this case is whether it is essential to the legal existence of a corporation organized under the act of May 12, 1852, "authorizing the construction of a plank, macadamized and gravel roads," that its articles of association shall set forth the residence of each and every subscriber thereto.

The first section of said act, as amended by the act of 1859, reads as follows:

"*Be it enacted by the general assembly of the state of Indiana*, That any number of persons may form themselves into a corporation for the purpose of constructing or owning a plank, macadamized, gravel, clay and dirt roads, by complying with the following requirements: They shall unite in articles of association, setting forth the name which they assume, the line of the route, and the place to and from which it is proposed to construct the road, the amount of capital stock, and the number of shares into which it is divided, the names and places of residence of the subscribers, and the amount of stock taken by each shall be subscribed to said articles of association. Whenever the stock subscribed amounts to the sum of $500 per mile of the proposed road, copies of the articles of association shall be filed in the office of the recorder of each county through which the road is to pass, and shall from that time be a corporation, known by the name assumed in (its) articles of association." 1 G. & H. 474.

In the present case, every requirement of the above section was fully complied with, except setting forth "the places of residence of the subscribers." There were twenty-seven subscribers to the articles of association, and the places of the residence of only two of them are set forth.

It is insisted by counsel for appellants that setting forth the places of residence of the subscribers is imperatively required by the statute, and is absolutely essential to the legal existence of the corporation, and that if one of the requirements of the statute may be dispensed with, all may be; that it has not been left to construction, but that the legislature has prescribed the terms and conditions, upon a compliance with which a corporation may be organized, as is shown by the use of

the following words: "By complying with the following requirements."

On the other hand, it is argued that the failure to affix to the names of the subscribers their places of residence, is a mere formal defect of a very technical character. It does not go to the existence or constitution of the corporation. It goes only to the description of the persons who compose it. When their names are given, the subscribers are sufficiently identified, and the statute is substantially complied with.

It is further contended by counsel for appellee, that while a strict construction will be adopted as to questions relating to the power of dealing in a corporate capacity, a liberal construction will be adopted as to questions relating to the mere manner of getting into operation or acquiring a corporate existence.

Counsel for appellee refer to and rely upon the case of Eakright v. The Logansport, etc., R. Co., 13 Ind. 404, as establishing the proposition that the requirement to state the place of the residence of the subscribers is only directory.

The question in that case was, whether the setting forth, in the articles of association, of the names of the directors was essential to the legal existence of the corporation. The court say: "Here the directors are not named in the articles of association; but it appears that they were elected at a meeting of the subscribers after the stock was subscribed and the articles were constructed; and further, at the same meeting at which they were elected, the same articles of association were expressly adopted by the subscribers. Indeed, all the requirements of the statute have, in this instance, been literally pursued, save that of naming the directors in the articles of association, and that, it seems to us, has, in effect, been done by the adoption of the articles when the directors were elected."

The court held that there had been a substantial compliance with the requirements of the statute, as the names of the directors had been, in substance and effect, set forth. But the court, after having decided the real question involved, proceeded to express an opinion upon a point that did not arise in the record, as the statute had been in effect complied with. The court say: "At all events, the requirements that they be named in the articles may be held merely directory, and not, in view of the facts stated in the complaint, essential to the validity of the corporation." The facts referred to as having been stated in the complaint, were those showing that the names of the directors had, in effect, been given. In our opinion, that portion of the above decision which held the requirements merely directory is not entitled to much weight or consideration, because the point was really not before the court, and the statement is made with a qualification that greatly weakens its force.

The cases of Piper v. Rhodes, 30 Ind. 309, and Rhodes v. Piper, 40 Ind. 369, are much in point. In such cases we held that the requirements of the above section of the statute were not merely directory, but were imperative, and should be substantially complied with.

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The omission was the failure to set forth in the articles of the association the name of such association. The one requirement is, under the statute, as imperative and essential as the other.

The case of The State, *ex rel.* O'Brien, v. The Bethlehem, etc., G. R. Co., 32 Ind. 357, involved a construction of the above quoted section of the statute. It is plainly inferrible, from the language used by the court, that it was intended to hold that there must be a substantial compliance with all the requirements of the statute. The court say: "The information is unskillfully drawn, is uncertain in many of its averments, and contains much useless matter; but we think that the matters alleged in the first specification are sufficient, if true, which the demurrer admits, to show that the association has failed to comply with several of the requirements of the statute which are essential to a legal organization as a corporation."

The omissions complained of were as follows: "The first charge alleges that the pretended articles of association did not set forth the name assumed by the company; that the articles of association do not contain an intelligent description of the line of the route and the place from and to which it is proposed to construct the road; nor does it contain the amount of the capital stock of the company or the number of shares into which it is divided, or the names and places of residence of the subscribers and the amount of stock subscribed by each."

The precise question involved in the case under consideration was involved in the above case, and the court held that it was essential to the legal organization of the corporation that the names and places of the residence of the subscribers must be set forth in the articles of the association. Such is the plain requirement of the statute. *The requirements enumerated in the first section of the act are plainly and distinctly set forth, and it is expressly declared in such section that a corporation may be organized by complying with the requirements therein specified. We are now asked to hold that the corporation was legally organized by complying with a part of such requirements. The legislature has made no discrimination between the requirements by making some of them directory and others imperative, and we possess no power to do so. The legislature had declared, in plain and unambiguous language, that "the names and places of residence of the stockholders" shall be set forth in the articles of association, and the effect of the failure to make such allegation is not left to construction, but it is made a condition precedent to the legal organization of the corporation.*

In Garrigus v. The Board of Commissioners of Parke County, 39 Ind. 66, we laid down certain rules of construction as applicable to corporations, to which we adhere.

The learned counsel for appellee have pressed upon our consideration the inconvenience and loss which would result from our holding the organization of the corporation incomplete, by reason of the failure to set forth in the articles of association the places of residence of the stockholders. There is no hardship or injustice in requiring those

who seek to be clothed with the power of imposing taxes upon the property and burdens upon the shoulders of others to comply with the plain, unambiguous and undoubted requirements of the statute which confers the power. *The legislature has prescribed the conditions upon which these corporate and extraordinary powers may be exercised, and it is but reasonable and just that those who accept the benefits conferred should comply with the conditions imposed. If loss and inconvenience result, it may have a tendency to induce persons getting up such organizations to secure the services of persons possessed of sufficient knowledge and skill to perfect an association in conformity with the law, and thus relieve corporations from expensive litigation and the courts from being crowded with unnecessary suits.* The gravel road and ditching associations have been a fruitful source of vexatious and expensive litigation, the most of which could have been prevented by the exercise of care and skill. The disastrous consequences of the want of care, skill and prudence should teach wisdom to those engaged in organizing and managing such associations.

In the case in judgment the capital stock was $12,000. The two stockholders whose places of residence are given subscribed for $1,500 of stock, a sum wholly insufficient to authorize the organization of the corporation. In legal effect, the case, therefore, stands as though none of the places of residence of the stockholders were set forth.

In our opinion, the court below erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs, and the cause is remanded, with directions to the court below to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

Note. Necessary to state names and residences of directors. 1875, Reed v. Richmond Street R. Co., 50 Ind. 342.

Sec. 156. Same.

(*d*) Place of business.

HARRIS AND STICKLE v. McGREGOR.[1]

1865. IN THE SUPREME COURT OF CALIFORNIA. 29 Cal. Rep. 124–128.

Appeal from the district court, Eleventh district, Calaveras county.

This was action to recover the sum of $600 damages for the diversion by the defendant of waters of the middle fork of the Mokelumne river, in Calaveras county, away from the ditch or canal known as Sandy Gulch or Harris' Ditch, and for an injunction to prevent further diversion during the pendency of the action, and for a perpetual injunction upon final hearing.

[1] Arguments omitted. Only part of opinion relating to the one point given.

By the court, SANDERSON, C. J. We pass the question as to the right of the defendant to prove the title to the Sandy Gulch or Harris' Ditch to be outstanding in the Bunker Hill Canal and Mining Company, alleged by the defendant to be a corporation, for the reason that in our judgment the evidence fails to establish the existence of any such corporation. The certificate offered in evidence, for the purpose of proving the existence of such a corporation, fails to comply with the provisions of the act under which the alleged corporation was attempted to be formed, in an essential particular rendering it null and void. That act prescribes with particularity the terms and conditions upon which persons seeking its benefits, and their successors, may become a body politic and corporate, and there must be at least a substantial compliance with each and all of those conditions before the corporation can be considered *in esse*. (Mokelumne Hill Mining Company v. Woodbury, 14 Cal. 424.)

Essentials of a certificate of incorporation.

By express terms of the statute the certificate of incorporation must state the following particulars:

1. The corporate name. 2. The objects for which the corporation is formed. 3. The amount of its capital stock. 4. The term of existence not to exceed fifty years. 5. The number of shares into which the stock is divided. 6. The number of trustees and the names of those who are to manage the affairs of the corporation for the first three months. 7. The names of the city or town and county in which the principal place of business is to be located. With the last of the foregoing provisions of the statute, the certificate in question fails to show a substantial compliance. All that is stated in the certificate in that respect is as follows: "The operations of the company are to be carried on in the county of Calaveras, state of California." This language in no sense, either expressly or by implication, can be held to designate the principal place of business of the corporation. It simply designates the county and state where the "operations of the company are to be carried on." But the "operations" of a corporation may be carried on in one county and their principal place of business, within the meaning of the statute, be in another and distant county; or the former may be in one state and the latter in another. But could we understand the language in question as fixing the principal place of business of the corporation in Calaveras county, the failure to comply with the statute would only be less in degree, for there is no specification of the "city" or "town," which is no less essential than the designation of the county, for it is so expressly provided. The "principal place of business" contemplated and intended by the statute is the principal office of the corporation at which the books of the corporation are kept, and its officers usually and ordinarily meet for the purpose of managing the affairs and transacting the business of the corporation, and the statute requires that the city or town, as the case may be, at which such office is to be located shall be stated in the certificate, for reasons which are obvious. But whether for reasons or not is immaterial,

for the same will which alone can confer corporate privileges can prescribe the conditions of the grant, and it is sufficient to say that such and such are the conditions.

In view of the judgment of nonsuit the order dissolving the injunction was proper; the latter followed the former as a matter of course. Upon the return of the case to the court below the plaintiff will be entitled to a renewal of the injunction upon a proper application. * * *

Judgment reversed and cause remanded for further proceedings.

See Pacific Bank v. DeRo, 37 Cal. 538, on 542. Also, 1893, Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. 552, *infra*, p. 614.

Sec. 157. Same.

(*e*) Purpose of incorporation.

THE ATTORNEY GENERAL, EX REL. MINOR, v. LORMAN ET AL.[1]

1886. IN THE SUPREME COURT OF MICHIGAN. 59 Mich. Rep. 157–165.

CHAMPLIN, J. This is a proceeding by information in the nature of a *quo warranto* to determine the rights of respondents to exercise the franchises of a corporation organized under "an act to authorize the formation of corporations for mining, smelting or manufacturing iron, copper, mineral, coal, silver, or other ores or minerals, and for other manufacturing purposes," approved February 5, 1853. * * *

It appears by the articles of association set up in the plea of respondents that the respondents, with others, are associated and incorporated under the act aforesaid, as declared in such articles, for the purpose of putting up, packing and manufacturing for market, Detroit river and lake ice, and distributing and selling the same. The law requires the articles of association to state distinctly and definitely the purpose for which the same is formed. If it does not state a purpose for which the statute authorized a corporation to be formed, it would not be legally incorporated, and its articles would afford no warrant for the exercise of corporate action. If it does state such a purpose, and if the other requirements of the law are complied with, it is a legal corporation, and authorized to act as such. In either case the articles themselves are the sole criterion to ascertain the purpose for which it was formed, and the intent must be gathered alone from the written instrument, and can not be aided or varied or contradicted by testimony or averments *aliunde* the instrument itself. The question, therefore, is, is the purpose set forth in the articles such as the statute authorizes the formation of corporations to carry on? We think it is. Its expressed purpose is to manufacture for market Detroit river and lake ice. It was not necessary for the articles to state the means or methods of manufacture, nor are we to presume that the undertaking would be impossible of accomplishment. * * *

Arguments omitted. Only part of opinion given.

The replication (of the attorney-general) sets forth the manner in which the Belle Isle Ice Company conducts its business, as follows:

"Said company owns and leases various river and lake fronts upon the Detroit river and Lake St. Clair during the winter months. When the ice is formed by a natural process, without the aid of any artificial means whatsoever, and of a thickness sufficient for use, it is cut precisely as it is formed by the natural process of freezing on said lake or river, and stored in ice-houses owned by the company. The manner of cutting said ice is, and has been, as follows: Any snow which may have fallen upon the ice is scraped and shoveled off by means of scrapers drawn by horses, and by hand shovels used by men. The ice is then marked off into squares of twenty-two inches in width, a hand-marker being first used to lay out the lines, after which a marker drawn by horses is used, which cuts lines from two to four inches in depth into the ice. Ice-plows, also drawn by horses, follow in these lines, cutting the ice to a depth of from six to fourteen inches, and the remaining thickness of ice is sawed through by means of long saws operated by hand, or is broken off by breaking bars, and separated from the solid mass of ice. The ice thus cut is floated to the foot of inclined slides or elevators leading to the ice-houses where it is to be stored, and is hoisted up by tackle operated by steam or horse-power, and conducted to the ice-houses, where it is packed in layers, and covered with some non-conducting material, such as marsh hay or sawdust. As the ice is required for use, it is transported to large ice-barges built for the purpose, and capable of holding 100 tons of ice, each taken to proper distributing points in the city of Detroit, where the ice is cut into smaller pieces suitable for consumption, and placed in covered wagons and delivered to customers. In the course of the business, as conducted by said Belle Isle Ice Company, a large number and variety of tools are necessary for clearing, marking, sawing, chopping and handling the ice, as heretofore fully stated, before it is in proper shape to be delivered to customers, and also ice-houses, ice-barges, wagons and other implements, and a large force of men."

Worcester defines "manufacturing" as follows:

"(1) The process of making anything by art, or of reducing materials into form fit for use by hand or by machinery; as an 'establishment for the manufacture of cloth.'

"(2) Anything made or manufactured by hand, or manual dexterity, or by machinery."

The same word, as a verb, he defines:

"(1) To form by manufacture, or workmanship, by the hand or by machinery; to make by art and labor."

The process described in the replication certainly does show that the ice is reduced into form fit for use, both by hand and by the use of machinery, and the answer of the respondents shows that this is done by the outlay of the capital, at least of $50.000, and the quantity thus manufactured annually is about 30,000 tons. It is very likely that the garnering and preparation of ice fit for consumers of the article falls very near the line. True, its natural condition is not

changed. The article itself is a natural product, as described in the replication. It is ice when it is taken from the river, and it is ice when delivered to the consumers. The form alone is changed. It is reduced in size and delivered in quantities to suit the convenience of the patrons of the company. But it is not necessary, to constitute the commodity a manufactured article, that a chemical change should be wrought in the thing manufactured. Iron manufactured from iron ore remains iron. Cotton gathered from the boll, and, by means of complicated machinery manufactured, becomes the cotton of commerce. Lumber is manufactured from logs or timber simply by changing its form. And it had been held that grinding bones to produce bone dust of commerce was manufacturing, within the meaning of the revenue laws of the United States. Schriefer v. Wood, 5 Blatchf. 215. So it was held by the supreme court of the United States that timber split into staves, or into long pieces designed for shovel handles, was "manufactured," and not covered by the reciprocity treaty of 1854. United States v. Hathaway, 4 Wall. 404, 408. * * *

Demurrer to replication sustained.

Note. What are or are not manufacturing corporations: Water companies are not. 1868, Dudley v. Jamaica P. Aqueduct, 100 Mass. 183. Mining companies are not. 1870, Byers v. Franklin Coal Co., 106 Mass. 131; 1892, Horn Silver Mining Co. v. New York, 143 U. S. 305. Gas companies are not. 1880, Williams v. Rees, 2 Fed. Rep. 882; 1886, Covington Gas L. Co. v. Covington, 84 Ky. 94; but see, *contra*, 1882, Nassau Gas Light Co. v. Brooklyn, 89 N. Y. 409. Electric light and power companies are not. 1891, Commonwealth v. Northern Elec. L. Co., 145 Pa. St. 105; 1891, Commonwealth v. Edison Elec. L. Co., 145 Pa. St. 131; 1898, Evanston Elec. Ill. Co. v. Kochersperger, 175 Ill. 26, 9 Am. & E. C. C. (N. S.) 224; but *contra*, 1892, People, *ex rel.*, etc., v. Wemple, 129 N. Y. 543, 664; 1892, Beggs v. Edison Elec. I. Co., 96 Ala. 295.

And see, generally, as to what is manufacturing, 1885, Engle v. Sohn, 41 Ohio St. 691, 52 Am. Rep. 103 and note.

The purposes for which a corporation is formed are to be determined by an inspection of its articles of association. 1896, Detroit Driving Club v. Fitzgerald, 109 Mich. 670, 4 Am. & E. C. C. (N. S.) 546, 67 N. W. 899; 1898, Evanston E. I. Co. v. Kochersperger, 175 Ill. 26, and extrinsic evidence as to the unlawful intentions of the promoters will not be received to defeat an action by such corporation against a subscriber upon the stock subscription contract. 1894, United States Vinegar Co. v. Schlegel, 143 N. Y. 537; 1895, United States Vinegar Co. v. Foehrenbach, 148 N. Y. 58, 3 Am. & E. C. C. (N. S.) 164.

Two or more purposes, when allowed; 1902, Ramsey v. Tod, 95 Tex. 614, 93 Am. St. R. 875.

Sec. 158. Same.

(*f*) Subscribing and acknowledging articles or charter.

KAISER v. LAWRENCE SAVINGS BANK ET AL.[1]

1881. IN THE SUPREME COURT OF IOWA. 56 Iowa Rep. 104–111.

The plaintiff, in April, 1877, became a creditor of the Lawrence Savings Bank by reason of a deposit of money made by him in the bank, which bank was located and doing business in the city of Lawrence, Kan. As such creditor he seeks to recover of the defendant,

[1] Only so much of the case as relates to the one point is given.

Hoag, upon the ground that the Lawrence Savings Bank was a partnership or unincorporated company, and that Hoag was a member of it. Hoag does not deny his ownership, but denies that the Lawrence Savings Bank was an unincorporated company or partnership, and avers that the same was duly incorporated under the laws of Kansas, by reason whereof he was exempt from personal liability for the debts of the bank. There was a trial without a jury, and judgment for the plaintiff. The defendant Hoag appeals.

ADAMS, C. J. The evidence tends to show that certain individuals attempted in good faith to become incorporated under the laws of Kansas for the purpose of doing business as a savings bank, and subscribed for shares in the supposed corporation. For several years they did business as a savings bank, under the supposition that they were duly incorporated. Prior to the time that plaintiff became a creditor of the bank, the defendant Hoag purchased an interest in the bank, and remained the owner of such interest from that time forward. * * *

The general incorporation law of Kansas constitutes chapter 23 of the statutes of Kansas. Section 8 provides that "the charter of an intended corporation must be subscribed by five or more persons, three of whom, at least, must be citizens of this state, and must be acknowledged by them before an officer duly authorized to take acknowledgment of deeds." Section 9 provides that "such charter shall thereupon be filed in the office of the secretary of state."

A certificate of the secretary of state of the state of Kansas was introduced in evidence, showing what papers, and what only, had been filed in his office pertaining to the incorporation of the Lawrence Savings Bank. The certificate shows that there were filed in his office what are denominated articles of association. The statute requires that a charter shall be filed. We are inclined to think, however, that the fact that the paper filed is denominated articles of association, instead of a charter, is not sufficient to invalidate it. We proceed, then, to inquire whether the paper complies with the statute in other respects, and we conclude that it does not. The statute requires that it shall be subscribed and acknowledged by five or more persons. The paper purporting to be articles of association is so informally drawn and executed that we can not say it is subscribed by any one. The paper consists of eight articles. The first six articles purport to be subscribed by twenty-three persons, but the seventh and eighth articles are not subscribed, and the seventh article is, under the statute, material. But if the articles had all been subscribed they would be fatally defective for want of acknowledgment by the subscribers, or a sufficient number thereof to comply with the statute. * * *

The defendant insists, however, that in order to establish the corporate existence of the Lawrence Savings Bank as against plaintiff it is sufficient to show authority to create the corporation, a *bona fide* attempt on the part of the corporators to become incorporated, and the doing of business as a corporation. In support of this proposition the defendant cites the Buffalo and Allegany R. Co. v. Carey,

26 N. Y. 77. In that case the court said, "that if the papers filed are colorable, but so defective that, in a proceeding on the part of the state against it, it would for that reason be dissolved, yet by the acts of user under such organization it becomes a corporation *de facto*, and no advantage can be taken of such defect in its constitution collaterally by any person." Substantially the same doctrine was enunciated in Kurtz v. The Paola Town Co., 20 Kan. 403, and Pope v. The Capital Bank, 20 Kan. 440. It should be observed, however, that in those cases the defendant set up a want of incorporation of the plaintiff and sought to escape liability upon that ground. In the case at bar the defendant sets up exemption, averring that the attempt to become incorporated and the doing of business under a claim of incorporation were sufficient to create the exemption.

It will be seen at once that the principle involved in those cases is essentially different from that in the case at bar.

It is hardly necessary to say that where incorporation has once taken place no act of forfeiture can be set up in a collateral action, until forfeiture has been judicially declared in an action brought for that purpose. See Angell & Ames on Corporations, § 636, and cases cited. But the principle involved in those cases is essentially different from that in the case at bar.

In Humphrey v. Mooney, 1 Colo. 193, a creditor of an assumed corporation sought to hold a member as a partner. It was held that as his right of action was based upon an express contract with the assumed corporation he was estopped to deny that it was in fact a corporation. The doctrine of that case is substantially that relied upon by the defendant. But it seems to us that it is not sustained by the weight of authority. The court cited in support of the decision Eaton v. Aspinwall, 19 N. Y. 121, and Buffalo v. Carey, 26 N. Y. 77, but neither of these cases, it appears to us, is in point. * * *

Affirmed.

Sec. 159. Same.

(*g*) Acknowledging articles.

THE PEOPLE, APPELLANT, v. THE MONTECITO WATER CO., ET AL., RESPONDENT.[1]

1893. IN THE SUPREME COURT OF CALIFORNIA. 97 Cal. Rep. 276–281.

Appeal from a judgment of the superior court of Los Angeles county.

The facts are stated in the opinion.

TEMPLE, C. Plaintiff appeals from a judgment entered upon demurrer to complaint.

The demurrer was general, and on the ground of insufficiency of the facts. It is a proceeding taken by the attorney-general of the state

[1] Only so much of the case as relates to the one point given.

in the nature of a *quo warranto* to deprive the defendant corporation of its corporate charter, and procure its dissolution on two grounds: 1. For want of a substantial compliance with the statutory requirements in its formation. * * *

It is contended that the corporation is not rightfully such, because while five incorporators signed the articles of incorporation, only four acknowledged the same.

Section 292 of the civil code reads as follows: "The articles of incorporation must be subscribed by five or more persons, a majority of whom must be residents of this state, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property."

It was said in People v. Selfridge, 52 Cal. 331: "The right to be a corporation is in itself a franchise; and to acquire a franchise under a general law, the prescribed statutory conditions must be complied with." Still, a substantial rather than a literal compliance will suffice. (People v. Stockton, etc., R. Co., 45 Cal. 313; 13 Am. Rep. 178.) Was there a substantial compliance in this case?

Because a substantial compliance will do, it does not follow that any positive statutory requirements can be omitted on the ground that it is unimportant. They are conditions precedent to acquiring a statutory right, and none can be dispensed with by the court.

What is a substantial rather than a literal compliance may be illustrated from the cases. In *Ex parte* Spring Valley Water-Works, 17 Cal. 132, the certificate stated the place of business, but did not describe it as the "principal place of business," as required. The court said: "The statement that San Francisco was *the* place of business would seem to imply that it was not only the principal but the only place of business."

In People v. Stockton, etc., R. Co., 45 Cal. 306, 13 Am. Rep. 178, the affidavit required in such cases to be attached to the certificate stated that 10 per cent. of the amount subscribed had been actually paid in, omitting the words "in good faith," which the statute required. In the certificate it was stated that more than 10 per cent. had been actually in good faith paid in. It was held sufficient; and it would seem that if it was actually paid in cash, it must have been paid in good faith.

And it was further held that payment by checks drawn against sufficient funds in a bank, which was ready to accept and pay checks, was substantially payment in cash.

In People v. Cheeseman, 7 Colo. 376, the acknowledgment taken by the notary omitted to state that the persons whose acknowledgments were taken were personally known to the notary. The certificate did state that the persons who signed appeared before him and acknowledged it. The statute did not prescribe what the acknowledgment should contain, and it was held a substantial compliance with the requirement, although the form prescribed for acknowledgments to deeds was not followed. It was acknowledged.

In all these cases it will be seen that the thing required was done,

but not literally, as directed. But there was no omission of any requirement. No case has been cited where the entire omission of a thing prescribed has been excused, unless it be the case of Larabee v. Baldwin, 35 Cal. 155. That was not an action instituted by the state to disincorporate on the ground of non-compliance. As we have seen, unless the state complains, a *de facto* corporation must be considered, under our code, as possessing a corporate character, and the stockholders, when sued upon their individual liability, should not be allowed to make the point that they did not comply with the law.

In that case the certificate was signed by five directors, but two failed to acknowledge it. Other questions are discussed at great length in the opinion, but in regard to the point made on the certificate it was simply remarked: "It is not clear that any fatal defect exists in the certificate of incorporation. If so, it is cured by the act of April 1, 1864." Plainly, it was unnecessary to consider the question. * * *

Section 292 of the Civil Code required the articles to be subscribed and acknowledged by each. As this is an express condition precedent to a valid incorporation, it is not of consequence to the court whether it be a wise or necessary requirement or not. Still, it is easy to see a reason for it. The certificate secures the state and all concerned against the possibility of any fictitious names being subscribed to the articles, and furnishes proof of the genuineness of the signatures.

If the acknowledgment can be dispensed with as to one, why not as to two, or three, or all?

Ordinarily, no doubt, the state would not be expected to institute a proceeding of this character for such a defect alone, and we must presume that the attorney-general would not have instituted this inquiry, if he were not convinced that there were reasons sufficient to justify it. Other reasons are alleged, but as the statute authorizes a proceeding to forfeit the charter where the statute has not been complied with, although the corporation is acting in good faith, and is a *de facto* corporation, the complaint must be held to state a cause of action, and the demurrer should be overruled.

The judgment should be reversed, and the cause remanded, with directions to overrule the demurrer.

Sec. 160. Same.

(*h*) Filing articles.

BERGERON, RESPONDENT, v. HOBBS AND OTHERS, APPELLANTS.[1]

1897. IN THE SUPREME COURT OF WISCONSIN. 96 Wis. Rep. 641–658, 65 Am. Stat. Rep. 85.

Appeal from a judgment of the circuit court for Bayfield county; John K. Parish, C. J. Affirmed.

[1] Arguments omitted. The strong dissenting opinion of Marshall, J., holding there was a corporation *de facto*, though *not de jure*, and that the plaintiff should be estopped, is omitted.

The defendants, under the name of Bayfield Agricultural Association, employed several persons to perform labor in improving their grounds and in erecting fences and buildings. Time checks given by the defendants to such laborers, for such labor, were assigned to the plaintiff, who brings this action to recover their amount, alleging that the defendants were a co-partnership. The defendants alleged that they were members of a corporation, and denied that they were co-partners, or liable as such. This was the issue which was tried. It appeared upon the trial that articles of organization of the defendants as the Bayfield County Agricultural Association, and a certificate showing the election of officers, had been recorded in the office of the register of deeds of Bayfield county, but were not on file there. They had been deposited with instruction to record and return them, which had been complied with. When the testimony on both sides was in, the court directed a verdict for the plaintiff for the amount of the time checks. From a judgment on that verdict the defendants appeal.

NEWMAN, J. There are two questions raised on this appeal: 1. Was the mere recording of the articles of incorporation, with the certificate of the election of officers, without the intention or fact of the papers themselves remaining in the office, a sufficient compliance with the statute, so that the organization of the corporation became complete, as upon a proper filing of the papers themselves? And 2. If the recording was not sufficient for that purpose, are the defendants liable to the plaintiff only as a *de facto* corporation, or are they liable as co-partners?

1. The statute (sec. 1460, R. S.) provides that, upon the filing of "a certificate of organization, * * * with a copy of the constitution," in the office of the register of deeds of the county, "such society shall have all the powers of a corporation necessary to promote the objects thereof." It can not be doubted that the filing of the proper paper in the proper office is made, by the statute, a condition precedent to the vesting of corporate powers. The court may not be able to clearly define the respect wherein the mere recording and removal of the papers from the office fails to serve the full purpose which the legislature intended to accomplish by the filing of them. The legislature, no doubt, had good and sufficient reasons for its choice of means to promote its purpose. For the court it is not a question of equivalents. A literal filing of the papers is necessary because it is so written in the law. The term "filing" and the verb "to file," as related to in this subject, include the idea that the paper is to remain in its proper order on file in the office. A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file. Bouv. Law Dict. The statute is plain and easy of observance. Valuable rights and exemptions from personal liability are to be secured by its observance. It is no undue severity to require its strict observance. The defendants had not observed it, and had not secured corporate powers.

2. Had the defendants secured immunity from individual liability? No doubt, as a general rule, where an attempt to organize a corporation fails by omission of some substantial step or proceeding required by the statute, its members or stockholders are liable as partners for its acts and contracts. Beach Priv. Corp., §§ 16, 162; I Thompson Corp., §§ 239, 416, 417. But the defendants' contention is that they are not within this rule, because they are at least *de facto* a corporation, and their right to be a corporation can not be inquired into in a collateral action, but only in a direct action for that purpose, by the state. The infirmity of the defendant's contention is in the assumption that they are *de facto* a corporation. In order to secure this immunity from inquiry into its right to be a corporation in a collateral action, its action as a corporation must be under a *color*, at least, of right. It is immaterial that they have carried on business, under the supposed authority to act as a body corporate, in entire good faith. If they had not *color* of legal right, they have obtained no immunity from individual liability for the debts of the supposed corporation. Until the articles of incorporation are filed in the office of the register of deeds of the county, there is no color of legal right to act as a corporation. The filing of such paper is a condition precedent to the right to so act. So long as an act, required as a condition precedent, remains undone, no immunity from individual liability is secured. I Thompson Corp., §§ 226, 508.

The defendants are not a corporation either *de jure* or *de facto*, but are liable for the plaintiffs' claim as partners. It is not necessary to prove a co-partnership by evidence. That was established by implication of law. Nor was it necessary to prove that the debt was unpaid. There was no presumption that it had been paid to be rebutted. The judgment of the circuit court is right, and must be affirmed.

By the court—The judgment of the circuit court is affirmed.

Note. To same effect, see, 1859, Mokelumne Hill C. & M. Co. v. Woodbury, 14 Cal. 425, *supra*, p. 296; 1874, Indianapolis M. Co. v. Herkimer, 46 Ind. 142; 1876, First National Bank v. Davies, 43 Iowa 424; 1876, Abbott v. Omaha Smelting Co., 4 Neb. 416; 1879, Doyle v. Mizner, 42 Mich. 332, *infra*, p. 632; 1879, Garnett v. Richardson, 35 Ark. 144; 1889, Childs v. Hurd, 32 W. Va. 66; 1893, Guckert v. Hacke, 159 Pa. St. 303; 1894, Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151; 1896, New York National Ex. Bk. v. Crowell, 177 Pa. St. 313. But compare, 1896, Supreme Court of Independent Order of Foresters v. Sup. Ct. U. O. of F., 94 Wis. 234; also, 1890, Vanneman v. Young, 52 N. J. L. 403, and 1897, Johnson v. Okerstrom, 70 Minn. 303; 1900, Slocum v. Head, 105 Wis. 431, 50 L. R. A. 324; 1901, Clausen v. Head, 110 Wis. 405, 84 Am. St. Rep. 933, 85 N. W. 1028, *contra*.

As to filing amendments of charter see, 1899, Jackson v. Crown Point Mining Co., 21 Utah 2, 81 Am. St. Rep. 651, 59 Pac. 238; 1900, Hoeft v. Kock, 123 Mich. 171, 81 Am. St. Rep. 159, 81 N. W. 1070.

ARTICLE V. CONDITIONS OF DE FACTO EXISTENCE.

Sec. 161. (1) Conditions precedent.

FINNEGAN v. NOERENBERG.[1]

1893. IN THE SUPREME COURT OF MINNESOTA. 52 Minn. Rep. 239–245, 38 Am. St. Rep. 552.

GILFILLAN, C. J. Eight persons signed, acknowledged and caused to be filed and recorded in the office of the city clerk in Minneapolis, articles assuming and purporting to form, under laws of 1870, ch. 29, a corporation, for the purpose, as specified in them, of "buying, owning, improving, selling and leasing of lands, tenements and hereditaments, real, personal and mixed estates and property, including the construction and leasing of a building in the city of Minneapolis, Minn., as a hall to aid and carry out the general purposes of the organization known as the 'Knights of Labor.'" The association received subscriptions to its capital stock, elected directors and a board of managers, adopted by-laws, bought a lot, erected a building on it, and, when completed, rented different parts of it to different parties. The plaintiff furnished plumbing for the building during its construction, amounting to $599.50, for which he brings this action against several subscribers to the stock, as co-partners, doing business under the firm name of the "K. of L. Building Association." The theory upon which the action is brought is that, the association having failed to become a corporation, it is in law a partnership, and the members liable as partners for the debts incurred by it.

It is claimed that the association was not an incorporation because —*first*, the act under which it attempted to become incorporated, to wit, Laws 1870, ch. 29, is void, because its subject is not properly expressed in the title; *second*, the act does not authorize the formation of corporations for the purpose or to transact the business stated in the articles; *third*, the place where the business was to be carried on was not distinctly stated in the articles, and they had, perhaps, some other minor defects.

It is unnecessary to consider whether this was a *de jure* corporation, so that it could defend against a *quo warranto*, or an action in the nature of a *quo warranto*, in behalf of the state; for although an association may not be able to justify itself when called on by the state to show by what authority it assumes to be and act as a corporation, it may be so far a corporation that, for reasons of public policy, no one but the state will be permitted to call in question the lawfulness of its organization. Such is what is termed a corporation *de facto*, that is, a corporation from the fact of its act-

[1] Arguments omitted; also statement of facts, except as given in the opinion.

ing as such, though not in law or of right a corporation. What is essential to constitute a body of men a *de facto* corporation is stated by Selden, J., in Methodist, etc., Church v. Pickett, 19 N. Y. 482, as "(1) *the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; and* (2) *a user by the party to the suit of the rights claimed to be conferred by such a charter or law.*" This statement was apparently adopted by this court in East Norway Church v. Froislie, 37 Minn. 447, 35 N. W. Rep. 260, but as it leaves out of account any attempt to organize under the charter or law, we think the statement of what is essential defective. The definition in Taylor on Private Corporations (page 145) is more nearly accurate: "*When a body of men are acting as a corporation, under color of apparent organization, in pursuance of some charter or enabling act, their authority to act as a corporation can not be questioned collaterally.*"

To give a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the *status* of a *de facto* corporation might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the *status* of a corporation to any extent merely because there is a law under which they might have become incorporated, and they have agreed among themselves to act, and they have acted, as a corporation. That was the condition in Johnson v. Corser, 34 Minn. 355, 25 N. W. Rep. 799, in which it was held that what had been done was ineffectual to limit the individual liability of the associates. They had not gone far enough to become a *de facto* corporation. They had merely signed the articles, but had not attempted to give them publicity by filing for record, which the statute required.

"*Color of apparent organization under some charter or enabling act*" *does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation de jure, but there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body being a corporation de jure; but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation de facto.*

The title to chapter 29 is "an act in relation to the formation of co-operative associations." Appellant's counsel argues that the body of the act does not contain a single element of "co-operation," as that term is generally understood. But how it is generally understood he does not inform us. In a broad sense, all associations, whether corporations or partnerships, are co-operative, for all the members, either by their labor or capital, or both, co-operate to a common purpose. There is undoubtedly, in popular use of the terms, a more limited sense, though the precise limits are not well defined. There is no legal, as distinguishable from their popular signification. In the Century Dictionary the term "co-operative society" is defined,

"a union of individuals, commonly laborers or small capitalists, formed * * * for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital or labor contributed by each member." Taking the distinctive feature of a co-operative society to be that it is made up of laborers or small capitalists, it is manifest that the chapter intends to deal with just that sort of associations. Not only does it contemplate that the operations of the corporations shall be local, but the capital stock is limited to $50,000, the stock which one member may hold to $1,000. No one can become a shareholder without the consent of the managers, and no one is entitled to more than one vote.

The provisions in the body of the act are in accord with the title, and it is therefore not open to the objection made against it.

The purposes for which, under the act, corporations may be formed, are "of trade, or of carrying on any lawful mechanical, manufacturing or agricultural business." The main purpose of the act being to enable men of small capital, or of no capital but their labor and their skill in trades, to form corporations, for the purpose of giving employment to such capital or labor and skill, the language expressing the purposes for which such corporations may be formed ought not to be narrowly construed. Giving a reasonably liberal meaning to the word "trade" in the act, it would include the buying and selling of real estate, and, upon a similar construction, the word "mechanical" would include the erection of buildings. The doing of the mason, or brick, or carpenter, or any other work upon a building is certainly mechanical. There can be little question that corporations might be formed to do either of those kinds of work on buildings, and, that being so, there is no reason why they may not be formed to do all of them. There is no reason to claim that such a corporation must do its work as a contractor for some other person. It may do it for itself, and, as the act authorizes the corporation to "take, hold and convey such real and personal estate as is necessary for the purposes of its organization," it may, instead of working for others as a contractor, make its profit by buying real estate, erecting buildings on it, and either selling or holding them for leasing.

The omission to state distinctly in the articles the place within which the business is to be carried on, though that might be essential to make it a *de jure* corporation, would not prevent it becoming one *de facto*.

The foundation for a *de facto* corporation having been laid by the attempt to organize under the law, the user shown was sufficient.

Judgment affirmed.

Note. See note at end of Cochran v. Arnold, *infra*, p. 629; 1902, Tulare Irrigation Dist. v. Shepard, 185 U. S. 1, Adv. Sh. May 1, 1902, p. 531. Even in eminent domain proceedings, *de facto* existence is sufficient; 1901, Postal Tel., etc., Co. v. Oregon, etc., Ry. Co., 23 Utah 474, 90 Am. St. R. 705, 65 Pac. 735. Compare, 1900, Slocum v. Head, 105 Wis. 431, 50 L. R. A. 824.

Sec. 162. Same.

SOCIETY PERUN v. CLEVELAND.[1]

1885. In the Supreme Court of Ohio. 43 Ohio State Rep. 481–499.

Error to the district court of Cuyahoga county.

On the 28th of January, 1874, the city of Cleveland conveyed to Perun (an incorporated school and library society) certain real estate situated in that city, and to secure the unpaid purchase-money therefor, Perun, on the same date, executed and delivered to the city four promissory notes and a mortgage upon the premises conveyed.

The city neglected to file this mortgage for record until the 21st day of October, 1879. In February, 1874, certain persons attempted to organize a mutual benefit association under an act supplementary to an act to provide for the creation and regulation of incorporate companies, passed May 1, 1852 (S. & C. Stat. 271), passed April 20, 1872 (69 Ohio L. 82), under the corporate name of Society Perun. Thereafter, in May, 1874, Perun delivered to Society Perun its deed purporting to convey to the latter the premises theretofore mortgaged to the city. From that time forward, and prior to the filing of the city's mortgage for record, Society Perun, acting in its supposed corporate capacity, from time to time, executed and delivered deeds, mortgages and executory contracts of sale, purporting to convey, incumber and sell parcels of these mortgaged premises to various parties, who were made defendants in the action below, and some of whom (including Amasa Stone, a mortgagee, and who had paid taxes upon the premises mortgaged to him), are cross-petitioners in error. Thereafter, in June, 1880, in a proceeding in *quo warranto*, in this court, instituted by the attorney-general, Society Perun was adjudged not to have become incorporated in conformity to the laws of this state, but that its pretended incorporation was in violation thereof; and it was accordingly ousted of all rights and franchises to be a corporation.

These proceedings in *quo warranto* were had pending and prior to the final judgment in the action below, which was brought by the city to foreclose her mortgage, and also to foreclose her supposed vendor's lien on the mortgaged premises, as against these subsequent grantees, mortgagees and purchasers.

The cause was appealed from the court of common pleas to the district court, wherein it was tried upon the issues, the court finding, among other things, that, as to the city of Cleveland, Society Perun was not a corporation, either in law or in fact, and that the conveyance to it by Perun was void as against the city, and that the mortgages and other liens and claims of all the defendants (except the lien of Amasa Stone for taxes, and the claims of certain defendants for

[1] Arguments omitted.

improvements on the premises) were subsequent and inferior to the lien of the city, in whose favor the court adjudged the second lien, and subsequent only to the lien of Amasa Stone for taxes paid by him, but of equal rank and merit with the holders of liens for expenditures on account of improvements above mentioned.

By the judgment in the *quo warranto* proceeding it was by this court in form adjudged that the defendants (the pretended incorporators), ever since their pretended incorporation, had unlawfully and without authority exercised the franchises of, and usurped the right to be, a body corporate; that the pretended organization of these defendants as a corporation was wholly void and of no effect, and vested in them no corporate rights, powers, privileges, or franchises of any description whatever.

It was further in form adjudged that the defendants never had, nor had any of them, the authority or lawful right to be a body corporate or to exercise or hold any of the powers, rights and liberties, privileges, functions or franchises of a body corporate, but that they and each of them in the use and exercise of the same were and had ever been usurpers thereof. The sole ground upon which this judgment of ouster was rendered was that, while the statute required that they should set forth in their certificate of incorporation (among other things) the manner of carrying on the business of the association, the attempted compliance with this requirement was in these words:

"*Third.* That the manner of carrying on the business of said association shall be such as may be from time to time prescribed by the by-laws of such association; provided that the same shall not be inconsistent with the laws of the state of Ohio."

Upon the trial below the plaintiff gave in evidence, against the objection of defendants, the record of the *quo warranto* proceedings.

The defendants offered in evidence the writing which was filed with the secretary of state as the certificate of incorporation of Society Perun.

They also offered to prove that the pretended incorporators proceeded to comply strictly with the requirements of the statutes, that they elected trustees, prepared a certificate of incorporation stating explicitly the manner of carrying on the business; that this was forwarded to the secretary of state, who submitted it to the attorney-general for examination and approval; that the secretary of state returned this paper with another form of certificate which had been approved by the attorney-general and secretary of state, and which was the identical certificate actually filed with the secretary of state, and under the supposed authority of which an organization was in good faith attempted, and that they proceeded in good faith to act and transact its business under the supposed authority of such incorporation.

All this was excluded, and the defendants excepted. To reverse this judgment the present proceeding is prosecuted. * * *

OWEN, J. The defendants below, conceding that Society Perun had never been a corporation *de jure*, maintain that the court below

should have permitted them to prove that such society was a *de facto* corporation; that it attempted, in good faith, to become a body corporate; proceeded to act and transact business in good faith under the supposed authority of incorporation, and that its acts ought not to have been declared to be wholly void as against the city of Cleveland.

The judgment of ouster was an adjudication between the state and the society upon the right of the latter to exercise corporate franchises. For the purposes of such adjudication it was competent for this court to consider and determine what had been its *status* from its first attempt to incorporate. But it had no power to pass upon or determine the rights of parties not before it.

It was not competent for this court to determine in that proceeding that Society Perun had never been a corporation *de facto*, or that its acts and business transactions, under the color of its supposed charter powers, were void. The authority of the court in that behalf was derived from section 6774 (Rev. Stat.), which provides: "When a defendant is found guilty of usurping, intruding into, or unlawfully holding or exercising an office, franchise or privilege, judgment shall be rendered that such defendant be ousted and altogether excluded therefrom, and that the relator recover his costs."

When the court had excluded the society from its franchises to be a corporation, it exhausted its jurisdiction over the subject-matter. It had no power to speak concerning whatever rights may have been acquired by the society as a corporation *de facto*, or by third parties in their transactions with it as an acting corporation.

It is conceded by the city that parties who had recognized the existence of the society by their transactions with it as a supposed corporation are estopped to deny its corporate existence. But it is maintained that the city, having engaged in no transactions with it, is free to challenge its existence as a corporation *de facto*, as well as *de jure*. The argument is that: "No case can be found where it is held that there is a corporation *de facto* against persons who have in no way recognized its existence as a corporation," and that: "The notion of a *de facto* corporation is based on the doctrine of estoppel; when estoppel can not be invoked there can be no *de facto* corporation."

The theory that a *de facto* corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority. A *de facto* corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, *a corporation*.

"It is a self-evident proposition that a contract can not be made with a corporation unless the corporation be in existence at the time. A real contract with an imaginary corporation is as impossible, in the nature of things, as a real contract with an imaginary person. It is essential, therefore, in order to establish the existence of a contract with a corporation, to show that the corporation was in existence, at least *de facto*, at the time the contract was made." Morawetz Private Corporations, § 137.

It is bound by all such acts as it might rightfully perform as a corporation *de jure*. *Where it has attempted in good faith to assume corporate powers; where its proceedings in that behalf are colorable, and are approved by those officers of the state who are authorized to act in that regard; where it has honestly proceeded for a number of years, without interference from the state, to transact business as a corporation; has been reputed and dealt with as a duly incorporated body, and valuable rights and interests have been acquired and transferred by it, no substantial reason is suggested why its corporate existence, in a suit involving such transactions, should be subject to attack by any other party than the state, and then only when it is called upon, in a direct proceeding for that purpose, to show by what authority it assumes to be a corporation.*

Proof was offered upon the trial below to show (1) that the persons seeking to incorporate first filed with the secretary of state a certificate which fully complied with the requirements of the statutes, and free from the defects which finally proved fatal to its existence, but which was disapproved by the attorney-general; (2) that the certificate of incorporation which was finally filed with the secretary of state recited that "said association has been formed and organized for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of said association; that the officers of said association have been duly chosen; that for the purpose of becoming a body corporate under an act passed by the general assembly of the state of Ohio, entitled an act supplementary to an act, entitled an act to provide for the creation and regulation of incorporated companies in the state of Ohio, passed May 1, 1852, passed April 20, 1872;" (3) that this certificate was approved by the secretary of state, and also by the attorney-general, as provided by the statutes (69 Ohio L. 150); (4) that it proceeded in good faith to transact business peculiar to corporations provided for by the act under which it attempted to incorporate.

All this was excluded, and the decision of the court below practically rested on the proof offered by the city, that Society Perun had been ousted of its franchises, which was evidently construed as determining that such society had from the first no corporate existence, either *de jure* or *de facto*, and consequently no capacity to receive or impart any interest in or title to real estate, except as against such parties as were by reason of their recognition of or dealings with it, estopped to deny its incorporate existence.

Did the court err? This fairly presents the controlling and very important question: Was it competent to show, as against a party who was not estopped to deny its corporate existence, that Society Perun was, at the time of the transactions involved in controversy, a corporation *de facto*?

In Attorney-General, *ex rel.* Pettee, v. Stevens, Saxton (N. J. Eq.) 369, the relator sought to enjoin the Camden and Amboy Railroad and Transportation Company and others acting under its authority

from erecting a bridge over a navigable stream. The claim was that the act authorizing the corporation had been perverted and disregarded, and that there was no legal incorporation. The relators were in no manner estopped to attack the corporate existence of the respondent. The court held:

"Where a set of men claiming to be a legally incorporated company under an act of the legislature, have done everything necessary to constitute them a corporation, colorably at least, if not legally, and are exercising all the powers and functions of a corporation, they are a corporation, *de facto*, if not *de jure;* and this court will not interfere, in an incidental way, to declare all their proceedings void, and treat them as a body having no rights or powers."

The chancellor speaking for the court said:

"Here, then, is a set of men claiming to be a legally incorporated company under the act of the legislature, exercising all the powers and functions of a corporation. They are a corporation *de facto*, if not *de jure*. Everything necessary to constitute them a corporation has been done, colorably at least, if not legally; and I do not feel at liberty, in this incidental way, to declare all their proceedings void, and treat them as a body having no rights or powers. It has been seen that the court will not do this where a corporation properly organized has plainly forfeited its privileges; and there is but little difference in principle between the two cases. In both the corporation is actually in existence, but whether legally and rightfully so is the question. And it appears to me that if the court can take cognizance of the matter in this case, it must in all others where it can be brought up, not only directly, but incidentally."

This case is approved and followed in National Docks R. Co. v. Central R. Co., 32 N. J. Eq. 755, which held: "When a corporation exists *de facto*, the court of chancery can not, at the instance of private parties, restrain its operations upon the ground that its organization is not *de jure*. In such case the proper remedy is by *quo warranto*, or information in the nature thereof, instituted by the attorney-general." The rule of estoppel found no place in this case.

In S. & L. G. R. Co. v. S. & C. R. Co., 45 Cal. 680, it was held that: "If the corporation *de facto* is in the actual possession of a public highway, under a grant of a franchise to improve and collect tolls on the same, a mere trespasser can not justify his entry thereon on the ground that it was only a corporation *de facto*, and was not *de jure* entitled to the franchises."

In Williams v. Kokomo B. & L. Association, 89 Ind. 339, one Leach gave to an acting corporation his mortgage on real estate. Subsequent to the execution and recording of it he executed another mortgage on the same land to Williamson. In a proceeding to foreclose the junior mortgage, Williamson maintained that the pretended corporation had no legal existence, by reason of defects and omissions in the proceedings to incorporate, and that the senior mortgage was void. He was in no manner estopped, by dealings with, or recognition of, the first mortgagee, to deny its corporate existence. The

court held that: "A junior mortgagee can not defeat a senior mortgage by showing that the corporation to which the senior mortgage was executed was defectively organized, if it be a corporation *de facto.*" Elliott, J., said: "Where persons assume to incorporate under the laws of the state, and in part comply with their requirements, assume corporate functions and transact business as a corporation, private persons can not collaterally question the right of such an association to a corporate existence, although there has not been a full compliance with the provisions of the statute. Baker v. Neff, 73 Ind. 68. *This rule is not limited to cases where one by contract admits corporate existence, but is a rule of general application.*" It is not easy to distinguish the principle of this case from that of the case at bar.

In Pape v. Capitol Bank, 20 Kan. 440, Pape and wife gave their notes to "James M. Spencer or bearer," and their mortgage on real estate to secure them. Spencer transferred the notes to the Capitol Bank of Topeka, an acting corporation, with this indorsement: "Pay the bearer, without recourse on me, James M. Spencer." The mortgage was also transferred to the bank, which proceeded by suit to collect the notes and foreclose the mortgage. Pape and wife interposed the defense that the bank was not, and never had been, a body corporate, by reason, among others, of a defective organization. The bank had assumed corporate functions after an attempt, in good faith, to incorporate, and for a number of years was in the actual and notorious exercise of corporate franchises. Pape had transacted banking business with the plaintiff prior to the purchase of the notes and mortgage, but such business was wholly unconnected with the notes and mortgage in suit. His wife, however, had not in any manner recognized the existence of the bank as a corporate body, and the doctrine of estoppel was not invoked to aid the court in sustaining a judgment of foreclosure against Pape and wife. Brewer, J., says: "The corporation is one *de facto*, and only the state can inquire, and that in a direct proceeding, whether it be one *de jure.* * * * There must, in such cases, be a law under which the incorporation can be had; there must also be an attempt, in good faith, on the part of the corporators, to incorporate under such law; and when, after this, there has been for a series of years, an actual, open and notorious exercise, unchallenged by the state, of the powers of a corporation, one who is sued on a note held by such corporation will not be permitted to question the validity of the incorporation as a defense to the action. No mere matters of technical omission in the incorporation, no acts of forfeiture from misuser after the incorporation, are subjects of inquiry in such an action. *This is not upon the ground of equitable estoppel but upon the grounds of public policy.* If the state, which alone can grant the authority to incorporate, remains silent during the open and notorious assertion and exercise of corporate powers, an individual will not, unless there be some powerful equity on his side, be permitted to raise the inquiry."

In Thompson v. Candor, 60 Ill. 244, Willetts, in February, 1858,

deeded to "Mercer Collegiate Institute," a body pretending to be a corporation, the tract of land in controversy. He died in March, 1858. In 1868 his heirs quitclaimed their interest in the land to Thompson, who filed a bill in chancery for the cancellation of the deed from Willetts to the "institute," alleging, as one of the grounds of relief, that the named grantee was not legally incorporated, had no capacity to take the title, and that the deed was void. The court held:

"Where parties endeavor to organize a corporation for educational purposes under the general law, adopt a name, elect trustees, and organize by electing a president and officers, and the trustees had acted for years in managing the property, had leased and mortgaged it, and expended large sums of money in its improvement, these acts constitute it a corporate body *de facto*, and the regularity of its organization can not be questioned collaterally. Such irregularity can only be questioned by *quo warranto* or *scire facias*."

Thornton, J., says: "In 1856 an attempt was made to organize a corporation under the general incorporation law. A corporate name was selected, trustees were appointed, and an organization effected by the election of a president and proper officers. The trustees thus appointed acted for years in the general management of the property, leased and mortgaged it, and expended a large sum of money. Here then was a corporate body *de facto*, which had been engaged in an undertaking involving important interests. The regularity of its organization can not be questioned collaterally. Any alleged non-compliance with the law can only be inquired into by the writ of *quo warranto* or *scire facias*."

There is no suggestion throughout the entire case of the rule of estoppel as an element affecting its disposition.

In Paper Works v. Willett, 1 Robertson (N. Y. Sup.) 131, it is held that formal defects in proceedings to organize a corporation are not available to defeat an action brought by a corporation for trespass in wrongfully taking property out of its possession.

See, also, illustrating the principle under discussion: Smith v. Sheeley, 12 Wall. 361; Grand Gulf Bank v. Archer, 8 S. & M. 151, 173; Dunning v. R. Co., 2 Carter (Ind.) 437; Danneborge Mining Co. v. Allment, 26 Cal. 286; Searsburg Turnpike Co. v. Cutler, 6 Vt. 315; Mitchell v. Deeds, 49 Ill. 416; Eliz. Academy v. Lindsey, 6 Ired. 476; Darst v. Gale, 83 Ill. 136; Rondell v. Fay, 32 Cal. 354; DeWitt v. Hastings, 40 N. Y. (Superior Court) 463; Rice v. R. Co., 21 Ill. 93; Douglas County v. Bolles, 94 U. S. 104; The Banks v. Poitiaux, 3 Randolph (Va.) 136; Goundie v. Northampton Water Co., 7 Pa St. 233; Baker v. Backus, 32 Ill. 79; Tarbell v. Page, 24 Ill. 46; Thornburg v. R. Co., 14 Ind. 499; Tar River Nav. Co. v. Neal, 3 Hawks, 520; Bear Camp River Co. v. Woodman, 2 Maine 404.

In Jones v. Dana, 24 Barb. 395, it was held that if a company has in form a charter authorizing it to act as a body corporate, and is in fact in the exercise of corporate powers at the time of taking a note from an individual, it is, as to him and *all third persons*, a corpora

tion *de facto*, and the validity of its corporate existence can only be tested by proceedings on behalf of the people.

In the case at bar the certificate which was last filed by the society embraced a full statement of the objects of incorporation, and indicated what the nature of its business must necessarily be, and was strongly suggestive of the manner in which it must necessarily be transacted; and while it is not our purpose to call in question the action of this court in the *quo warranto* proceedings, we have no hesitation in saying that if we were now called upon to determine whether the corporate life of Society Perun should be taken, the question, upon the facts offered in proof at the trial below, would not be free from doubt and difficulty. It is very clear that the proceedings to incorporate were colorable; and so far as this fact is a test of the existence of a corporation *de facto*, it is most amply established. That there was proof of user is manifest from the evidence, which was received without objection.

That the judgment of ouster did not and could not have a retroactive effect upon the rights of the society, and of parties who have dealt with it during its *de facto* existence, is suggested by the opinion of Wright, J., in Gaff v. Flesher, 33 Ohio St. 115.

The evidence which was offered and excluded would, if credited, have shown Society Perun capable of holding and transferring the legal title to the lands in controversy. Walsh v. Barton, 24 Ohio St. 43; Darst v. Gale, 83 Ill. 136; Shewalter v. Pirner, 55 Mo. 218; Nat. Bank v. Matthews, 98 U. S. 628; Goundie v. Northampton Water Co., 7 Pa. St. 233; Barrow v. Nashville Turn. Co., 9 Humph. 304; Kelly v. People's Trans. Co., 3 Ore. 189; Bogardus v. Trinity Church, 4 Sandf. Ch. 758.

The public and all persons dealing with this society were justified in assuming that the certificate filed with the secretary of state, and by him admitted to record in his office, had been approved by him, and also by the attorney-general, as required by statute (69 Ohio L. 150), and that it so far conformed to all legal requirements that, as provided in section 2 of the act of incorporation (69 Ohio L. 83), "a copy, duly certified by the secretary of state, under the great seal of the state of Ohio, shall be evidence of the existence of such association."

It would seem that such approval, record and certificate, followed by uninterrupted and unchallenged user for nearly six years, of all of which proof was tendered, would constitute a corporation *de facto*, if such a body is, under any circumstances, entitled to legal recognition.

The highest considerations of public policy and fair dealings protest against treating such an organization as a nullity, and all of its transactions void.

The principle of the above cases is to be distinguished from a case where a mere corporation *de facto* attempts to assert the power of eminent domain by the appropriation of private property to public use. It has been held that the exercise of this right (which is but a delegation of the sovereign power of the state) depends upon the

sufficiency and legal validity of the certificate of incorporation and public record of its organization. Railroad Co. v. Sullivant, 5 Ohio St. 276; Atkinson v. R. Co., 15 Ohio St. 21.

The case of Raccopn River Nav. Co. v. Eagle, 29 Ohio St. 238, is relied upon by the defendant in error. It was an action to recover upon a stock subscription. A plea of *nul tiel corporation* was interposed. The plaintiff claimed to be organized under an act to authorize the incorporation of companies "for the purpose of improving any stream of water * * * declared navigable by any law of the state of Ohio." On the trial the plaintiff offered in evidence a certificate by which it appeared that the company was formed for the purpose of improving, etc., Big Raccoon river. Unfortunately there was no navigable stream in Ohio by that name. No other testimony was offered. There was no proof of user. There was no defect in the form of the proceedings to incorporate, but an attempt to organize and incorporate for a purpose impossible of accomplishment. There was neither a *de jure* nor *de facto* corporation. Judgment was properly rendered for defendant.

In excluding proof of what was actually done looking to the incorporation of Society Perun, and of the subsequent acts of user, which was offered in evidence, there was error, for which the judgment in the first entitled case (as well as that in the same plaintiff against Hay *et al.*, which was tried with it and involved the same general questions) is reversed. Numerous other questions are presented by the voluminous records in these cases, but as they all depend upon the one central and controlling question discussed above, and as the disposition here made of the cases must lead to a retrial in the light of the principles indicated in this opinion, they are not separately considered.

Judgment reversed.

Note. See note at end of Cochran v. Arnold, *infra*, p. 629.

Sec. 163. (2) Reasons for not allowing a private party to attack successfully the validity of *de facto* corporate organization.

COCHRAN ET AL. v. ARNOLD ET AL.[1]

1868. IN THE SUPREME COURT OF PENNSYLVANIA. 58 Pa. St. Rep. 399–408.

STRONG, J. * * * The action was assumpsit brought against a large number of persons, charging them as partners in the purchase of cotton alleged to have been sold and delivered. The defendants were

[1] Argument omitted. Only part of opinion given.

stockholders of a company called Conestoga Steam Mills, which claimed to have become a corporation in 1849, under the general manufacturing law of that year. In 1849 a certificate of association for corporate purposes was made out and recorded. It set forth all that the law required. It was entirely regular on its face. A certified copy of it was filed in the office of the secretary of the commonwealth. Ostensibly, the requirements of the law were fully met. From that time until after the cotton was sold, the corporation had, if not a legal, at least a *de facto* existence, and it carried on business as such. In November, 1856, the plaintiff sold a quantity of cotton to it and took the promissory notes of the corporation for the price, with a full knowledge of the mode of its constitution, and of what is now alleged to have been a failure to comply with the requisitions of the manufacturing law for the procurement of a charter. They now sue those who were stockholders of the company at the time the cotton was purchased, and claimed to recover against them individually, upon the ground that the original certificate for incorporation, though apparently regular, was illegal and void, because it did not set forth that the capital paid in was at the time invested in mills, machinery and other property adapted to the purposes for which the corporation was proposed to be organized. This they contend renders the charter a nullity, and justifies them in treating the sale as having been made to the defendants as partners. The case rests therefore upon the assumption that, because the corporation was so irregularly constituted that the commonwealth might have called in question its legal existence, the plaintiffs may attack it and disprove its lawful being.

But the assumption is unwarranted. The plaintiffs are not at liberty to assert in this action that the corporation was not lawfully formed. Though formed under a general law, it is as against all the world, but the commonwealth, as completely and effectively a corporate body as if it had been created by a special act of assembly and by letters-patent. The act of April 7, 1849, prescribes what shall be the legal proof of the existence of such a corporation. That proof is a certificate of certain things made out as required, recorded in the proper county, with a certified copy of the certificate filed in the office of the secretary of the commonwealth, indorsed by him and then retained by the company. The law declares that when the certificate has been thus recorded and filed, the persons who have signed and acknowledged it, and their successors, shall be a body politic and corporate, in fact and in law. No distinction is made between the effect of such a mode of incorporation and the effect of any other mode. If the certificate recorded and filed is false, or if the law has in any particular been violated, the commonwealth has a remedy by writ of *quo warranto*, as it would have in any other case where corporate privileges have been obtained by fraudulent means or in an illegal manner. But until the franchise claimed and used has been directly adjudged not to exist, there is a corporation *de facto* at least. If there is anything settled it is that the corporate existence of a corporation *de facto* can not be inquired into collaterally. Upon this subject the authorities

are too numerous to admit of citation. The plaintiffs do not deny the principle as a general rule, but they contend that it is not applicable to corporations of this character, to those organized by the corporators themselves under a general law, and for support in this position they rely upon Patterson v. Arnold, 9 Wright 410. Such is the doctrine advanced in that case. But the decision then made was that of a bare majority of the court. It does not profess to rest on a single authority. It is sustained by none, for it is in conflict with the steady course of decisions elsewhere, wherever statutes exist similar to ours of 1849. Very little attempt was made to sustain it by reason, and if it is the law it must work great confusion and lead to intolerable mischiefs. Happily, if it was mistakenly made, we may now correct the mistake without harm to any one.

There is no reason that can be given for such a distinction as is claimed between a charter obtained under the act of 1849 and one obtained under a special act of assembly. In each case corporate power is obtained by act of the corporators, under restrictions imposed by law. When an act authorizes letters-patent to issue after a certificate by commissioners appointed to receive subscriptions to the capital stock that a certain amount has been subscribed, and a certain proportion paid in, the certificate may be false, but nobody ever supposed that the charter obtained by the false certificate is void, or that it may be attacked collaterally. Why, then, should it not be so in case of a charter under the act of 1849?

How much more is a charter secured under that act the work of the corporators than this one obtained in the other mode? How much less is the organization under the conduct of the state? Yet that it is less is the only reason attempted to be given in Patterson v. Arnold why the charter in the one case should be open to collateral attack, and in the other assailable only directly by the commonwealth.

If we look at the consequences of permitting one who deals with a corporation formed under the general manufacturing law to deny that it ever had any legal existence, or to call in question its rights to exercise corporate powers or enjoy corporate privileges, we shall find them to be no less mischievous than such as would follow the doctrine that any corporation may be collaterally attacked by one who has given credit to it, that it is not immunity to its shareholders. Indeed, the mischiefs of such a doctrine are the same, whatever may be the mode of obtaining corporate existence. By one jury a charter may be set aside. By another it may be sustained. One creditor may sue the corporation as such, obtain a judgment and sell its land, himself becoming the purchaser. Another creditor may sue the corporators, alleging that their charter is null, furnishing no immunity to them. He may obtain a judgment and sell the same land to another purchaser, as the property, not of the corporation, but of the stockholders. In such a case which purchaser would hold the title?

Again, new stockholders may come in, totally ignorant of any fraud or mistake in making out the certificate. Are they to be charged individually because there was a secret vice in obtaining corporate be-

ing? That would be monstrous. It would render the manufacturing law a thing to be avoided, though it expresses a cherished policy of the legislature. Yet, if a charter can be shown invalid by a collateral attack at the suit of a creditor, why are not new stockholders who have come in after the birth of the corporation equally liable as partners, or joint contractors, with all the original stockholders? Can the charter be effective and yet not effective? In Patterson v. Arnold it seems to have been thought a charter may be good as to some stockholders and a nullity as to others. What confusion must this produce? Some may be sued as partners, and others through the corporation, and under judgments obtained execution be levied upon the same property. Or all the original stockholders may go out and give place to successors. Then that which was incurably vicious, because an usurpation upon the commonwealth, has become good. It is impossible, however, that a charter can be good as to some stockholders and bad as to others. Every one has an interest in the property of his associates invested in the common stock. Such is his corporate right. If that property can be withdrawn by action against his associates individually, the charter ceases to be to him all that it purports to be.

It is said that those who certify falsely for the purpose of obtaining a charter are guilty of fraud. Doubtless this is so. There is a fraud upon the state. If it be also a fraud upon creditors, the law furnishes a remedy. An action will lie for the fraud. But to deny the corporate existence of a *de facto* corporation, and to hold as partners those who were guilty of fraud in obtaining the charter, is to confound an action *ex contractu* with one essentially for a tort.

It has already been said that Patterson v. Arnold is unsustained by authority. General laws, much like our act of 1849, exist in many of the states, and whenever the question has come up it has been ruled that corporations formed under them, like all others, are to be regarded as such until their right is questioned by the state. The question can not be raised collaterally whether they are lawfully such. In Jones v. Dana, 24 Barb. Sup. C. Rep. 402, the court said: "The statute is explicit and leaves no room for construction. It makes the copies of the charter and certificates filed in the office of the county clerk the authority of the corporation to commence business and issue policies, and makes them evidence for and against the company; that is, evidence of the authority to act as a corporation. The legislature having said what acts shall give the company corporate powers. and what shall be the evidence of those acts, as well for as against the company, courts can not, at the instance of third persons, go behind those acts, and the prescribed evidence of them, for the purpose of determining the validity of the corporation, and make the decision, perhaps, depend upon some mistake or accident from which no one has received or can receive any injury." And again: "The only remaining question is, whether the plaintiffs have shown the Utica Insurance Company, acting under a charter, or an authority apparently valid, and really so, unless impeached by something outside of the record evidence of the corporate existence, and depending upon

proof *aliunde*. If they have, and have thus furnished *prima facie* evidence of the incorporation, they can not go behind that evidence to show that it was got up in fraud or mistake, or irregularly brought into existence." All this was said in reference to a corporation that came into being under an act very similar to ours. To the same effect is Sedman v. Eveleth, 6 Metcalf 114, and Baker v. Backus, 32 Ill. 111. I know of no case, except Patterson v. Arnold, in which a different doctrine has been advanced. It was not then competent for the plaintiffs in this action, after having contracted with the Conestoga Steam Mills as a corporation, to deny its corporate existence. To all the stockholders its charter furnished an immunity against its creditors. The plaintiffs, therefore, would have had no cause of action against any of the defendants had their amendment been allowed.

There is another reason why there could have been no recovery. If the certificate for the incorporation was erroneous or fraudulent, the plaintiffs knew it when they sold the cotton. It was not for them afterward to say it was a wrong done to them. It is needless, however, to enlarge upon this. It is enough that they were not at liberty to call in question the validity of the charter.

The judgment is affirmed.

Note. **De facto corporations:** See also, Clopton, J., in Snider's Sons' Co. v. Troy, 91 Ala. 224, *infra*, p. 656, and particularly as to *de facto* corporations, 1847, Brouwer v. Appleby, 1 Sandf. (N. Y. Superior Ct.) 158; 1859, Eaton v. Aspinwall, 19 N. Y. 119; 1862, Buffalo & A. R. Co. v. Cary, 26 N. Y. 75; 1872, Swartwout v. R. Co., 24 Mich. 390; 1881, Butchers' & D. Bank v. McDonald, 130 Mass. 264; 1885, People v. La Rue, 67 Cal. 526, 8 Pac. Rep. 84; 1886, Stout v. Zulick, 48 N. J. L. 599, 7 Atl. Rep. 362; 1889, Eaton v. Walker, 76 Mich. 579, 43 N. W. Rep. 638, 27 A. & E. C. C. 310; 1890, Snider's Sons' Co. v. Troy, 91 Ala. 224, 24 Am. St. Rep. 887, *infra*, p. 656; 1891, American Salt Co. v. Heidenheimer, 80 Texas 344, 26 Am. St. Rep. 743; 1891, Allen v. Long, 80 Texas 261, 26 Am. St. Rep. 735; 1893, Gibbs' Estate, 157 Pa. St. 59, *supra*, p. 244; 1894, Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. Rep. 368; 1894, McTighe v. Macon Const. Co., 94 Ga. 306, 47 Am. St. Rep. 153; 1894, State Bank Building Co. v. Pierce, 92 Iowa 668; 1895, Coxe v. State, 144 N. Y. 396, 39 N. E. Rep. 400; 1895, American Loan and Trust Co. v. Minn. & N. W. R. Co., 157 Ill. 641; 1895, Greenbrier Indus. Ex. v. Squires, 40 W. Va. 307, 52 Am. St. Rep. 884; 1895, Jones v. Hardware Co., 21 Colo. 263, 52 Am. St. Rep. 220, 29 L. R. A. 143, *infra*, p. 637; 1896, Bradley v. Reppell, 133 Mo. 545, 54 Am. St. Rep. 685, *infra*, p. 868; 1895, American Mirror Co. v. Bulkley, 107 Mich. 447; 1896, Tuckasegee Mining Co. v. Goodhue, 118 N. C. 981; 1896, Duke v. Taylor, 37 Fla. 64, 53 Am. St. Rep. 232; 1897, Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. Rep. 591; 1897, Continental Trust Co. v. T., St. L. & K. R. Co. (C. C. N. D. Ohio), 82 Fed. Rep. 642; 1897, Johnson v. Okerstrom, 70 Minn. 303, 73 N. W. Rep. 147; 1898, Maryland Tube and Iron Works v. West End Imp. Co., 87 Md. 207, 39 L. R. A. 810; 1898, Jones v. Hale, 32 Ore. 465, 8 Am. & E. C. C. (N. S.) 150; 1899, Calkins v. Bump, 120 Mich. 335, 79 N. W. Rep. 491; 1899, Marsh v. Mathias, 19 Utah 350, 56 Pac. Rep. 1074; 1899, City of Wilmington v. Addicks, — Del. —, 43 Atl. Rep. 297; 1899, Christian & Craft Grocery Co. v. Fruitdale Lumber Co., 121 Ala. 340, 25 So. Rep. 566; 1899, Commonwealth v. Yetter, 190 Pa. St. 488. See, also, *infra*, pp. 1122–1130, on necessity of pleading and proving corporate existence, in suits by and against a corporation.

There is great confusion among the cases as to the doctrines concerning *de facto* corporate existence, and estoppel to deny corporate existence; many cases call an apparent corporation a *de facto* corporation, when there is no suf-

ficient reason for so designating it, but abundant reason for holding the person who questioned the existence of the corporation estopped from doing so. On the other hand, many cases are decided on grounds of estoppel, when, in fact, there are sufficient reasons for holding the corporation to be a *de facto* one, and hence, there is no necessity of invoking the doctrine of estoppel. Much of the confusion undoubtedly arises also from the variety of opinion as to the necessity of pleading and proving corporate existence in suits by or against corporations. See *infra*, pp. 1122–1130. For example, in Williams v. Bank, 7 Wend. (N. Y.) 539 (1831), it is said "A contract made with a corporation by name is not an admission or *any evidence* that the corporation is entitled to sue by that name." And again, in Welland Canal Co. v. Hathaway, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51 (1832), it is said: "When a corporation sues, if they have not the powers and privileges assumed * * * it is their own fault, not his. Whether they had * * * or not must be known to themselves, not to the defendant, and no act of his could legally add to or detract from them. Why, then, should he be estopped from denying their corporate capacity, or they be excused from establishing it by legal evidence, when they are endeavoring to enforce their rights in a manner and before a tribunal which can entertain their suit only on proof or assumption that they are a corporate body, duly constituted by competent authority?" So, too, in Maryland Tube and Iron Works v. West End Improvement Co., 87 Md. 207, 39 L. R. A. 810 (1898), where the question was as to whether there was cause for estoppel before the franchise tax was paid, it was said that *the doctrine of estoppel can not be invoked unless the corporation has at least a de facto existence.* A similar holding was made in Jones v. Hardware Co., 21 Colo. 263, *infra*, p. 637, and Duke v. Taylor, 37 Fla. 64, but it is submitted that the foregoing views are not according to the weight of authority. On the contrary: "A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world, except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even as against the state, except in direct proceedings to arrest its usurpation of power, its acts are binding." People v. La Rue, 67 Cal. 526 (1885). Even the state in a *quo warranto* to test the right to a corporate office can not question the corporate existence. Commonwealth v. Yetter, 190 Pa. St. 488 (1899). See, also, Beach, §§ 13, 14, 16; Clark, §§ 41, 42; Cook, §§ 183–186, 231–235, 637; Elliott, §§ 69–80; Morawetz, §§ 735–778; Taylor, §§ 145–157; I Thompson, §§ 495–513; VII Thompson, § 8212.

ARTICLE VI. CONDITIONS OF CORPORATE EXISTENCE BY ESTOPPEL.

Sec. 164. (A) Theories:

"An examination of the cases in which the doctrine of estoppel to deny corporate existence has been applied will show that most of them rest on some basis of conduct, or of benefit obtained, or other cause rendering it inequitable to allow such denial. The doctrine is an equitable one, and should be applied only where there are equitable grounds for applying it. It should never be applied where it would be inequitable to do so. Nor should it be applied unless it would be inequitable not to do so." Clark on Corps., § 43, p. 103.

(1) The doctrine is one of equity.

(*a*) Will be applied where it would be inequitable not to apply it.

ESTEY MANUFACTURING COMPANY v. RUNNELS.[1]

1884. IN THE SUPREME COURT OF MICHIGAN. 55 Mich. Rep. 130–133.

CHAMPLIN, J. This action was commenced before a circuit court commissioner to recover the possession of certain land described in the complaint, and averring that the defendant holds the same unlawfully and against the rights of the Estey Manufacturing Company. December 3, 1883, was the return day, when the defendant appeared and pleaded not guilty. The cause was then tried and judgment rendered in favor of the plaintiff; and on the 8th day of December, 1883, the defendant appealed the suit to the circuit court for the county of Shiawassee. The cause was tried in the circuit, April 3, 1884, when the plaintiff again had a verdict, whereupon the defendant brings the suit to this court by writ of error. * * *

Defendant also introduced and read in evidence a duly certified copy of the articles of association of the plaintiff corporation, from which it appeared that there were but three corporators, two of whom resided in Michigan and one in Vermont. The acknowledgment of Jacob W. Estey was taken before a person styling himself a notary public, but his official character and authority to take acknowledgments was not authenticated in accordance with the requirements of our statutes. The defendant's counsel requested the court to charge the jury as follows: * * *

"*Fourth*. That the articles of association filed in said cause and read therein are void under the law." * * *

The third and fourth requests refer to the same point, and may be considered together. Where a body assumes to be a corporation and acts under a particular name, a third party dealing with it under such assumed name is estopped to deny its corporate existence. Such is the general rule, founded upon equitable principles, and if any exceptions exist, it is only where "there are no facts which make it legally unjust to forbid its denial." Doyle v. Mizner, 42 Mich. 337. In this case the defendant introduced in evidence the execution upon which the sale was made. From this it appears that it was issued upon a judgment rendered for damages for the non-performance of certain promises and undertakings made by this defendant to the Estey Manufacturing Company, which shows that the defendant had had dealings with the plaintiff as a corporation in the name assumed by it. He was therefore estopped, not only by having dealt with it as a corporation, but by the judgment in the case, to deny its corporate existence. The execution, sale and sheriff's deeds all result from the contract relation voluntarily entered into between the defendant and this corporate body, and it would be manifestly unjust and inequitable to

[1] Arguments omitted. Only part of opinion relating to the one point given.

permit the defendant to question the legal corporate existence of the plaintiff in this collateral proceeding.

For these reasons the requests were properly refused, and the judgment is affirmed.

The other justices concurred.

Note. See note at the end of this article, on extent of doctrine.

Sec. 165. Same.

(*b*) Will be applied only where it is equitable to do so.

DOYLE v. MIZNER, GRAY AND KANE.[1]

1879. IN THE SUPREME COURT OF MICHIGAN. 42 Mich. Rep. 332–341.

Error to superior court of Detroit. Trover. Plaintiff brings error.

CAMPBELL, C. J. Doyle brought suit to recover for the forcible removal and disposal of certain goods claimed to be his property, and taken from his possession by defendant Kane under color of a chattel mortgage purporting to be made by Mizner and Gray, as president and secretary of the Detroit Chemical Works. * * *

January 27, 1875, an agreement was signed by Doyle, Mizner and Gray to organize a joint-stock company, to be known as the Detroit Chemical Works, with a capital of $50,000, in 2,000 shares of $25 each. The paid-in capital was fixed at $14,000; the estimated assets of the Detroit Manufacturing Company, of which $10,000 as paid-up stock was to go to Doyle, and $2,000 each to Gray and Mizner, who were therein stated to have purchased that interest. But there is nothing to indicate that they gave or were to give any consideration. The remaining $36,000 was to be sold for working capital, after allowing Doyle $4,000 to be sold for Doyle's benefit in payment for certain claims sold to the company, and for which he was to turn in $4,000 of his stock. The first $500 raised was to go towards paying the chattel mortgage. Without some further showing it would seem that under this arrangement Doyle furnished the entire original capital, and Gray and Mizner got their share out of him for nothing. * * *

On the 11th of February, 1875, a transfer in writing was signed by the three parties of all the property of the Detroit Manufacturing Company to the chemical works for the expressed consideration of $14,000, "subject to a claim of about $500, held by Kane & Hibbard (or their client), of Detroit, Mich." * * *

Doyle's ground of action is based on the claim that he never transferred his rights to any one, and that the paper in question was not to become operative until he received consideration by payment for his goods. His testimony, if believed, shows that the paper was never delivered in such a way as to belong to the Detroit Chemical Works or to pass any title until paid for.

[1] Arguments omitted. Only part of opinion given.

It is claimed for the defense that Doyle, having dealt with it and acted with Gray and Mizner, is estopped from denying its corporate existence. *There are certainly many cases in which a recognition of corporate existence by dealing with the corporation, will estop from questioning it. But this doctrine rests on the ground that such action creates relations and encourages conduct which there may be difficulty in undoing. In ordinary cases such recognitions have been considered as binding.*

But this rule is one originating in equitable principles, and can not be applied universally. There would be no sense in applying it where no new rights have intervened, and where such recognition has itself been brought about by fraudulent dealings carried on for the very purpose of entrapping a party into the action on which such recognition rested. If there was no corporation in fact, and if there are no facts which make it legally unjust to forbid its denial, it is difficult to understand what room there is for an estoppel. And inasmuch as facts were asserted by plaintiff tending to show good reasons why he should not be estopped, and that testimony was open to the jury, the rulings upon the proof of corporate existence are fairly open to review.

The incorporation was sought to be shown by asking Doyle on cross-examination concerning the signing of the paper purporting to be articles of incorporation, which had been filed in the Detroit city clerk's office, April 6, 1875. This paper was not acknowledged, and was not filed in the county clerk's office. A copy of the same paper was certified by the secretary of state; but his certificate did not give a copy of any acknowledgment, but merely said the paper was accompanied by an acknowledgment in the usual form. The original paper had an unsigned certificate of acknowledgment.

Under our present constitution no charters can be granted, and all private corporations must be organized under general laws, and can only be valid when strictly conforming to all the conditions imposed upon their completion. The statute concerning manufacturing corporations expressly requires that the articles shall be "acknowledged before some person authorized by the laws of this state to take acknowledgments of deeds." Comp. L., § 2839.

There was, therefore, no incorporation shown, and, therefore, for the purposes of this case, none exists as a matter of fact. The only way in which, under these circumstances, any question of corporate action could arise would be by way of estoppel. And it is important to see how far relations existed which might create it, and whether any one shows a right to rely on it.

By the contract of January 27, 1875, Doyle agreed to transfer his assets to the company as soon as it should become incorporated. The whole consideration of that agreement rested on the creation of stock, which was to be in part apportioned and in part sold as agreed. Nothing but the stock of such a nature as to be lawfully transferable as such could satisfy the agreement. And until provision was made which secured this no consideration existed for the transfer, and there

was no promise to make it. This becomes material in another point of view, which will be referred to presently.

To what extent, if any, the action of those parties on the assumption there was a corporation would estop them as against third parties dealing with them, can only be decided when such cases arise. *As between themselves there can be no such estoppel where Mizner and Gray are not injured by any honest reliance on Doyle's action to their prejudice. Each of them knew what was done, and was bound in law to know there was no incorporation. If a mistake of law would exonerate them from this rule, it would also exonerate Doyle, and would still bind him by no estoppel extending beyond such results as came from an honest reliance on his acts.* They could claim no interest in his property for which no consideration passed, and they could claim no rights against him except to the extent of their damage by a justifiable reliance on what had been done to their prejudice by his procurement or encouragement.

If it was understood the bill of sale was not to take immediate effect, then no title could pass to the concern either corporation or unincorporated. And, as already seen, there was no state of things which formed any legal consideration for the transfer under the agreement of January, 1875. We think the court erred in connecting the transfer with that agreement, if there was no actual incorporation. In the absence of an actual incorporation the transfer must be regarded as a new and distinct arrangement, resting on its own consideration. It could not be valid unless delivered, and where the same persons are grantors and representatives of the grantees, there must be distinct evidence that it was intended to be operative, which its signature alone would not give. And if there was no corporate existence, not only does the consideration of the transfer expressed on its face utterly fail, but the further difficulty arises that there is absolute identity between grantors and grantees, with nothing to distinguish it from any other grant of a party to himself. From such a document no new rights could arise as between the parties. * * *

Reversed.

Sec. 166.

(2) Estoppel arises on matter of fact only, and not of law.

SNYDER v. STUDEBAKER.

1862. IN THE SUPREME COURT OF INDIANA. 19 Ind. Rep. 462–466.

Appeal from the Wells Circuit Court.

WORDEN, J. This was an action by Snyder against Studebaker to recover possession of a certain tract of land. Judgment for the defendant.

The same question is presented by the pleadings and the evidence. It appears that, in March, 1853, the plaintiff, who was then the

owner of the land, conveyed the same to the Fort Wayne and Southern Railroad Company, by deed, duly executed and delivered.

This conveyance was made on account of a stock subscription.

Afterward, in November, 1855, the railroad company, for a valuable consideration, conveyed the premises to the defendant.

The Fort Wayne and Southern Railroad Company was chartered by act of the legislature, passed in 1849; and it appears that the corporators named in the act in question met in the town of Bluffton, in said county of Wells, on the 19th day of November, 1851, and then and there accepted the act of incorporation, and organized the company pursuant to the provisions of said act.

If the corporation was not created before the 1st of November, 1851, when the new constitution took effect, it could have no existence at all, as that instrument prohibits the creation of corporations other than banking, by special act. The State v. Dawson, 16 Ind. 40. Harriman v. Southam, 16 Ind. 190.

The plaintiff claims that, inasmuch as there was no acceptance of the charter, or organization under it, until after the adoption of the constitution of 1851, there was no such corporation as The Fort Wayne and Southern Railroad Company at the time he executed the conveyance, and, hence, that no title passed from him. But is he in a condition to dispute the existence of the corporation at the time he made his conveyance to it?

It has been held, in numerous cases in this state, that *a party who has contracted with a corporation, as such, is, as a general proposition, estopped by his contract* to dispute the existence of the corporation at the time of the contract. The following cases may be cited, though there are, perhaps, others reported and some not reported as yet: Judah v. The American Live Stock Insurance Company, 4 Ind. 333; The Brookville and Greensburg Turnpike Company v. McCarty, 8 Ind. 392; Ensey v. The Cleveland and St. Louis Railroad Company, 10 Ind. 178; Fort Wayne and Bluffton Turnpike Company v. Deam, 10 Ind. 563; Jones v. The Cincinnati Type Foundry Company, 14 Ind. 89; Hubbard v. Chappell, 14 Ind. 601; The Evansville, etc., Railroad Company v. The City of Evansville, 15 Ind. 395; Meikel v. The German Savings Fund Society, 16 Ind. 181; Heaston v. The Cincinnati and Fort Wayne Railroad Company, 16 Ind. 275.

The doctrine is by no means confined to the state, but prevails elsewhere. The Dutchess Cotton Manufactory v. Davis, 14 Johns. 238; All Saints' Church v. Lovett, 1 Hall 191; Palmer v. Lawrence, 3 Sand. Sup. C. R. 161; Eaton v. Aspinwall, 6 Duer 176; Jones v. Bank of Tennessee, 8 B. Mon. 122; Worcester Medical Institution v. Harding, 11 Cush. 285; The Congregational Society v. Perry, 6 N. H. 164; People's Savings Bank, etc., v. Collins, 27 Conn. 142; West Winsted Savings Bank v. Ford, 27 Conn. 282; Angell and Ames on Corp., § 94.

The estoppel arises upon matter of fact only, and not upon matter of law. Hence, if there be no law which authorized the supposed

corporation, or if the statute authorizing it be unconstitutional and void, the contract does not estop the party making it to dispute the existence of the corporation. But if, on the other hand, there be a law which authorized the corporation, then, whether the corporators have complied with it, so as to become duly incorporated, is a question of fact, and the party making the contract is estopped to dispute the organization or the legal existence of the corporation. This proposition is substantially stated in the cases of Jones v. The Cincinnati Type Foundry Company, Meikel v. The German Savings Fund Society, and Heaston v. The Cincinnati and Fort Wayne Railroad Company, *supra*.

Let us apply the doctrine to the case before us. The corporators named in the act to establish the Fort Wayne and Southern Railroad Company had a right, at any time before the offer of the franchises was withdrawn, that is, before the constitution of 1851 was adopted, to accept the charter, and organize under it. If they did so accept the charter, and organize, the corporation was legitimately created, and the new constitution did not destroy it.

Whether they did so accept the charter, and organize, was a question of fact, and the plaintiff, by his conveyance, is estopped to deny such acceptance and organization.

That the corporators accepted the charter, and organized under it, within the time when it was competent to do so, was as fully admitted by the contract as was any other step necessary to an organization.

The conclusion necessarily follows that the plaintiff is estopped to dispute the existence of the corporation at the time of his conveyance to it.

This point was ruled the other way in the case of Harriman v. Southam, 16 Ind. 190; but, upon more mature reflection, we are satisfied that the decision upon this point was wrong, and should be overruled.

We may remark, also, that the doctrine of estoppel was erroneously applied in the case of The Evansville, etc., Railroad Co. v. The City of Evansville, 15 Ind. 395. There the point made was that the law under which the corporation was organized was unconstitutional and void. A party, we have seen, does not, by his contract, estop himself to deny that there is any law, or any valid law, by which the corporation was authorized.

Some further observation, in respect to the case before us, will not be out of place. The doctrine of estoppel, as applied to the case, does not rest upon a mere technical rule of law. It has its foundation in the clearest equity, and the principles of natural justice. The doctrine of estoppel *in pais* is of comparatively recent growth, but is firmly and clearly established. "The recent decisions of the courts, both in this country and in England, appear to have given a much broader sweep to the doctrine of estoppel *in pais* than that which formerly existed, and to have established that, *in all cases where an act is done, or a statement made, by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair, there*

the character of an estoppel will be given to what would otherwise be mere matter of evidence, and it will, therefore, become binding upon a jury, even in the presence of proof of a contrary nature." 2 Smith Lead. Cas., p. 531, 1 Am. ed. See, also, upon this subject, Kinney v. Farnsworth, 17 Conn. 355; Middleton Bank v. Jerome, 18 Conn. 443; Laney v. Laney, 4 Ind. 149. In Doe ex dem. Richardson v. Baldwin, 1 Zabriskie, 397, it was said that "The doctrine of estoppel rests upon the principle, that when one has done an act, or made a statement, which it would be a fraud, on his part, to controvert or impair, and such act or statement has so influenced any one that it has been acted upon, the party making it will be cut off from the power of retraction. *It must appear*, 1. *That he has done some act, or made some admission inconsistent with his claim; 2. That the other party has acted upon such conduct or admission;* 3. *That such party will be injured by allowing the conduct or admission to be withdrawn.*" Here the plaintiff, by his conveyance to the corporation, admitted that it had an existence, and could receive the title. Upon this act and admission of the plaintiff the defendant has acted in purchasing the land of the company. If the plaintiff had not conveyed to the corporation, the defendant would not have purchased from it. The law will not now permit the plaintiff to withdraw the admission made by him in conveying to the corporation and deprive the defendant of the land which he purchased on the faith of such admission. In our opinion the judgment below is right, and must be affirmed.

Per Curiam.—The judgment is affirmed, with costs.

Note. See following cases, and those cited to Cochran v. Arnold, *supra*, p. 629.

Sec. 167.

(3) Estoppel applies only in cases where there is at least a *de facto* existence.

JONES v. THE ASPEN HARDWARE COMPANY.

1895. IN THE SUPREME COURT OF COLORADO. 21 Colo. Rep. 263–271, 52 Am. St. Rep. 220.

The Aspen Hardware Company instituted this suit in the court below for the purpose of recovering a stock of goods seized by the United States marshal under a writ of attachment issued out of the circuit court of the United States at the suit of Joseph A. Thatcher, plaintiff, against one A. B. Eads. The only question in the case has reference to the corporate capacity of defendant in error, it not having filed, prior to the attachment levy, its certificate of incorporation with the secretary of state, as required by the statute. Session Laws of 1887, p. 406. In the district court judgment was entered in favor of the company. The statute reads as follows:

"Every corporation, joint-stock company or association incorporated

by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom, or of any state or territory of the United States beyond the limits of this state, having capital stock divided into shares, shall pay to the secretary of state for the use of the state a fee of ten dollars, in case the capital stock which said corporation, joint-stock company or association, is authorized to have, does not exceed one hundred thousand dollars; but, in case the capital stock thereof is in excess of one hundred thousand dollars, the secretary of state shall collect the further sum of ten (10) cents on each and every thousand dollars of such excess, and a like fee of ten cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of the certificate of incorporation, articles of association or charter of said corporation, joint-stock company or association, in the office of the secretary of state; and no such corporation, joint-stock company or association *shall have* or exercise any corporate powers or be permitted to do business in this state until the said fee shall have been paid; and the secretary of state shall not file any certificate of incorporation, articles of association, charter or certificate of the increase of capital stock, or certify or give any certificate to any such corporation, joint-stock company or association, until said fee shall have been paid to him. But this act shall not apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes." Section 1, Acts of 1887, p. 406.

CHIEF JUSTICE HAYT delivered the opinion of the court.

In November, A. D. 1889, Shepard & Bowles, as co-partners, were doing a general hardware business in the city of Aspen, and, during that month made a sale of their business, stock in trade, good-will, etc., to A. B. Eads, the consideration for this transfer being certain real estate and the assumption of certain indebtedness of the firm of Shepard & Bowles. Eads being unable to comply with the terms of the agreement, a new arrangement was made between the parties, and an organization known as the Aspen Hardware Company was formed by Bowles, Eads and one Kettler. The articles of incorporation provided that the affairs of the company should be managed by a board of three directors, naming Bowles, Eads and Kettler as such directors for the first year. It was the evident intention of the parties that the company should be duly and legally incorporated, and to this end they caused to be executed articles of incorporation on the 16th day of November, 1889, in due form, and immediately filed the same with the clerk and recorder of Pitkin county. For some reasons not explained by the evidence, the articles were not filed in the office of the secretary of state until after the levy of the writ of attachment hereinafter referred to, and not until the day upon which this suit in replevin was instituted, but whether before or after the commencement of this action does not clearly appear from the evidence.

After the articles were filed with the county clerk, the board of directors held a meeting, elected officers, caused capital stock to be issued, etc., Eads being present and participating in this meeting, at

which Bowles was elected president, Eads vice-president, and Kettler secretary and treasurer. Thereupon, Eads, for a valuable consideration, sold and transferred the property to the new organization, and Mr. Bowles, from that time forward, conducted the business for the Aspen Hardware Company, selling goods and purchasing new goods in the corporate name. Eads, soon after the sale, left the town of Aspen and did not return, nor personally take part in the business at that point, but continued as a director and vice-president of the company, and retained a portion of his stock, although he had sold a part of it prior to the levy of the writ of attachment.

The business was thus continued until July 31, 1890, when a suit was commenced by Thatcher, plaintiff, against A. B. Eads, and the property in question levied upon as the property of the defendant in that suit, and this action of replevin was immediately instituted to recover possession of the property, or its value.

The controversy in this case is narrowed to the single question of the capacity of defendant in error to take title to the property in controversy as a corporation at the time of the attempted transfer by Eads, it not having at that time filed its articles of incorporation with the secretary of state, or paid the fee for such a filing, as provided by the statute of 1887, p. 406.

This is the first time the effect of this statute has been before this court for consideration, although in Edwards v. D. & R. G. R. Co., 13 Colo. 59, the constitutionality of a somewhat similar act was under review. That act was attacked upon several grounds, among which was that it was void because the subject was not clearly expressed in the title, the title being "An act to provide for the formation of corporations," and it was held that this title was sufficient to cover legislation requiring a fee to be paid for filing the certificate of incorporation, under the principle that the same was germane to the general subject expressed in the title, and that legislation fixing the amount of such fee, time of payment, etc., was not obnoxious to the constitutional provision with reference to titles. The act of 1887, now under consideration, is entitled "An act to fix the fees to be collected by the secretary of state for incorporation and certain other privileges." The body of the act, however, relates entirely to the fee to be charged and collected for filing certificates of incorporation, articles of association, charters, or increase of capital stock of joint-stock companies, and in addition thereto provides that no such corporation, joint-stock company or association "*shall have or exercise any corporate powers or be permitted to do any business in this state until the said fee shall have been paid.*" * * * This provision is so closely allied to the general subject, which is the fixing of fees for filing certificates of incorporation, etc., that under the uniform rule of decisions in this state it must be held to be a proper matter for legislation under the title selected. Golden Canal Co. v. Bright, 8 Colo. 144; People, *ex rel.* Thomas, v. Goddard, 8 Colo. 432; People, *ex rel.* Thomas, v. Scott, 9 Colo. 422; Dallas v. Redman, 10 Colo. 297; Edwards v. D. & R. G. R., *supra; In re*, Pratt, 19 Colo. 138.

In this case the Aspen Hardware Company claims title to the property in dispute in its corporate capacity and not as a co-partnership. It is admitted that the fee for filing the certificate of incorporation with the secretary of state was not paid prior to the levy of the writ of attachment, and that the certificate was not filed in the office of the secretary of state until about the time of the bringing of the present action, the evidence leaving the exact time uncertain.

It is to be remembered that in this case the corporation is the party plaintiff, and it may be stated, as a general rule, that when a company relies on its corporate capacity it assumes the burden of establishing such capacity.

The language of the act is plain and unambiguous. It reads: "No such corporation * * * shall have or exercise any corporate powers * * *."

The taking of title to property was certainly the exercise of a corporate power, and as such prohibited by the express terms of the statute. This is not controverted by counsel for appellee, but it is contended that Eads, having assisted in the organization of the corporation, and having sold to it the hardware stock, is estopped from denying the corporate existence of the company, and that the attaching creditor took the property subject to the same estoppel.

The doctrine of estoppel can not be successfully invoked, we think, unless the corporation has at least a de facto existence. The rule is stated as follows by Morawetz on Private Corporations, § 750, it having been first announced in the case of Brouwer v. Appleby, 1 Sandf. 158: "A defendant who has contracted with a corporation *de facto* is never permitted to allege any defect in its organization as affecting its capacity to contract or sue, but that all such objections, if valid, are only available on behalf of the sovereign power of the state."

It is also well settled that to constitute a *de facto* corporation there must be either a charter or a law authorizing the creation of such a corporation, with an attempt in good faith to comply with its terms, and also a user or attempt to exercise corporate powers under it. Duggan v. The Colorado Mortgage and Investment Co., 11 Colo. 113; Bates et al. v. Wilson et al., 14 Colo. 140.

A *de facto* corporation can never be recognized in violation of a positive law. This principle, which seems to be supported by all the authorities, is thus stated in Morawetz on Private Corporations, § 758: "If the formation of a corporate association is not only prohibited by this general rule of the common law, but is also in violation of some principle of morality or public policy, or a *positive statutory prohibition*, the parties forming such association will not be legally bound by their agreement of membership, and the courts will not recognize the association, either as among its members or against third parties." To recognize the defendant as a *de facto* corporation would, as we have seen, be in direct conflict with the express language of the act, which declares that without the payment of the fee the corporation shall have no corporate power.

One object of this statute is to restrict the organization of "wild-

cat" corporations, it being supposed that the increased fee required by the act would, in a measure, at least, prevent the overcapitalization of companies. The legislature being of the opinion that this purpose would be advanced by requiring the fee to be paid as a condition precedent to the exercise of any corporate power, it is the duty of the courts to give effect to this intent as the same is manifest from the plain language of the act."

The taking of title to the property in controversy being the exercise of a corporate power, and, as such, forbidden until the fee for filing has been paid, it follows that the title of The Aspen Hardware Company as a corporation can not be upheld. *Having failed to comply with the statute, The Aspen Hardware Company at the time of the transfer was neither a de jure nor a de facto corporation, but simply a voluntary association of individuals in the nature of a co-partnership.*

There is a broad distinction between those acts made necessary by the statute as a prerequisite to the exercise of corporate powers and those acts required of individuals seeking incorporation, but not made prerequisites to the exercise of such powers.

"In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally, in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the incorporation is responsible only to the government in a direct proceeding to forfeit the charter." Abbott v. Omaha Smelting and Refining Company, 4 Neb. 416. The omission in this case is of acts of the former class, and consequently there was no corporation in *esse* at the time of the levy of the writ, while the evidence leaves it in doubt if this omission had been supplied prior to the institution of the present action.

But although it could not at the time exercise any corporate power, this did not prevent The Aspen Hardware Company from taking title to the property as a co-partnership. In other words, under the conceded facts, the company was not at the time a corporation, but this will not preclude it from maintaining the action as a co-partnership. The plaintiff sues as The Aspen Hardware Company, and the facts alleged show that such company was a co-partnership and not a corporation. There is nothing in the name of the association to conflict with this, as at common law partners may carry on business under any name they choose. They are bound rather by their acts than by the style which they give to themselves. Cook on Stock and Stockholders, § 233; Chaffee v. Ludeling, 27 La. Ann. 607.

This principle has been applied in many cases where parties have set up the defense of individual non-liability by reason of having directed an incorporation to be had, but where none in fact was consummated. Cook on Stock and Stockholders, §§ 233, 234; Abbott v. Omaha Smelting and Refining Co., *supra*; Empire Mills v. Alston Grocery Co., 15 S. W. Rep. 505 (Texas).

The law having cast this liability upon the members of the associa-

tion, we think they must be given the advantages accorded a co-partnership. So, in this case, while we feel compelled, under the statute, to deny plaintiff's right of recovery as a corporation, we think they may maintain the action as a co-partnership. The cause will accordingly be reversed and remanded, with directions to the district court to allow parties to amend their pleadings as they may be advised.

Reversed.

Note. To same effect: 1898, Maryland Tube & Iron Works v. West End Imp. Co., 87 Md. 207, 39 L. R. A. 810.

See, also, cases following and those cited in note to Cochran v. Arnold, *supra*, p. 629.

Sec. 168.

(4) Public policy forbids the creation or recognition of corporations by estoppel.

BOYCE v. THE TRUSTEES OF TOWSONTOWN STATION OF THE M. E. CHURCH.[1]

1876. IN THE COURT OF APPEALS of MARYLAND. 46 Md. Rep. 359–374.

[Action of assumpsit by appellant against appellee. Plea there never was a corporate body as alleged. Plaintiff offered evidence to show corporate existence, by way of user, by reading a mortgage executed by the church to certain persons, a deed to the church for its property, an application by the church for a loan, a mortgage given by it for its property to secure bonds issued by it; *by way of authority* to exist, a certificate of incorporation, setting forth name, officers, location, powers, purposes, acknowledged before one justice of the peace (the statute requiring the acknowledgment to be before two justices), all of which was objected to, and excluded by the court; this exclusion of evidence is assigned as error, and appeal taken.]

Arthur W. Machen, for appellee, contended:

The proposition contended for by the appellant's counsel would be as inconvenient in practice as it is illogical and unsound. If, whenever certain individuals choose to call themselves a corporation, and conduct business in the name of the supposed corporation, a corporation *de facto* is thereby created, a high attribute of sovereignty becomes unnecessary, all statutory restrictions and guards become nugatory, and any partnership may practically become a corporation.

But what kind of a corporation is it, if it has no powers? No principle is better established than that all the corporate powers must be found expressed in the charter, or necessarily incident to those powers which are expressed. How would it advance the plaintiff to hold that a corporation may be considered as existing, if it is impossible that any cause of action can be established against it for want of charter conferring power to make the contract out of which it is to arise?

[1] Statement of facts abridged. Arguments for appellants omitted; only part of argument for appellee given.

There is no room for presumption or estoppel, for, the plaintiff having produced the alleged instrument of incorporation, the truth appears, and it is manifest that the provisions of the law have not been complied with, and that no incorporation was effected.

STEWART, J., delivered the opinion of the court.

From a careful consideration of the case, we find no error in the rulings of the circuit court, in the four exceptions taken by the appellant.

The controlling question to be determined under the first plea of the appellee of *nul tiel* corporation is, whether any or all of the evidence offered on the part of the appellant in the said exception, and refused by the court, was sufficient to show that the appellant could be held to be a corporation *de jure* or *de facto*, or to estop the appellee from disputing its liability as a corporation.

The act of 1868, ch. 471, in its fourteenth section, provides, amongst other things. for the incorporation of religious societies, and by sections 151, 162, 163 and 164 for religious corporations.

These last provisions are more especially applicable to the organization of a church, religious society or congregation, of whatever denomination which the appellee professes to be, and it is to be presumed were intended for such purpose.

Amongst other requisites to constitute a religious corporation, church, religious society or corporation under these last sections, it was necessary that the agreement for that purpose should be acknowledged by the trustees or a majority of them, before two justices of the peace of the county or city in which the church, congregation or society, or the greatest number of the members shall reside, or before a judge of the circuit court, or of the supreme bench of Baltimore, and certified by the said justices or judge according to the directions of section 163.

No authority having been given to the judge by these provisions, to determine that the law had been complied with, his certificate is not sufficient evidence that the defendant is a corporation.

But the appellant has undertaken to offer evidence of certain acts and proceedings of the appellee, referred to in the exceptions, to show that it held itself out as a corporation, and treated with the appellant as such, and is estopped from denying its liability as a corporation.

We think it would be extending the doctrine of estoppel to an extent not justified by the principles of public policy, to allow it to operate through the conduct of parties concerned, to create substantially a de facto corporation, with just such powers as the parties may by their acts give to it.

This would be substituting the dealings of the parties for compliance with the requirements of the law, and giving to them the same effect through the aid of the courts. Thus, virtually, through the courts, recognizing the existence of the corporation, in manifest disregard of the written law.

It has been determined by this court that a corporation can not bind itself in excess of its powers. Pennsylvania Steam Navigation Co. v. Dandridge, 8 G. & J. 319.

Whilst denying its capacity upon any principle of estoppel to make contracts, *ultra vires*, to bind itself, it would not be consistent with that theory to recognize its *existence ad libitum*, according to the conduct of the parties concerned.

Such a principle would seem to affix no other limit to the existence of the corporation de facto or the extent of its power than the dealings of the parties, through the recognition of the courts, might upon the doctrine of estoppel prescribe.

It would be more reasonable to hold corporations to their contracts, though *ultra vires*, of which they have received the benefit, or to prevent parties who have contracted with them, and receive the benefit therefrom, from defeating their liability, on the ground of want of power in the corporation, as is held in quarters of high authority (see note and references in 2d Kent 351), than to hold that corporations should be deemed to have existence because they had so held themselves out.

The statute law of the state, expressly requiring certain prescribed acts to be done to constitute a corporation, to permit parties indirectly, or upon the principle of estoppel, virtually to create a corporation for any purpose, or to have acts so construed, would be in manifest opposition to the statute law and clearly against its policy, and justified upon no sound principle in the administration of justice.

Judgment affirmed.

Sec. 169. (B) Parties estopped.

(1) The pretended corporation itself.

FITZPATRICK, RECEIVER, v. RUTTER.[1]

1896. IN THE SUPREME COURT OF ILLINOIS. 160 Ill. 282–7.

MR. JUSTICE WILKIN delivered the opinion of the court:

On November 20, 1893, George Rutter filed in the circuit court of Cook county his declaration in assumpsit against the Switchmen's Mutual Aid Association of North America, of which he was a member, to collect an indemnity of $1,000, claimed to be due him, under the rules of the association, for injuries sustained in a railroad accident. Summons was issued and served upon the officers of the association, but the declaration was not filed ten days prior to the first day of the January term, 1894. By agreement of counsel, however, it was stipulated that the association would take no advantage of the failure to file the declaration in the proper time. The declaration was filed on the first day of the January term, 1894, and on March 13, following, no plea being on file, judgment by default was taken against the defendant association. Execution having been issued thereon and returned no property found, Rutter, on June 18, 1894, filed a creditor's

[1] Arguments omitted. Only part of opinion given.

bill in the superior court of Cook county, based on the judgment of March 13, to discover and reach moneys in the hands of the association. The defendant was served with summons, just as it was in the suit at law. No answer being made, it was defaulted. The officers of the association answered[1] for themselves and the other members of the association, and upon their answer being replied to, the cause was referred to a master, and proofs were taken upon the issue thus formed. The decree of the court was in favor of complainant. Defendants severally prayed an appeal, but afterward withdrew their prayer for appeal, and John E. Fitzpatrick, as receiver of the association, having been appointed by the circuit court on July 21, 1894, made himself a party to the cause and perfected the appeal. The cause was taken to the appellate court for the First district, and is brought here to reverse the decision of affirmance in that court.

The first ground upon which appellant relies for reversal here is that the circuit court had no jurisdiction over the person of the defendant association, as it was sued as a corporation, summons being issued and served upon its officers only, instead of each of the members, as should have been done, to bring a voluntary association within the jurisdiction of the court. If a court has proceeded without jurisdiction, its judgment is absolutely void for every purpose, and will be so declared in any court in which it may be presented, and that question is, therefore, proper to be considered here. But we think, from an examination of the record, the appellate court and the trial court were justified in finding, from the evidence, that the association was a *de facto* corporation, and properly served with process. The Switchmen's Mutual Aid Association of North America had an organization, consisting of directors, a president, secretary and other officers. Its name implied a corporate body. It authenticated its acts by a common seal and exercised corporate powers, and it is thus estopped from denying its corporate existence. United States Express Co. v. Bedbury, 34 Ill. 459. * * *

Judgment affirmed.

Note. See, 1695, Knight v. Corporation of Wells, 1 Lutw. f. 508; 1729, Henriques v. Dutch West India Co., 2 Ld. Raym. 1532; 1842, Stone v. Berkshire Congregational Society, 14 Vt. 86; 1848, Johnston v. South West R. Bank, 3 Strob. Eq. (S. C.) 263; 1851, Stoddard v. Onondaga Conference, 12 Barb. (N. Y.) 573; 1857, Abbott v. Aspinwall, 26 Barb. (N. Y.) 202; 1858, Kennedy v. Cotton, 28 Barb. (N. Y.) 59; 1860, Dooley v. Cheshire Glass Co., 15 Gray (Mass.) 494; 1860, Calender v. Painesville, etc., R. Co., 11 Ohio St. 516; 1864, The United States Express Co. v. Bedbury, 34 Ill. 459, holding that the name "The United States Express Co." imported a corporation; 1871, McCullough v. Talladega Ins. Co., 46 Ala. 376; 1874, Grape Sugar and Vinegar Mfg. Co. v. Small, 40 Md. 395; 1879, Humphrey v. Patrons Mercantile Assn., 50 Iowa 607; 1881, Empire Mfg. Co. v. Stuart, 46 Mich.

[1] This answer, as stated in the report of the case in 58 Ill. App. 532, on 533, alleged that "it was a voluntary association having several thousand members throughout the United States and Canada; that it was not incorporated under the laws of this or any other state or country; that it did not hold itself out to the public or to its members as a corporation, and that it was not a *corporation de facto*." The master found these allegations to be substantially true. See 58 Ill. App. 534.

482; 1882, Dobson v. Simonton, 86 N. C. 492; 1886, Kelly v. Newburyport & A. H. R., 141 Mass. 496, 6 N. E. 745; 1888, Williams v. Stevens Point Lumber Co., 72 Wis. 487; 1891, Scheufler v. Grand Lodge A. O. U. W., 45 Minn. 256; 1892, Roll v. St. Louis, etc., Smelting & M. Co., 52 Mo. App. 60; 1893, Stewart Paper Mfg. Co. v. Rau, 92 Ga. 511, 17 S. E. 748; 1893, Meneer v. Detroit Mut. Benev. & P. Assn., 95 Mich. 451; 1898, Bishop v. Kent & Stanley Co., 20 R. I. 680, 9 Am. & E. C. C. (N. S.) 718.

Sec. 170.

(2) The associates.

(*a*) Among themselves.

FOSTER v. MOULTON.

1886. IN THE SUPREME COURT OF MINNESOTA. 35 Minn. Rep. 458–460.

Appeal by defendant, E. H. Moulton, from an order of the district court for Blue Earth county, Severance, J., presiding, overruling his separate demurrer to the complaint.

BERRY, J. The complaint in this action sets out what purports to be the articles of incorporation of a mutual benefit association, which appears to have been intended to be a sort of mutual insurance company, and alleges that said articles were duly executed by defendants, and duly recorded with the register of deeds and secretary of state; that one McCarthy became a member of the association, paid his dues and received a certificate of membership; that he sustained bodily injury, entitling him, as such member, to pecuniary benefit; that the amount due him under the terms of his membership has not been paid, and that he has duly assigned his right to such benefit to the plaintiff.

The association did not comply with the statute so as to become an insurance corporation *de jure*. The appellant (one of the defendants) contends that it was duly incorporated as a benevolent society under Gen. Stat. 1878, ch. 34, title iii. This can not be so, for it is no more a benevolent society than any mutual insurance company, or other mutual company, or any partnership of which one member undertakes to do something for the pecuniary advantage of another member in consideration of the undertaking of the latter to do a like thing for him. The undertaking is not in any proper sense *benevolent*, but it is for a *quid pro quo* it paid for. People v. Nelson, 46 N. Y. 477. The association involved in the case at bar is, in substance, for purposes of *mutual insurance*. State v. Merchants' Exch. Mut. Benev. Soc., 72 Mo. 146; State v. Benefit Assn. 6 Mo. App. 163; Commonwealth v. Wetherbee, 105 Mass. 149; May Ins., § 550, a.

But notwithstanding it is not a corporation *de jure*, we think it must at least, as between its members, be regarded as a corporation *de facto*. It is manifest that the understanding between the members and the basis upon which certificates of membership were issued was that the association was a corporation in fact as it was in form. Morawetz Priv. Corp., § 139. *It never could have been intended or ex-*

bected that the members of the association, whether original founders —members like defendants—or those who should become members by joining at any time, should or would be liable as individuals, either jointly or severally, to any particular member who should, by virtue of and under the terms of his membership, become entitled to pecuniary relief or benefit. On the contrary, the intention and the real contract was that the association, as a corporation in the contemplation of the parties, i. e., the members, should be liable, and the association only. In such a state of facts, though the association is not a corporation *de jure*, and perhaps not for every purpose a corporation *de facto*, it is as between the members themselves to be treated as a corporation *de facto* (for that is the way in which the *contract* of the parties treats it), and the right of a member to pecuniary benefit from the association by virtue of his membership must stand upon the basis that it is a corporation *de facto*. Being presumed to know the significance of his membership, its rights and liabilities (Coles v. Iowa State Mut. Ins. Co., 18 Iowa 425), he is estopped to take any other position. This is not only intrinsically just and fair, but it is in accordance with the principles of the authorities. Morawetz Priv. Corp., §§ 131, 132, 134–137; Buffalo & A. R. Co. v. Cary, 26 N. Y. 75, followed in 57, 64, 67 N. Y., and 95 U. S.; White v. Ross, 4 Abb. Dec. 589; Aspinwall v. Sacchi, 57 N. Y. 331; Eaton v. Aspinwall, 19 N. Y. 119; Sands v. Hill, 46 Barb. 651; Sanger v. Upton, 91 U. S. 56; Chubb v. Upton, 95 U. S. 665.

It is important to bear in mind that no fraud is alleged against defendant; and, further, that this is a case in which a member of the association is seeking relief by virtue of his membership. If the action were between a purported or pretended corporation, which was wholly unauthorized and invalid, and a stranger, different rules and principles might, in some circumstances, be involved.

The application of the foregoing views is that, the action having been brought against defendants as individuals merely, the general demurrer of the appellant, who was one of the defendant members of the association, was erroneously overruled. The overruling order is accordingly reversed.

Note. See note to next case, *infra*, p. 649.

Sec. 171. Same.

(*b*) As to the corporation or its creditors.

1. Upon subscription liability.

CANFIELD v. GREGORY.[1]

1895. In the Supreme Court of Errors of Connecticut. 66 Conn. Rep. 9–23.

Baldwin, J. * * * The plaintiff sues as trustee in insolvency of a joint-stock corporation, upon an assessment which it has called in upon

[1] Only part of the opinion is given.

the defendant's stock, and the only answer is *nul tiel corporation*. The second reply is that, however this may be, the defendant is estopped from making such a defense, because the debts, whose existence have made the company insolvent, are due to creditors who trusted it as a corporation, because they were led to believe that it was such by the acts of the defendant, in promoting its organization, publishing its articles of association, acting as a director and as its president, and contracting in its name and behalf these very liabilities.

It is claimed that these averments were not sufficient, because no bad faith, willful wrong or gross carelessness is charged. No such charges were necessary. The plaintiff represents the rights of the creditors of an insolvent company, who contracted with it as being a corporation. Whatever rights they formerly had against those who were its members he now has. They were led to believe in the existence of such a corporation by the acts of the defendant, as a promoter, stockholder, director and president of the company, which are set out in the reply. It was natural that such acts should induce that belief. He had means of knowledge as to the manner in which the company was organized which were not possessed by the public in general. Had he in fact known that its organization was so defective that the corporation, in whose name he was contracting, had no existence, or was incapable of transacting business, his acts would have been no more prejudicial to the other contracting parties. It is not his intent, so much as the result of his conduct, which determines his liability.

The modern estoppel *in pais* is of equitable origin, though of equal application in courts of law. It is much more than a rule of evidence. It establishes rights; it determines remedies. An equitable estoppel does not so much shut out the truth as let in the truth, and the whole truth. Its office is not to support some strict rule of law, but to show what equity and good conscience require, under the particular circumstances of the case, irrespective of what might otherwise be the legal rights of the parties. The key to its application is not infrequently to be found in the rule that in matters of trust and confidence, when one of two innocent persons must suffer, in consequence of the acts of one of them, the loss must generally be borne by him who thus occasioned it. Horn v. Cole, 51 N. H. 287, 12 Am. Rep. 111; Stevens v. Dennett, *ibid.* 324, 330; 2 Pomeroy's Eq. Juris., § 802.

This rule clearly governs the case at bar. It is true that it does not extend to acts or representations not naturally calculated to mislead, and on which others had no right to rely. Danforth v. Adams, 29 Conn. 107. But those of the defendant were addressed to the public and to the parties injured. They came from one who was in a position to know what he affirmed. They gained credit to an organization in which he was interested. The company was a *de facto* corporation. Its creditors, who contracted with it as a corporation, could not hold the individuals who had associated to form it personally liable as co-partners, for with them no contract had been made. 2 Morawetz on Private Corporations, § 748. The defendant was thus shielded from

partnership liability by his representations as to its corporate character, and on these representations those with whom he dealt as one of its officers had a right to rely. Northrop v. Bushnell, 38 Conn. 498, 511; West Winsted Savings Bank v. Ford, 27 Conn. 282, 289. * * *

It was not in dispute between the parties to this cause that the articles of association and organization certificate were sufficient in form, and that they were duly published and filed for record. The only issue tendered by the answer was upon the allegation that there was not and never had been any such corporation as that of which the plaintiff claimed to be a trustee, but the estoppel set up in the reply had a broader reach, and was invoked to preclude the defendant from denying that the corporation ever existed, and that it was capable of contracting debts and making calls on stock subscriptions.

As the case was tried in the court below in this broader aspect, and as if turning on the right of the defendant to rely on the falsity of material statements in the organization certificate, we have treated it from the same point of view, although it may be that, in strictness, the answer was disproved by the admitted facts, which went to show that a corporation was organized, although it never became legally competent to commence business. If this be so, the plaintiff would no less have been entitled to a verdict on the issues closed.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

Note. 1. *As to subscription liability.* 1819, Chester Glass Co. v. Dewey, 16 Mass. 94, 8 Am. Dec. 128; 1850, Oswego & S. P. R. Co. v. Rust, 5 How. Pr. (N. Y.) 390; 1856, Eaton v. Aspinwall, 13 How. Pr. (N. Y.) 184; 1857, Stoops v. Greensburgh P. R. Co., 10 Ind. 47; 1859, Rice v. Rock Island & A. R. Co., 21 Ill. 93; 1862, Buffalo & A. R. Co. v. Cary, 26 N. Y. 75; 1873, Montpelier & W. R. Co. v. Langdon, 46 Vt. 284; 1873, Upton v. Hansbrough, 3 Biss. 417, Fed. Cas. 16,801; 1874, Ossipee Hosiery & W. Mfg. Co. v. Canney, 54 N. H. 295; 1875, Parker v. North Cent. M. R. Co., 33 Mich. 23; 1877, Baile v. Calvert Ed. Soc., 47 Md. 117; 1878, Dows v. Naper, 91 Ill. 44; 1880, Home Ins. Co. v. Sherwood, 72 Mo. 461; 1885, Thompson v. Reno Sav. Bank, 19 Nev. 103, 3 Am. St. Rep. 797, with *note*, p. 806; 1888, Aultman v. Waddle, 40 Kan. 195, 19 Pac. Rep. 730; 1890, National Com. Bank v. McDonnell, 92 Ala. 387; 1894, American Homestead Co. v. Linigan, 46 La. Ann. 1118, 15 So. Rep. 369; 1893, Building & L. Assn. v. Chamberlain, 4 So. Dak. 271, 56 N. W. Rep. 897; 1895, Greenbrier Indus. Ex. v. Squires, 40 W. Va. 307, 52 Am. St. Rep. 884; 1898, *In re* Davis Estate v. Watkins, 56 Neb. 288, 76 N. W. Rep. 575.

2. *But preliminary subscriptions to the stock of a corporation to be formed* are presumed to be made with the understanding that a *de jure* corporation will be formed, and hence if there is no other ground of estoppel than the mere subscription, the subscriber is not estopped from denying that there is a valid corporation. 1874, Indianapolis F. & M. Co. v. Herkimer, 46 Ind. 142; 1879, Rickhoff v. Brown's R. S. S. M. Co., 68 Ind. 388; 1894, Capps v. Hastings Pros. Co., 40 Neb. 470, 42 Am. St. Rep. 677, 24 L. R. A. 259, 58 N. W. Rep. 956, *supra*, p. 239. But see Dorris v. French, 4 Hun (N. Y.) 292 (1875).

3. *What acts will raise an estoppel.*

(*a*) Payments on calls estop: 1864, Ohio, etc., R. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128; 1866, Boggs v. Olcott, 40 Ill. 303; 1879, Rickhoff v. Machine Co., 68 Ind. 388; 1880, Musgrave v. Morrison, 54 Md. 161; 1886, Bell's Appeal, 115 Pa. St. 88, 2 Am. St. Rep. 532; 1891, Minnesota Gaslight Co. v. Denslow, 46 Minn. 171, 48 N. W. Rep. 771; 1895, Greenbrier Indus. Ex. v. Squires, 40 W. Va. 307, 52 Am. St. Rep. 884.

(*b*) Voting at meetings estops: 1864, Railroad Company v. Bowser, 48 Pa. St. 29; 1890, Association v. Walker, 83 Mich. 386; 1895, Greenbrier Indus. Ex. v. Squires, 40 W. Va. 307.

(*c*) Attending and participating in organization meeting, or acquiescing in corporate acts, and receiving benefits estop: 1824, Rockville & W. T. R. Co. v. Van Ness, 2 Cranch (C. C.) 449, Fed. Cas. 11,986; 1849, South Bay M. D. Co. v. Gray, 30 Maine 547; 1850, Bridge Co. v. Chapin, 6 Cush. (Mass.) 50, on 53; 1858, Haynes v. Brown, 36 N. H. 545; 1888, Schloss v. Trade Co., 87 Ala. 411, on 414, 13 Am. St. Rep. 51; 1894, Ogden Clay Co. v. Harvey, 9 Utah 497, 35 Pac. Rep. 510; 1895, Greenbrier Indus. Ex. v. Squires, 40 W. Va. 307.

(*d*) Accepting office from corporation. See note below, under Curtis, Exr., v. Tracy, *infra*, p. 650.

Sec. 172. Same.

2. Upon statutory liability.

McCARTHY v. LAVASCHE.

1878. 89 Ill. 270, 31 Am. Rep. 83, *supra*, 253.

Note. To same effect, see, 1859, Eaton v. Aspinwall, 19 N. Y. 119; 1871, Slocum v. Providence Steam & Gas R. Co., 10 R. I. 112, 116; 1872, Peychaud v. Lane, 24 La. Ann. 404; 1873, Upton v. Hansbrough, 3 Biss. 417, Fed. Cas. 16,801; 1876, Casey v. Galli, 94 U. S. 673; 1883, Keyser v. Hitz, 2 Mackey (D. C.) 473; 1886, Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177. As to what acts will raise an estoppel, see *supra*, note, § 171.

Sec. 173.

(3) The promoters and officers of the apparent corporation.

CURTIS, Exr., v. TRACY, Et Al.[1]

1897. In the Supreme Court of Illinois. 169 Ill. Rep. 233–238. Affirming same case, 62 Ill. App. 49.

Mr. Justice Magruder delivered the opinion of the court:

This is an action brought to the July term, 1895, of the superior court of Cook county, against appellees, seeking to hold them liable as partners upon four promissory notes, executed by the Central Illinois Coal Company, all dated April 16, 1884, amounting altogether to $20,000. * * *

The contention of the plaintiff, arising upon exceptions to the admission of evidence and upon the refusal of propositions of law submitted to the court, is, that, as the notes sued upon were made in the name of the corporation on April 16, 1884, and the certificate of organization was not recorded until June 5, 1885, the defendants, as directors, assumed to exercise corporate powers without complying with the provisions of the incorporation act, and are, therefore, liable

[1] Statement of facts much abridged.

to pay the notes as partners under sections 4 and 18 of that act. (1 Starr & Cur. Stat. 610, 617).

We have recently considered the liability of officers and directors of a corporation, under said sections 4 and 18, to creditors who are third persons. (Loverin v. McLaughlin, 161 Ill. 417.) In the Loverin case a distinction was said to exist between cases where a stockholder is a party to the suit, and cases where the contest is between third persons and the officers or directors assuming to exercise corporate powers. In the case at bar, C. H. Curtis, plaintiff's testator, was a stockholder in the company at or near the time when he became the owner of the notes sued upon, and not only so, but he was elected as a director of the company and transacted business for the company as such director before the certificate of organization was recorded as required by section 4. While acting as a director of the company, he accepted 400 shares of the capital stock as security for the very debt here sought to be recovered. It is true that the notes were not made while he was director, but after he became director he recognized the debt as an obligation of the corporation by taking part in proceedings by the board of directors by which the debt was further secured. Being already a stockholder and director he accepted additional certificates of stock, issued to him as security for these notes. This was done on October 22, 1884, and the certificate of organization was not recorded until June 5, 1885. It was as much his duty to see to it that the certificate was recorded as it was the duty of the original board of directors, elected by the first meeting of the subscribers. (Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67.) By acting with the other directors in the meeting of October 22, 1884, he assumed to exercise corporate functions before that provision of the act, which required the certificate to be recorded, had been complied with. He is estopped by his conduct from seeking to enforce the liability provided for in section 18 against the defendants. He can not enforce against others a penalty which he has himself incurred by his own conduct.

It is well settled that a stockholder can not defend against a liability which rests upon him for the benefit of corporate creditors, upon the ground that the corporation was not legally organized by reason of non-compliance with the terms of the statute providing for such an incorporation. (Hickling v. Wilson, 104 Ill. 54.) He is estopped by the act of subscribing for the stock from setting up such defense. Upon principle there can be no difference between such a case and a case where a stockholder, who is also a director, seeks to enforce a claim resting for its validity upon the fact that the corporation in which he is such stockholder and director was not organized in accordance with the statute. *Where a man has acted as a director of a corporation and participated in the management of its affairs, and attended its business meetings and voted upon questions affecting its interests, before the certificate of its organization has been recorded as required by law, he should be estopped from enforcing against others a liability based exclusively upon their failure to record the same certificate which he failed to have recorded.*

Under the facts as herein recited, we think that the judgments of the superior court of Cook county and of the appellate court were correct. Those judgments are accordingly affirmed.

Judgment affirmed.

Note. See, 1828, All Saints Church v. Lovett, 1 Hall (N. Y.) 191; 1843, Selma & T. R. R. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; 1853, Danbury & N. R. Co. v. Wilson, 22 Conn. 435; 1858, Hayes v. Brown, 36 N. H. 545; 1867, Mason v. Nichols, 22 Wis. 376; 1870, Ramsey v. Peoria M. & F. Ins. Co., 55 Ill. 311; 1871, Parrott v. Byers, 40 Cal. 614; 1876, Phœnix W. Co. v. Badger, 67 N. Y. 294; 1882, Close v. Glenwood Cemetery, 107 U. S. 466; 1885, Thompson v. Reno Sav. Bank, 19 Nev. 103, 3 Am. St. Rep. 797, and note; 1888, Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 Am. St. Rep. 539; 1888, Weinman v. Wilkinsburg & E. L. Pass. Ry., 118 Pa. St. 192, 12 Atl. Rep. 288; 1889, Corey v. Morrill, 61 Vt. 598; 1890, Bates v. Wilson, 14 Colo. 140, 24 Pac. Rep. 99; 1894, State Bank Building Co. v. Pierce, 92 Iowa 668, 61 N. W. Rep. 426.

Sec. 174.

(4) Dealers with knowledge of claim of corporate capacity.

(*a*) Who seek to evade liability to the apparent corporation.

WEST WINSTED SAVINGS BANK AND BUILDING ASSOCIATION v. FORD.[1]

1858. IN THE SUPREME COURT OF ERRORS OF CONNECTICUT. 27 Conn. Rep. *282–291.

ELLSWORTH, J. It appears in March, 1852, the respondent, with twenty-five others, took measures to form a corporation in West Winsted, under the act of 1850 authorizing the establishment of savings and building associations. The corporators prepared and signed the articles of association, and caused a copy to be left with the clerk of the town, in all respects complete except that the names of the corporators were not appended. They commenced and ever since have continued to prosecute their business (somewhat extensively) under their corporate name, "The West Winsted Savings Bank and Building Association." In July, 1854, the respondent applied to and received from the company a loan of $1,000, from which a bonus of 28 per cent. was deducted, leaving the amount actually received $720. For this loan of $1,000 he executed his note to the company, and agreed to secure it by good and perfect deed of land described in the petitioners' bill. It is found that he did execute and deliver to them a deed as agreed, except that one of the witnesses to it was a member of the company, and therefore, not a good witness, as this court has recently decided. In consequence of this the deed is not good, and the debt is not secured. The company have now brought their bill to obtain a good and perfect deed. All the facts stated in the bill are

[1] Statement of facts, except as given in the opinion, and arguments omitted.

found to be true except what is said about the corporators having signed the copy of the articles left with the town clerk. Our advice is asked as to the company's right to demand and have such deed, together with a decree of foreclosure; and whether the bonus is legal, and may be enforced, or should be rejected, in ascertaining the sum which is now due on the note.

We think the company are entitled to the relief they ask for, including in the debt the bonus of twenty-eight per cent.

It is objected to any decree in favor of the petitioners, that they are not a body corporate as they have alleged, and can not bring suit, inasmuch as the corporators did not comply with the fifth section of the act, which says a copy of the articles shall first be left with the town clerk.

On the one hand it is claimed that the statute requires that a copy shall be left and nothing more, and that the court has no power or right to superadd any other prerequisite; on the other hand, it is claimed that the paper is not a copy without the names of the stockholders which are appended to the original. We have not thought it important to examine or decide this point, because we are all satisfied for several reasons that no such objection ought to prevail in this case.

In the first place, the objection to the existence of a corporation plaintiff can not be raised upon the general issue. It is preliminary in its character, like all objections to the person or character in which a plaintiff sues, and should be pleaded in an earlier stage of the cause. The existence of a corporation and its capacity to sue are admitted by a plea to the merits. The authorities on this point are very numerous. Phœnix Bank of N. Y. v. Curtis, 14 Conn. 437; Champlin v. Tilley, 3 Day 303; Sutton v. Cole, 3 Pick. 232, 245; Penobscot Boom Corporation v. Lampson, 16 Maine 224; Bank of Manchester v. Allen, 11 Verm. 302; School District v. Blaisdell, 6 N. H. 197; Bank of Utica v. Smally, 2 Cow. 770.

In the second place, the respondent is estopped by matter *in pais*. We have seldom met with a case to which this kind of equitable estoppel is more properly applicable than the present. In 1852 the respondent, with others, united and formed this association, and proclaimed themselves a corporation under the act of 1850. They unitedly took what were supposed to be the necessary measures to perfect their organization according to law; and if it has not been exactly done, the omission was through their mutual mistake and misapprehension. They intended that it should be considered as done, and so we must now treat them, not only as possessing a corporate existence, but as having a corporate existence under the statute, and having, as to and among themselves certainly, the attributes of such a corporation. The respondent has influenced persons to become members of the company, some by subscribing and some by purchasing from those who have subscribed, and to deposit their moneys and form contracts with the company as duly incorporated and qualified to act as a corporation under the provisions of the statute. Besides,

the company has, during all this time, with the concurrence and co-operation of the respondent, been carrying on business as a corporation, admitting new members, choosing officers and agents, borrowing and loaning money, receiving money on deposit and the like, until the rights and duties of the corporators and the corporation have become exceedingly multiplied and important, and, which ought to be conclusive upon the respondent, he has borrowed this very money and given his note and deed for it to the company by its corporate name. It would be a reproach to the law if, after this, he can be allowed to call in question the existence of the corporation or its capacity to loan the money. Of what particular importance was the leaving a copy of the articles of association to the members of the company? How did the omission affect or injure them? Their relations between themselves or with the company did not grow out of that circumstance, and we can not allow it to have any effect on these parties, however it may be as to the right of the government to complain, if it see fit, and prosecute the company by a writ of *quo warranto*.

The doctrine of equitable estoppel is of so common application here and elsewhere at this day, and has been so often discussed, and shown to be founded in such obvious propriety and necessity, that we need not spend time in discussing it, and it will be sufficient if we merely state the general principles pertaining to it. At the common law estoppels are founded on deeds and records of court, but estopples in equity are estopples *in pais*. The doctrine of this kind of estoppels was at first administered as a branch of equity jurisprudence, but is now incorporated into the law. The rule with regard to common law estoppels is a precise and technical one, though supposed to be founded in principles of truth and justice, such as the statement of material facts in specialties or as found by verdicts or judgments upon trials in courts of record. The common law rule is obviously too narrow and inadequate for the attainment of equity in the multiplied transactions of modern times, and hence the equitable estoppel of the present day.

Estoppel *in pais* is founded in the obligation which every man is under to speak and act according to the truth of the case, and in the policy of the law to prevent the great mischiefs resulting from uncertainty, confusion and want of confidence in the intercourse of men, if they were permitted to deny that which they have deliberately and solemnly asserted and received as true. But the mere acts, statements, or admissions of a party when not performed or made under seal or of record, or in some of those acts to which peculiar authority is attached by law, were not at common law considered as estoppels, and had no other weight than that of evidence, more or less important, but which might be explained or rebutted. By the recent decisions of the courts in this country and in England, a much wider scope is given to the doctrine of estoppels *in pais*, and it is now held and established, that wherever an act is done or a settlement made by a party which can not be contravened or contradicted without fraud, or gross misconduct, which is akin to it, on his part, an injury to oth-

ers whose conduct has been influenced by the act or omission, or, as was said in Middleton Bank v. Jerome, 18 Conn. 449, where a person by his acts or his words intentionally induces another to believe in the truth of a fact and thereby change his situation or commit his interests, the character of an estoppel will attach to what would otherwise be mere matter of evidence, and will become binding upon a party and decisive with a jury even in opposition to proof of a contrary nature. Equitable estoppels, therefore, only arise when the conduct of the party estopped is fraudulent in its purpose, or unjust in its result, which forms the material distinction between the common law doctrine of estoppel and that which has grown up under the influence of equity in modern times. This entire doctrine has been examined and settled in this court in repeated instances as may be seen by the cases in our books. Kinney v. Farnsworth, 17 Conn. 360; Middleton Bank v. Jerome, 18 Conn. 450; Noyes v. Ward, 19 Conn. 250; Whitaker v. Williams, 20 Conn. 98; Emmons v. Gibbings, 24 Conn. 538. Let this doctrine be applied to the respondent and his course of conduct, and we must see that it is not for him, with his money in his pocket, to call in question the character of the party who has loaned him the money and taken his mortgage. If further authority is wanted we refer to Worcester Medical Society v. Harding, 11 Cush. 285, which is exactly this case, and in which the court promptly overruled this objection. Stow v. Wyse, 7 Conn. 214; Narraganset Bank v. Atlantic Silk Co., 3 Met. 282; Congregational Society in Troy v. Perry, 6 N. H. 164; Dutchess Cotton Manufacturing Co. v. Davis, 14 Jones, 238; Eaton v. Aspinwall, 6 Duer 176; McFarlon v. Triton Ins. Co., 4 Denio 392; Schenectady & Saratoga Plank-road Co. v. Thatcher, 1 Kern 108; Palmer v. Lawrence, 3 Sandf. 161; All Saints Church v. Lovett, 1 Hall Sup. Ct. 191.

It has been claimed that the respondent is estopped under the common law rule, by the statement in his deed that there is such a corporation as the plaintiff's from whom he has borrowed the money and to whom he has executed his mortgage deed. But passing this, we decide that this fact, with the others to which we have alluded are sufficient to constitute a good equitable estoppel, which is sufficient for the present case. It is stronger than the common case of landlord and tenant where rent has been paid, which is a good estoppel.

There is still another ground of objection to the claim of the respondents, to which allusion has previously been made, to wit, that this corporation, having enjoyed its franchises so long, can be called in question only by the government, and can be reached only by *quo warranto*, if the government feel that here has been an unwarrantable exercise of corporate power. There is perhaps force in this objection, but it is not necessary for us to consider it.

Our conclusion is that the petitioners are entitled to a good and perfect deed from the respondent and a decree for a foreclosure for the whole note; and this is our advice.

In this opinion the other judges concurred.

Decree advised for plaintiffs.

Note. See, 1829, Hamtramck v. Bank of Edwardsville, 2 Mo. 169; 1833, The Congregational Society v. Perry, 6 N. H. 164; 1839, Bank v. Allen, 11 Vt. 302; 1843, Proprietors of Quincy Canal v. Newcomb, 7 Metc. (Mass.) 276; 1853, Worcester Med. Inst. v. Harding, 11 Cush. (65 Mass.) 285; 1855, Henderson R. Co. v. Leavell, 55 Ky. (16 B. Mon.) 358; 1860, Jones v. Cincinnati Type Foundry Co., 14 Ind. 89; 1861, Wood v. Coosa & C. R. Co., 32 Ga. 273; 1862, Washington College v. Duke, 14 Iowa 14; 1868, Cochran v. Arnold, 58 Pa. St. 399, *supra*, p. 625; 1878, Cahall v. Citizens' Mut. B. Assn., 61 Ala. 232; 1880, Humphreys v. Mooney, 5 Colo. 282; 1881, St. Louis Gas L. Co. v. St. Louis, 11 Mo. App. 55; 1881, Central Ag. & Mech. Assn. v. Alabama G. L. Ins. Co., 70 Ala. 120; 1883, Imboden et al. v. The Etowah & B. B. M. Co., 70 Ga. 86, on 107; 1883, Whitford v. Laidler, 94 N. Y. 145; 1886, Town of Searcy v. Yarnell, 47 Ark. 269; 1886, Singer Mfg. Co. v. Bennett, 28 W. Va. 16; 1887, Fresno Canal & I. Co. v. Warner, 72 Cal. 379, 14 Pac. Rep. 37; 1889, McCord & N. M. Co. v. Glenn, 6 Utah 139, 21 Pac. Rep. 500; 1889, Cravens v. Eagle Cotton Mills Co., 120 Ind. 6, 21 N. E. Rep. 981; 1891, Bon Aqua Imp. Co. v. Standard F. I. Co., 34 W. Va. 764, 12 S. E. Rep. 771; 1892, Perine v. Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W. Rep. 1022; 1895, Johnston v. Gumbel, 19 South. 100; 1896, Livingston Loan & B. Assn. v. Drummond, 49 Neb. 200, 68 N. W. Rep. 375; 1896, Tuckasegee Min. Co. v. Goodhue, 118 N. C. 981; 1898, Carroll v. Pacific Nat'l Bank, 19 Wash. 639, 9 Am. & E. C. C. (N. S.) 202, holding that a dealer with an apparent corporation will be estopped from denying the corporate existence, if it would prejudice third parties; 1898, Jones v. Hale, 32 Ore. 465, 52 Pac. Rep. 311; 1898, Grande Ronde L. Co. v. Cotton, 12 Colo. App. 375, 55 Pac. Rep. 610. But compare Jones v. Aspen Hardware Co., *supra*, p. 637.

Sec. 175. Same.

(*b*) Who seek to hold members of the corporation liable as partners, or individually liable.

SNIDER'S SONS' CO. v. TROY.[1]

1890. IN THE SUPREME COURT OF ALABAMA. 91 Alabama Rep. 224–233.

This action was brought by the Louis Snider's Sons' Company, a corporation created under the laws of Ohio, against D. S. Troy, and was commenced on the 15th of February, 1890. The complaint contained a single count, which claimed $827.92 for goods consisting of paper and other printing materials, sold by plaintiffs in March, April, May and July, 1888, to or on the order of the Dispatch Publishing Company, then publishing a newspaper in the city of Montgomery. The complaint alleged that said publishing company was at the time a partnership, and defendant was one of the partners: that the company claimed to be a corporation under the laws of Alabama, but was never, in fact, incorporated; that it was insolvent when plaintiff's account matured, and has ceased to do business.

The defendant filed a special plea, alleging that on the 2d day of October, 1885, he and two other persons named, filed in the office of the judge of probate of Montgomery county a declaration in writing

[1] Arguments omitted.

for the formation of a corporation under the name of the Dispatch Publishing Company, stating the substance of the declaration, "all of which will more fully appear by reference to the same, a copy of which, with the indorsements thereon, is hereto attached as an exhibit, and made a part of this plea; that this defendant and his associates, immediately after the filing of said declaration as aforesaid, proceeded to organize said Dispatch Publishing Company, by electing a board of directors consisting of three members, as by law provided, and, on the organization of said company as aforesaid, commenced doing business under the name and style of the Dispatch Publishing Company, by the publication of a newspaper in said city of Montgomery; that the debt now sued for was contracted by said company as such corporation, and not otherwise; that plaintiffs knew that said company was doing business as a corporation, and made said contract with it as a corporation, and not as a partnership or association of individuals, and dealt with it as a corporation, and sold said bill of goods to it as a corporation, and not in any other capacity whatsoever."

The court overruled a demurrer to this plea, and its judgment is assigned as error.

CLOPTON, J. A corporation *de facto* exists, when from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and a *user* of the rights claimed to be conferred by the law—when there is an organization with color of law and the exercise of corporate franchises. Meth. E. Un. Church v. Pickett, 48 N. J. L. 599.

The enabling law, under which a corporation for the purposes and objects of the Dispatch Publishing Company, and with the powers assumed, might have been lawfully created at that time, is contained in sections 1803–1812 of the Code of 1876, and the amendatory acts, which authorize and provide for the incorporation of two or more persons desirous of forming a private corporation for the purpose of carrying on any industrial or other lawful business not otherwise specially provided for by law. Acts 1882–3, p. 40. The plea avers that defendant and two other named persons filed, September 2, 1885, with the judge of probate of Montgomery county a written declaration, signed by themselves, setting forth substantially the matters required by the statute, except the residences of the persons; that they organized by the election of three directors, and commenced and continued to do business in a corporate capacity, and were so doing business when the debt sued for was contracted. If the averments of the plea be true, the truth of which is admitted by the demurrer, the Dispatch Publishing Company was an association having capital stock divided into shares, organized by the election of officers, transacting business and exercising franchises, functions and powers, after an at-

tempted incorporation—as if it were a corporation *de jure*—a colorable compliance with the requirements of an existing and enabling law, and *user* of the rights claimed to be conferred thereby—the essential elements of a corporation *de facto*. Cen. Agr. & Mech. Assn. v. Alabama Gold Life Ins. Co., 70 Ala. 120.

Appellant seeks by the action to hold defendant, who was a member, liable as a partner for paper and other supplies sold to the Dispatch Publishing Company. Whether the shareholders in a corporation *de facto* are individually liable for the corporate debts, in the absence of fraud or a statute, is a question as to which the authorities are in direct antagonism. In Cook on Stock and Stockholders, § 233, the doctrine asserted is: "A corporate creditor, seeking to enforce the payment of his debt, may ignore the existence of the corporation, and may proceed against the supposed stockholders as partners by proving that the prescribed method of becoming incorporated was not complied with by the company in question." The leading cases supporting this doctrine are Bigelow v. Gregory, 73 Ill. 197; Abbott v. Omaha Smelt. Co., 4 Neb. 416; Garrett v. Richardson, 35 Ark. 144; Ferris v. Thaw, 72 Mo. 446; Richardson v. Mayo, 40 Ohio St. 9; Coleman v. Coleman, 78 Ind. 344. We have omitted reference to a few cases sometimes cited, for the reason, either the question on liability as partners was not before the court, as in Blanchard v. Kaull, 44 Cal. 440, or the debt was contracted before any steps were taken, other than the mere filing of a certificate, toward organization, as in Porpoise Fish Co. v. Bergen, 13 Amer. & Eng. Cor. Cas. 1, or it was contracted after the expiration of the charter by its own limitation, without reorganization, as in Nat. Bank v. Landon, 45 N. Y. 410. In the case last cited the shareholders entered into a special agreement which by its terms created a partnership as to third persons.

In 2 Morawetz on Corporations, § 748, the doctrine is stated as follows: "If an association assumes to enter into a contract in a corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members can not be charged as parties to the contract, either severally or jointly, or as partners." The following cases maintain the doctrine that the members of a corporation *de facto* can not be held liable as partners for the corporate debts: Fay v. Noble, 7 Cush. 188; First Nat. Bank v. Avery, 117 Mass. 476; Stout v. Zulick, 48 N. J. L. 599; Plan. Bank v. Padgett, 69 Ga. 164; Mer. & Man. Bank v. Stone, 38 Mich. 779; Humphrey v. Mooney, 5 Cal. 282; Cen. City Sav. Bank v. Walker, 66 N. Y. 424; Gartside Coal Co. v. Maxwell, 22 Fed. Rep. 197; Whiting v. Wyman, 101 U. S. 392.

The plea and demurrer do not raise the question of the liability of the supposed stockholders as partners, where there has been no intention or attempt to incorporate; where they are acting as a body corporate, without even color of legislative authority—sheer usurpation. The plea avers that the debt sued for was contracted by the Dispatch Publishing Company, which is alleged to have been a *de facto* corporation, and that plaintiff sold the goods to and contracted with the com-

pany as a corporation, knowing that it was doing business as such. The question before us, and the only question we propose to decide, is, whether, there being no fraud alleged nor statute making the stockholders individually liable, a creditor who has dealt with a *de facto* corporation as a corporation, who has entered into contractual relations with it in its corporate name and capacity, can disregard the existence of the corporation, and, electing to treat it as a partnership, enforce the collection of his debt from the stockholders individually? The conflicting authorities afford aid in the solution of this question only so far as their opinions may be in accord with settled principles and sustained by reason. Though it is an undecided question in this state, principles have been well settled which materially bear upon the inquiry, and mark the way to a correct conclusion.

Corporations may exist either *de jure* or *de facto*. If of the latter class, they are under the protection of the same law and governed by the same legal principles as those of the former, so long as the state acquiesces in their existence and exercise of corporate functions. A private citizen, whose rights are not invaded, who has no cause of complaint, has no right to inquire collaterally into the legality of its existence. This can only be done in a direct proceeding on the part of the state, from whom is derived the right to exist as a corporation, and whose authority is usurped. This principle was clearly and emphatically declared in Lehman v. Warner, 61 Ala. 455, in the following language: "The corporation must of necessity be presumed to be rightfully in possession of the franchise, and rightfully to exercise the power which the legislative grant confers. Individual right is not invaded, if the negative is true in fact, and there is usurpation. It is the state—the sovereign—whose rights are invaded and whose rights are usurped. The individual could not create the corporation, could not grant, define, limit its powers, and no grant of these by the sovereign can lessen his rights. There can consequently be no cause of complaint by the citizen, and no right to inquire whether the corporate existence is rightful—*de jure* or merely colorable." Taylor on Corp., § 145; 4 Am. & Eng. Enc. of Law 198. The creditor can not proceed against the stockholders as partners without proving non-compliance with prescribed conditions precedent, thus inquiring collaterally, not into the fact, but the legality of its existence.

It is also an established rule of general application that a party who contracts with a corporation exercising corporate powers and performing corporate functions—existing as a *de facto* corporation—in its corporate name and capacity, will not be permitted, in a suit on the contract, to deny and disprove the rightfulness of its existence. 4 Am. & Eng. Ency. of Law 198. In Swartwout v. Michigan Air Line R. Co., 24 Mich. 390, Cooley, J., declares the rule as follows: "Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence, when it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be, and the questions are only whether there has been exact regularity and strict

compliance with the provisions of the law relating to corporation, it is plainly a dictate alike of justice and public policy, that in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, that such questions should not be suffered to be raised."

The general rule is thus stated in Brickell, C. J.: "Whoever contracts with a corporation in the use of corporate powers and franchises, and within the scope of such powers, is estopped from denying the existence of the corporation, or inquiring into the regularity of the corporate organization, when an enforcement of the contract, or of rights arising under it, is sought." Cahall v. Citizens' M. B. Assn., 61 Ala. 232; Central Agr. & Mech. Assn. v. Alabama Gold Life Ins. Co., 70 Ala. 120; Schloss v. Montg. Trade Co., 87 Ala. 411.

It is conceded that the rule has been invoked and applied most frequently in suits against the stockholders or corporation, or persons who have contracted with it, where the stockholder, corporation or person is seeking to avoid a liability by denying the legality of the corporate organization. But why should it not be applicable in other cases? *Why should a stockholder be estopped in a suit by a creditor of an insolvent corporation to require payment of his unpaid subscription, and the creditor allowed to ignore the existence of the corporation, and proceed against the stockholder as a partner? Why should not the estoppel be mutual? Taylor, in his work on Corporations, section 148, having stated the general rule, that a corporation when sued on its contract, and the person who contracted with it, when sued on his contract, is each estopped to deny its legal incorporation, adds: "Furthermore, persons who have contracted with a corporation as such, and have acquired claims against it, are estopped from denying its corporate existence for the purpose of holding its shareholders liable as partners."* And the same rule was applied in several of the cases cited above, in which a corporate creditor was seeking to hold the stockholder liable as a partner for a corporate debt. The abrogation of the foregoing well-established rule is the logical sequence of maintaining a suit by a creditor of a *de facto* corporation, charging the stockholders as partners.

Another consideration. Section 8 of article xiv of the constitution declares: "In no case shall any stockholder be individually liable, otherwise than for the unpaid stock owned by him or her." Exemption from liability, other than for unpaid stock, is the declared policy of the state. It can not be imposed by legislation, or by the judgment of court. In view of the constitutional provision, it is manifest that the shareholders of the Dispatch Publishing Company intended, by the attempt to incorporate, to avoid individual liability for the debts contracted by the corporation. When a party deals and contracts with a corporation as corporators, exemption from individual liability enters as an element of the contract. It is true that the liability of persons associated in an enterprise or adventure is not determinable by the name they assume, but by the legal consequences of their acts. A partnership may arise as to third persons, by mere operation of

law, and contrary to the intention of the parties; but, to have this effect, the elements essential to constitute a partnership as to third persons must exist. A corporation *de facto* has an independent *status*, recognized by the law as distinct from that of its members. A partnership is not the necessary legal consequence of an abortive attempt at incorporation. As said in Fay v. Noble, *supra*: "Surely, it can not be, in the absence of all fraudulent intent, that such a legal result follows as to fasten on parties involuntarily, for such a cause, the enlarged liability of co-partners, a liability neither contemplated nor assented to by them. The statement of the proposition carries with it a sufficient refutation."

Maintenance of such suit involves judicial nullification of franchises and powers enjoyed and exercised by a de facto corporation, as a distinct entity recognized by the law, acquiesced in by the state; defeats the corporate character of the contract; changes the relation from that of stockholders to that of partners; substitutes other and new parties to the contract, and effects the imposition of an enlarged liability, which they did not assume, but intended to avoid; so understood by the creditor when he contracted the debt with the corporation as such. The contract is valid and binding on the corporation, which the creditor trusted. No injustice is done him, for all his rights and remedies are preserved by the principle that the corporation and the shareholder are estopped from denying its legal existence as against him. It will not answer to say that he is not repudiating, but enforcing the contract. He repudiates the party—the corporation—with which he made the contract, and seeks its enforcement against parties who never entered into contractual relations with him.

The doctrine that a creditor who has dealt with a *de facto* corporation in its corporate capacity can not charge the stockholders as partners with the corporate debt, there being no fraudulent intent alleged and proved, seems to us to be sustained by the weight of authority, maintained by stronger reasoning, consistent with well settled principles, and in harmony with the policy of the state.

Affirmed.

Note. See, 1882, Planters' and Miners' Bank v. Padgett, 69 Ga. 159; 1886, Stout v. Zulick, 48 N. J. L. 599, 7 Atl. Rep. 362; 1889, Larned v. Beal, 65 N. H. 184, 23 Atl. Rep. 149; 1892, Thornton v. Balcom, 85 Iowa 198, 52 N. W. Rep. 190; 1896, Hogue v. Capital Nat'l Bank, 47 Neb. 929, 66 N. W. Rep. 1036; 1896, American Mirror and Glass Bev. Co. v. Bulkley, 107 Mich. 447, 65 N. W. Rep. 291. See, also, cases, *infra*, p. 667. But see *contra*, 1886, Glenn v. Bergmann, 20 Mo. App. 343; 1891, Stivers v. Carmichael, 83 Iowa 759, 49 N. W. Rep. 983; 1892, Bradley Fertilizer v. South. Pub. Co., 17 N. Y. Supp. 587; 1895, Williams v. Hewitt, 47 La. Ann. 1076, 17 So. Rep. 496; 1901, Owensboro Wagon Co. v. Bliss, — Ala. —, 31 So. 81; 1901, Clausen v. Head, 110 Wis. 405, 84 Am. St. Rep. 933, 85 N. W. 1028. See, also, cases below, pp. 664, 676; 1901, Owensboro Wagon Co. v. Bliss, 132 Ala. 253, 90 Am. St. R. 907, 31 So. 81.

Sec. 176.

(*c*) But dealers with a pretended corporation, without knowledge that it, at the time, claims to be such, are not estopped to deny it is a corporation.

GUCKERT v. HACKE ET AL., APPELLANTS.[1]

1893. IN THE SUPREME COURT OF PENNSYLVANIA. 159 Pa. St. Rep. 303–307.

Assumpsit against incorporators for the debt of a corporation.

At the trial before PORTER, J., it appeared that plaintiff entered into a contract to make some alterations and repairs in a building occupied by the Hughes & Gawthrop Co. In October, 1890, a certificate of incorporation in proper form was presented by the Hughes & Gawthrop Co. to the governor asking for a charter. The certificate was approved and letters-patent were duly issued. All the details required by the act of April 29, 1874, P. L. 77, were complied with, excepting only the recording of the certificate in the recorder's office of Allegheny county. The certificate was not recorded until June, 1891. In the meantime, plaintiff, without knowledge of the incorporation, made the contract with Gawthrop, upon which he sued. Subsequently, he accepted a note for the debt, signed with the corporate name.

Defendant's points were as follows:

"1. The provisions of section 3 of the act of April 29, 1874, which provides that 'original certificates with all indorsements thereon shall then be recorded in the office of the recorder of deeds in and for the county where the chief operations are to be carried on,' are merely directory, and a failure to so record does not render the charter void or render the subscribers thereto individually liable for debts contracted by the corporation. *Answer*. The failure to record as stated will not of itself render the stockholders individually liable."

"2. That from the moment the letters-patent were issued by the governor of the commonwealth of Pennsylvania to the Hughes & Gawthrop Co., the subscribers to the articles of association became a corporation for every practical purpose, and any one dealing with them as a corporation is estopped from impeaching the charter in a collateral proceeding by showing that a condition precedent to the existence of the corporation has not been complied with." Affirmed.

"3. If the jury find from the evidence that letters-patent were issued to the defendants by the governor of this commonwealth to act as a corporation under the name of the Hughes & Gawthrop Co., and they were actually engaged in carrying on business under such letters-patent or charter, and that the contract sued on was made by E.

[1] Arguments omitted.

B. Gawthrop, general manager of the Hughes-Gawthrop Co., and that the plaintiff received the promissory note of Hughes-Gawthrop Co., as a corporation, in payment of the amount due on said contract, he can not now recover from Paul H. Hacke and J. B. George, two of the defendants, as individuals." Affirmed.

Verdict and judgment against defendant, E. B. Gawthrop, and in favor of Paul H. Hacke *et al.*, the other defendants. Plaintiff appealed.

Opinion by MR. CHIEF JUSTICE STERRETT, December, 30, 1893:

It is essential to the creation of a corporation under an enabling statute that all material provisions should be substantially followed; and, exemption from personal liability being one of the chief characteristics distinguishing corporations from partnerships and unincorporated joint stock companies, it follows that those who transact business upon the strength of an organization which is materially defective are individually liable, as partners, to those with whom they have dealt. What provisions are material must be gathered from the relation of each to the purpose and scope of the act; and when, therefore, successive steps are prescribed for the creation of corporations, these must obviously be regarded as imperative. Enabling statutes, on the principle of *expressio unius est exclusio alterius*, impliedly prohibit any other mode of doing the act which they authorize; they must be strictly construed. Sutherland on Stat. Construction, section 454. Hence it has been uniformly held that requirements in respect of filing charters are imperative. Childs v. Smith, 55 Barb. 45; Smith v. Warden, 86 Mo. 382; Abbott v. Smelting Co., 4 Neb. 416; Beach on Corporations, section 162.

It is plain, even from a cursory reading of the act of April 29, 1874, P. L. 77, that recording of the certificate "in the office for the recording of deeds, and in and for the county where the chief operations are to be carried on," was intended to be made one of the conditions precedent to corporate existence. That was the last of successive steps required to be taken, and the right to begin the transaction of corporate business was made to depend upon the taking of that step. "From thenceforth," the act expressly declares, the subscribers and their associates and successors "shall be a corporation for the purposes and upon the terms named in the said charter." One of the purposes of the act being exemption from personal liability in the transaction of business, it is obviously material that the public should have notice, and notice by record was accordingly prescribed. Failure to record was failure to comply with one of the express conditions of incorporation, and consequently of exemption from liability.

It may be conceded that had plaintiff dealt with defendants as a corporation he would have been estopped from claiming against them in any other capacity, even though they failed to record their charter. Spahr v. Bank, 94 Pa. 429. But it is not pretended that he had any knowledge of the existence of the charter; and there was certainly nothing, either in the name under which they did business or in their conduct, which should have put him upon inquiry. In

these circumstances he was amply justified in dealing with them as partners. It was through their default—not his—that they were so treated; and it would be manifest injustice that he should lose his admittedly honest claim.

In the absence of an express agreement the acceptance of a note from the defendants as a corporation, after plaintiff had performed his part of the contract, can not operate by way of election or estoppel. The relation of the parties was fixed by their *status* when the original contract was made and can not be changed by gratuitous inference. The members of the alleged corporation were the defendants, and were not injured by the acceptance of the note. The principle which treats the acceptance of a note as additional security to and not as satisfaction of a mechanic's lien (Jones v. Shawhan, 4 W. & S. 257) is, with even more justice, applicable here.

It follows from what has been said that the instructions complained of are erroneous.

Judgment reversed and a *venire facias de novo* awarded.

Note. To same effect, 1889, Eaton v. Walker, 76 Mich. 579, 6 L. R. A. 102; 1896, N. Y. Nat'l Ex. Bank v. Crowell et al., 177 Pa. St. 313; 1899, Christian & C. G. Co. v. Fruitdale L. Co., 121 Ala. 340, 25 So. Rep. 566.

Sec. 177. (5) Non-dealers who injure the corporation are estopped to deny corporate existence.

(*a*) In case of torts against the corporation.

THE CINCINNATI, LAFAYETTE AND CHICAGO RAILROAD CO. v. THE DANVILLE AND VINCENNES RAILWAY CO.

1874. In the Supreme Court of Illinois. 75 Illinois Reports 113–118.

Appeal from the circuit court of Iroquois county, the Hon. Charles H. Wood, J., presiding.

This was a bill for an injunction, filed by the appellant against the appellee to restrain the latter taking possession of the railroad and right of way of the complainant under certain fraudulent proceedings for the condemnation of the same.

Mr. Justice McAllister delivered the opinion of the court:

In the year 1871, certain persons, purporting to be twenty-five in number, proceeded to organize themselves, under the general railroad law of 1849, into the appellant corporation, for the purpose of supplying a portion in this state of what was necessary to constitute a complete line of railway between the cities of Cincinnati, O., and Chicago, in this state. The amount of stock was fixed, was subscribed and paid; directors were elected, articles of association pre-

pared, subscribed, certified and filed with the secretary of state, and the usual certificate given by that officer.

The portion of the line to be constructed was from a point on the line between this state and Indiana, about three miles southeast of Sheldon, in Iroquois county, thence running northeasterly through that county and a portion of Kankakee county to the village of St. Anne.

Appellant did not assume to exercise the right of eminent domain, but obtained the right of way, so far as it was obtained, by purchase or contract. It located the road between the points stated, and, by about the middle of December, 1871, had it constructed, so that about the 1st of May, 1872, the through line, including the portion in question, was opened for public use as a railroad, and appellant has not only been in the exercise of its franchises as a railroad corporation, but the same has been open, public and notorious. In November, 1872, this company reorganized under the general railroad act of this state, which went into force March 1, 1872.

It appears, also, that about the 13th of November, 1872, the appellee was organized under the last mentioned act as a railroad corporation, to construct a road, in part at least, upon a route similar to that of appellant. On the 22d of November, 1872, appellee, having caused a survey of this line and a plat to be made, presented a petition to the county court of Iroquois county for the purpose, ostensibly, of condemning land through that county for its right of way. Numerous tracts and parcels are described and the names of owners or pretended owners given. Appellant is not named or described in the petition. Nor was any notice to appellant given or contemplated. Such proceedings were had upon this petition that a jury was summoned to ascertain the compensation. About this time appellant discovered that although it was in the actual possession and use of the right of way before mentioned as a common carrier, and this fact must have been known to the agents and attorneys of appellee, yet the land that appellee was about to have condemned was, in fact, the very right of way of which appellant was in actual and open possession for public purposes, and to this circumstance there was not the remotest allusion in appellee's petition. It appearing that there was no necessity or even plausible excuse for thus interfering with appellant's right of way, then, in view of the circumstances of appellant's open and notorious possession of it, and the studious exclusion of all these facts from appellee's petition, and the failure to make appellant a party, with notice, the inference is irresistible that this proceeding in the county court was designed for the fraudulent purpose of surreptitiously gaining possession of appellant's right of way. The actors in the formation of the scheme, as would seem from their positions in argument on this appeal, reasoned in this wise: "Now, there are defects in the organization of the Cincinnati, Lafayette and Chicago Railroad Company; they have made a slip in some particulars, and if we can so manage as to get a condemnation proceeding through the court without notice to that company, and thereby get into possession,

we can then assail their organization, convince the court that they can have no standing in court on account of those defects, and thus keep that possession, no matter how acquired." That is the very argument they urge here to sustain the decree of the court below dismissing appellant's bill to restrain them from thus obtaining possession, on the ground of fraud and want of jurisdiction in the proceedings to condemn. It is apparent from the fact of those proceedings, when considered with the surrounding circumstances, that the former, though ostensibly for the ordinary purpose of condemning land not appropriated to the railroad uses, for appellee's rights of way, were, in reality, but in the execution of a scheme devised for the fraudulent and inequitable purpose of getting possession of appellant's right of way without making compensation, and then to seize upon alleged defects in appellant's organization as a means of retaining it against justice and right. The morality of the act is supported by the same reasoning which would be resorted to in justification of a contemplated theft from one *non compos mentis*, "He is incapable of appearing in court to vindicate his rights."

An elaborate printed argument has been presented by appellee's counsel to show that appellant was not rightfully organized, and that therefore it could acquire no right of way, and especially that it can have no standing in court in its claim for protection against this contemplated invasion of its possession. He says the act of 1849 was repealed by the constitution of 1870.

There is, in our opinion, no basis for the position that the sections of the act of 1849, so far as they provide for the formation of such corporations, are abrogated by the constitution. They are not inconsistent with any of its provisions. Then, there being such a law authorizing the formation of railroad corporations, and articles of association having been prepared and filed with the secretary of state, and he having given the certificate provided for, and there having been a user of the franchises purporting to be invested in the association, the latter became a *de facto* corporation, and under the settled law of this court neither the eligibility of the directors nor the rightfulness of the existence of the corporation could be inquired into collaterally in this suit. Tarbell v. Page, 24 Ill. 46; Mitchel *et al.* v. Deeds, 49 Ill. 416; Thompson v. Candor, 60 Ill. 244.

In Mitchell v. Deeds, before cited, the court, page 422, said: "The law is well settled in this state, that, under the plea of *nul tiel corporation*, the plaintiff need only show an organization in fact and a user of corporate franchises."

So, by parity of reasoning, such organization in fact, and user, are all that is necessary to maintain a bill in equity against a mere stranger seeking to interfere with the property of such *de facto corporation*. Here it was indisputably shown that there was such an organization in fact, followed by user of corporate franchises. That was sufficient. So, also, it was shown that the directors were elected under color of authority and were acting as such. They were, therefore, *de facto* officers of the corporation. Their title to the office could not be

brought in question and decided collaterally in this suit. Lawson *et al.* v. Kolbenson *et al.*, 61 Ill. 418, and authorities there cited.

Appellee had authority to exercise the right of eminent domain, but, by the statute prescribing the mode of its exercise, it could not have appellant's right of way condemned for even a qualified or conjoint use without describing it in the petition as such right of way, and alleging inability to agree as to compensation. This proceeding, which might, perhaps, have been lawful and proper but for circumstances which were studiously concealed, was for an inequitable purpose. It was designed and carried forward for the purpose of getting possession of the right of way, of which appellant was in quiet possession as owner, without making appellant a party or paying to it any compensation. No other object was intended by, and no other result could follow, the carrying the proceeding through to a finality. It was, in this view, a proper case for an injunction. In Goodenough v. Sheppard, 28 Ill. 81, it was held that a person in the quiet possession of real estate as owner may obtain an injunction to restrain others from dispossessing him by means of process growing out of litigation to which he was not a party. *It does not lie with appellee to say, in justification of this inequitable proceeding, that the appellant was not so far rightfully organized or authorized to construct the railroad in question as to be capable of holding lands for the purposes of a right of way. This is a question solely between appellant and the persons from whom title was obtained, or between appellant and the people of the state, when proper proceedings shall arise to require its decision.*

It is obvious, from the record, that the court below made inquisition into the rightfulness of appellant's corporate existence, and dismissed the bill for defects in its organization. This was error. The decree will be reversed, and cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

Note. See, also, 1843, Quincy Canal v. Newcomb, 7 Metc. (Mass.) 276; 1846, Elizabeth City Academy v. Lindsey, 28 N. C. (6 Ired.) 476, 45 Am. Dec. 500; 1873, Stockton & L. G. R. Co. v. Stockton & R. Co., 45 Cal. 680; 1878, Alderman v. School Directors, etc., 91 Ill. 179; 1889, Golden Gate M. & M. Co. v. Joshua H. M. W., 82 Cal. 184; 1893, Crenshaw v. Ullman, 113 Mo. 633, 20 S. W. Rep. 1077. But see, 1885, Doboy & U. I. Tel. Co. v. D. E. Magathias, 25 Fed Rep. (U. S. C. C.) 697.

Sec. 178.

(*b*) Or crimes affecting the corporation.

SASSER v. THE STATE OF OHIO.[1]

1844. IN THE SUPREME COURT OF OHIO. 13 Ohio Rep. 453-489.

[These are writs of error to the court of common pleas of the county of Hamilton.

In the first of these cases the plaintiff was indicted for "having in his possession, and secretly keeping, a bank-note plate, for the purpose of striking and printing false and counterfeited bank-notes, to wit, false and counterfeited bank notes in the likeness and similitude of true and genuine bank notes of the Bank of Tennessee, of the denomination of $20," etc. The second count was the same, with the addition that the possession was for the purpose of printing counterfeited bank notes. At the October term, 1844, he was found guilty on the second count, and not guilty on the first, and sentenced, upon the second count, to imprisonment in the penitentiary for five years. A bill of exceptions was taken during the trial, from which it appears that the prosecuting attorney proved, by parol, that there was such a bank as the one named in the indictment, and that its bills, of the denomination specified, were current in Ohio. The plaintiff objected to this proof, and insisted that the act incorporating the Bank of Tennessee was the only evidence that could be introduced; which objection was overruled.]

BIRCHARD, J. * * * Did the court err in admitting the testimony objected to? This presents a question not free from difficulty, and yet the decision below is believed to be consistent with the uniform and oft-repeated adjudications upon similar questions since the first organization of the state. The general rule is, that the best evidence must be given which the nature of the case admits of. The rule does not require that the strongest possible assurance of the point in question shall be given, but that no evidence shall be received of a character which presupposes that better and higher evidence is in the possession or power of the party offering it. Were these banks suitors in court, claiming the exercise of corporate rights, the offer by them of parol proof to maintain the right, unless it were a right acquired by prescription, would be within the rule, for it would carry a presumption against them, that, if produced, their charters would show that the franchise in question was not conferred. Hence the rule in Lewis v. Bank of Kentucky, 12 Ohio Rep. 151: "The corporators have full knowledge of their powers and capacity, and the means of establishing them." When they exercise powers under the authority of a written charter, the non-production of that charter and the attempt to supply

[1] Statement of facts abridged. Arguments omitted, and part of opinion omitted.

it by parol evidence is an indirect admission that the charter is sufficient, and that, if they can not make out by parol a better one than exists on paper, they must fail. An analogous point was ruled by Lord Mansfield, in Roe v. Harvey, 7 Burr. 2484. No such implication necessarily arises when parol proof of the actual existence of a bank in a sister state is offered by a third party, and especially when offered by the public prosecutor against a person charged with counterfeiting the bills or plates of such bank, because the act of counterfeiting implies, on his part, an admission that there is such a bank, and that its genuine issues and plates are authorized and of value. It is irrational to presume that men will take the trouble to counterfeit paper which is wholly worthless. All men are presumed to act according to their interest. No one could have any interests in forging valueless notes. Rules of law are never founded upon unnatural premises. On the contrary, it is, in general, safe to abolish a rule, when the sound reason upon which it was established has ceased to exist.

Admitting the proposition, that if the bank notes in question were issued by an unauthorized bank they would be nullities, and that, in that case, the plates might be secretly kept without incurring the penalty of the law, it does not follow that the evidence offered below was incompetent. The rules of presumptive evidence apply to corporations as well as individuals, and a charter may be presumed from the long exercise of corporate rights. U. S. Bank v. Dandridge, 12 Wheat. 70. The proof offered in this case showed that paper of the description alleged to be counterfeited was current in Ohio, and reputed to be the paper of legally established institutions of Virginia and Tennessee. Proof that their paper had obtained general circulation and acquired universal confidence in a state like this, at a time when public attention is turned towards all corporations, both foreign and domestic, with eager and jealous scrutiny, certainly raised a violent presumption that the banks had a legitimate existence, and lawfully possessed the powers which they had exercised. Coupled with the other legal presumption, that no one will counterfeit the valueless paper of an unauthorized bank, and we think the proof, unrebutted, sufficient for the prosecution. This made out a *prima facie* case, and was ample to cast upon the accused the burden of proving that the laws of Virginia and Tennessee restricted banking generally, or by these institutions in particular. The People v. Davis, 21 Wend. 309, is a case in point. Davis was indicted for having in his possession a counterfeit note of the Morris Canal and Banking Company, and the question was whether the prosecution were bound to prove the existence of the company by the production of the charter, and it was held they were not—that they might prove it in the ordinary way, and "that secondary evidence, such as the acts and operations of the company, and the like, had been invariably received at the oyer and terminer." Is there any real danger in continuing this rule of evidence? It may be presumed that, if it were palpably mischievous, or, even by possibility, occasionally dangerous in practice, it would

not have stood without question for forty years in Ohio, and in many of our sister states for a still longer period. But this case even does not show that injustice has been caused by its application. We know, as a matter of fact, that each of the two institutions is legally constituted, and recognized as such, by the courts of Virginia and Tennessee. No actual wrong was committed by the decision complained of, because the proof offered established nothing that was untrue. It is attacked, not for the individual wrong it has wrought in this case, but for the public good, lest, peradventure, it may work harm hereafter to somebody if allowed to stand as a precedent.

In argument, it is admitted that parol proof has hitherto "always been held sufficient in similar cases; but, it is said, this is because counsel have not objected that it was secondary evidence, and that omissions of counsel should not be allowed to establish a rule of practice, in opposition to the paramount principles of law." If the argument be sound that this kind of evidence, when offered by a third party, does not raise the inference that higher evidence, in the possession of the party, is withheld, and if the act of forgery implies a confession, by the forger, that the instrument which it purports to imitate is valid, it can not well be said to be secondary evidence, because it does not fall within the reason that distinguishes the two classes of proof. Is it always within the power of the prosecutor to prove the charters of banks incorporated by our sister states? That they may be procured by taking sufficient pains and ample time is not doubted. Certified copies of any legislative act may be had on application to the executives of the states of Virginia and Tennessee. But under our constitution, an accused person is entitled to "a speedy public trial." He can not lawfully be detained, and committed for trial, without evidence. Nor is that evidence, on a question of commitment, which is no evidence on a final trial. What, then, would be the effect of a rule that would, indispensably, require the production of the act incorporating a foreign and distant bank in like cases? It would afford immunity to crime in innumerable cases. It would be as fatal to the success of many necessary prosecutions for counterfeiting as a rule that would permit the forged signature of the officer of a bank to be disproved by him alone—a rule which has long since ceased to be recognized by the most enlightened tribunals of this country, and, at this day, is not law in England. Hess v. The State, 5 Ohio Rep. 7; Commonwealth v. Cary, 2 Pick. 47.

Some courts still consider the testimony of experts touching the genuineness of the handwriting as secondary and inferior evidence to the testimony of the supposed writer; others avoid the general rule by assuming that the testimony of each is primary evidence, while all alike admit the evidence and avoid the application of the rule which would exclude it. So, in cases of many public officers, proof of official character is permitted by parol when third parties make the issue, and even when the officer is a party. Thus one may show himself to be a constable by proving his own acts in that capacity, and by general reputation; Johnson v. Stedman, 3 Ohio Rep. 94. That he

is a collector of taxes; Eldred v. Sexton, 5 Ohio Rep. 215. The reason of the decision in these cases is applicable here. "It is more consistent with the ends of justice than to establish a contrary rule." It is not conclusive evidence, but is so *prima facie*, and, unless contradicted, must be conclusive. The character of a bank, indeed, whose paper is in general circulation, performing the offices of money in a business community like ours, becomes as well known as the official character of a constable or tax-gatherer who resides amongst us. The people in general are as well informed upon the subject as upon many matters of public history. There is no county in the state where men of integrity can not be found competent to state whether paper, the money in general circulation among the people, is the paper of a real or unauthorized institution. The continuance of the rule that has obtained is, therefore, perfectly consistent with the security of individual right; and, while it subserves public convenience, the mere fact it is at war with a technical rule, if it be so at war, furnishes no good reason for changing the practice. * * *

Judgment affirmed.

Note. See, also, 1886, Stultz v. Turnpike Co., 48 N. J. L. 596; 1893, Canal Street G. R. Co. v. Paas, 95 Mich. 372. But compare, 1888, Plank-road Co. v. Hilton, 69 Mich. 115; 1899, James v. State, 77 Miss. 370, 78 Am. St. Rep. 527.

As to injuries to non-dealers generally by the apparent corporation, it would seem that if they have done nothing to recognize the corporate existence there could be no estoppel; yet if the corporation shows it is a *de facto* one, the logic of the cases would seem to be that a non-dealer who is not estopped could not hold members individually liable, or successfully impeach the corporate existence, even if he is injured by such *de facto* corporation; however, if the apparent corporation can not show that it has acquired a *de facto* existence by being organized under a valid law, in good faith, followed by *corporate* acts, a non-dealer could ignore the apparent corporate existence.

NOTE TO ART VI. EXTENT OF THE DOCTRINE OF ESTOPPEL.

It is usual to say that in order to obtain a *de facto* corporate existence there must be a *valid law* under which to organize, an *apparent compliance* with the law, a *bona fide attempt to organize* under the law, and a *user* of corporate franchises. See Elliott on Corporations, § 72; Clark on Corporations, §§ 41, 42, and Finnegan v. Noerenberg, *supra*, p. 614, and Society Perun v. Cleveland, *supra*, p. 617. If, therefore, any of these elements are wanting there can be no *de facto* corporation, and the only ground for holding a pretended corporation, where one or more of these elements is wanting, to be such must be upon grounds of estoppel, or something analogous thereto. It seems, however, that there is no perfect basis for an estoppel except against the pretended corporation itself or its members, for it or they only have misled others to believe it to be a corporaton. No one who *contracts* with such a pretended corporation as a corporation, has misled it or its members as to its real nature, for they know as much about it as he. The most that can be said is that the party so contracting is willing to accept the *corporate* security for the performance of the contract, and should not afterward be allowed to insist upon a different security, such as the individual or partnership liability of the members. The fact is, he has not misled the corporation, but it has misled him—yet, perhaps, not to his damage, when he willingly accepted the corporate security. Hence it would not be equitable to claim a greater security, when, upon being offered a certain security, viz., the *corporate* security, he accepted it. This is hardly an estoppel, but rather a mere *term* of the

contract, upon which the minds of the parties met, although it was false in fact, and known to be so by the pretended corporation at the time.

As to the validity of the law under which the corporation claims to be organized, there are three conceivable conditions: (1) A law in fact prohibiting such a corporation. (2) No law at all. (3) An unconstitutional law. It would seem there could be no *de facto* corporation in either case, and it is generally so held. Can there be a corporation by estoppel? According to the decision in Boyce v. The Trustee, etc., *supra*, p. 642; Jones v. Aspen Hardware Co., *supra*, p. 637, and Snyder v. Studebaker, *supra*, p. 634, there could not be a corporation under any circumstances of estoppel, either in favor of or against the pretended corporation; but it would seem that estoppels might arise in all of these cases, as well as others; yet in the first two—a prohibitory law, and no law at all—public policy might override all grounds of estoppel and say, in such cases, no corporate existence should be recognized. See Wright v. Lee, 2 S. D. 596: Empire Mills v. Alston Grocery Co., 15 S. W. Rep. (Tex. App.) 200, 505; Building and Loan Assn. v. Chamberlain, 4 S. D. 271, 56 N. W. Rep. 897; Oregonian R. Co. v. Oregonian R. & N. Co., 23 Fed. Rep. 233; but compare, 1870, Smith v. Sheeley, 12 Wall. (U. S.) 358, and 1883, Saunders v. Farmer, 62 N. H. 572; 1898, Carroll v. National Bank, 19 Wash. 639, 54 Pac. Rep. 32.

But in the third case—the unconstitutional law—many cases hold there can be corporations by estoppel (many erroneously calling them *de facto* corporations). See, 1870, Smith v. Sheeley, 12 Wall. (U. S.) 358; 1876, St. Louis v. Shields, 62 Mo. 247; 1878, McCarthy v. Lavasche, 89 Ill. 270, *supra*, p. 253; 1878, Dows v. Naper, 91 Ill. 44; 1880, Freeland v. Insurance Co., 94 Pa. St. 504; 1881, McClinch v. Sturgis, 72 Maine 288; 1883, Saunders v. Farmer, 62 N. H. 572; 1884, Catholic Church v. Tobbein, 82 Mo. 418, on 424; 1887, Fresno, etc., Irrigation Company v. Warner, 72 Cal. 379, 17 A. & E. Corp. Cas. 37; 1889, Winget v. Quincy B. & H. Assn., 128 Ill. 67; 1892, Wright v. Lee, 2 S. D. 596, 37 Am. & E. C. C. 588; 1893, Building & L. Assn. v. Chamberlain, 4 S. D. 271, 44 Am. & E. C. C. 49; 1893, Black River Improvement Co. v. Holway, 85 Wis. 344; 1894, Georgia S. & F. R. Co. v. Mercantile T. & D. Co., 94 Ga. 306; 1895, Coxe v. State, 144 N. Y. 396; 1898, Gardner v. Minn. & S. L. R. Co., 73 Minn. 517, 76 N. W. Rep. 282; 1899, Richards v. Minn. Sav. Bank, 75 Minn. 196, 77 N. W. Rep. 822; but compare, 1889, Eaton v. Walker, 76 Mich. 579, *contra*.

As to the next two requisites of *de facto* existence—apparent compliance with the law, and *bona fide* attempt to organize—both being questions of fact, it would seem that estoppels should be allowed to arise as in other cases. But in both of these cases it should be remembered that the law will not allow its privileges to be used, even if literally followed, as an engine for accomplishing frauds (see Metcalf v. Arnold, *supra*, p. 97), or without any effort in good faith to comply with it (as, see Montgomery v. Forbes, *supra*, p. 594, and Walton v. Oliver, *supra*, p. 565).

As to *user*, it seems that meeting, subscribing stock and completing organization is sufficient *user* to make a *de facto* existence, if the other elements are present. See, 1893, Union Water Co. v. Kean, 52 N. J. Eq. 111, 44 Am. & E. C. C. 13. But *no organization*, though corporate powers are claimed, is not such *user* as makes a corporation *de facto* See Walton v. Oliver, *supra*, p. 565, and Montgomery v. Forbes, *supra*, p. 594. In Eaton v. Walker, 76 Mich. 579, it was held that organization under an unconstitutional law, and assuming to act as a corporation, was not such *user* as made a *de facto* existence, and, under the facts of that case, it was held that no estoppel arose. See Angell & Ames, §§ 83, 172, 635–6; Beach, §§ 13, 14, 866, 871; Boone, §§ 104, 118, 121, 239; Clark, §§ 43, 44; Cook, § 637; Elliott, §§ 81–88; Morawetz, §§ 750, 774, 778 *n*; Taylor, §§ 146–151, 537–9, 739; I Thompson, §§ 518–533; VII Thompson, § 8213. The matter is closely allied to the subject of pleading and proof, upon which the cases are in much conflict. See, *infra*, §§ 327–333.

See note 94 Am. St. R. 698.

ARTICLE VII. EFFECT OF FAILURE TO COMPLY WITH CONDITIONS, AND NO ESTOPPEL, UPON THE LIABILITY OF MEMBERS OF THE PRETENDED CORPORATION; THEORIES.

Sec. 179. (1) Makes the associates partners (if the pretended corporation was for a business purpose) and liable as such, or with the rights of such.

MARTIN ET AL., APPELLANTS, v. FEWELL.[1]

1883. IN THE SUPREME COURT OF MISSOURI. 79 Missouri Rep. 401–412.

HOUGH, C. J. This is an action of assumpsit by plaintiffs as partners against defendants as partners. There are three counts in the petition. The first is to recover judgment for goods alleged to have been sold by plaintiffs to defendants, March 30, 1877, amounting to $553.89; the second count is for goods sold August 14, 1877, amounting to $72.09, and the third is for goods sold October 9, 1877, amounting to $422.40. In addition to the usual averments as to the sale and delivery of goods, each count contains substantially the following allegations: That at the time of said sales the defendants were partners in the retail mercantile business in Calhoun, Henry county; that one M. Woods was the general agent of defendants, and was by them authorized to conduct, manage and superintend said business, to buy and sell goods and merchandise, and to do all things in and about said business as fully as if he were himself sole owner thereof, and to do all things usual and customary to be done by merchants carrying on that sort of business; that M. Woods, as such agent, and with the knowledge and approbation of these defendants, carried on said business under the name "M. Woods," and the defendants had no other partnership designation; that prior to December, 1876, plaintiffs had had dealings with said defendants, and had sold and delivered to them goods and merchandise, through Woods as defendant's agent; that plaintiffs had at no time business transactions with Woods in any other capacity than as agent for defendants.

The answer contains a general denial, and also alleges that the goods in the petition mentioned were sold and delivered by plaintiffs to the "Calhoun Grange Store Company," a duly organized corporation of Missouri, and not the defendants; that the certificate of incorporation was duly filed in the recorder's office of Henry county, on the — day of ——, 1876, and on May 18, 1877, a similar certificate was filed with the secretary of state, and on the same day the said secretary executed to said Calhoun Grange Store Company a certificate of incorporation as provided by law. The replication is a general denial of the new matter pleaded in the answer. * * *

[1] Only part of the opinion given.

At the request of the defendants, the court gave the following instructions:

1. If the jury believe from the evidence that prior to the sale of any goods by the plaintiffs to Woods for the grange store in question, the defendants had, for the purpose of organizing a business corporation for running and conducting what is commonly known as a grange store, agreed to subscribe and pay shares of stock to such organization, and did take such stock with such understanding and for such purpose, and took initiative measures for the incorporation of said business, and organized as if incorporated, and elected directors for the management and control of said association, and designated said Woods to conduct and superintend said store for such directors, and did make and acknowledge the articles of association read in evidence, and at the time of the first sale of any goods by plaintiffs to said Woods, said defendants, through directors, were acting under the said articles of association as a corporation, and not otherwise, and the said Woods had no authority from them to buy goods except as the agent of said association, then, although said articles of incorporation may not have been filed and recorded as by statute provided, the defendants are not liable as partners to the plaintiffs for any goods bought of them by said Woods.

2. Even though the articles of association read in evidence were not filed with the secretary of state, yet, if defendants were acting alone under such articles of association, claiming to be a corporation, such omission to file the same with the secretary of state did not, of itself, make the defendants liable as partners for any goods bought for the store after said articles were actually drawn up, signed and acknowledged. * * *

The court, of its own motion, gave the following instruction to the jury:

If you believe from the evidence that the defendants, or some of them, in the fall of 1875, or in the spring of 1876, made an agreement with each other to contribute money or capital for the purpose of carrying on the business of buying and selling merchandise for their mutual profit, and that they did so contribute and carry on said business, either personally or by their agent, then such of defendants as did these things became and were partners in such business, and each partner was individually liable for all the partnership debts, provided that it does not further appear from the evidence that they did not intend to act and carry on business as partners, but that they intended to do business as an incorporated company and each one to be liable only for the amonnt of his stock.

Upon the giving of these instructions the plaintiffs took a nonsuit, and on the refusal of the court to set the same aside, they appealed to this court. * * *

The only question remaining to be determined is whether, on the facts stated in the first and second instructions given at the instance of the defendants, and in the instructions given by the court of its own motion, the defendants are liable as co-partners. Neither the case of Hurt v. Salisbury, 55 Mo. 311, nor that of Richardson v. Pitts, 71

Mo. 128, relied upon by the counsel for the plaintiffs, furnishes a distinct answer to this inquiry. The first case was a suit upon a note executed by certain individuals as directors assuming to represent a corporation which had no legal existence, and this court held that the parties who signed the note were liable thereon. In the case last named certain members of an inchoate corporation, whose incorporation was incomplete by reason of a failure to file the articles of association with the secretary of state, advanced money for the benefit of the joint enterprise under obligations incurred by them upon the supposition that the association was duly incorporated, and they were adjudged to be entitled to contribution from their associate members beyond the amount of stock severally subscribed for by such associates. The effect of this decision is to create the relation and liability of partners as between the members of an unincorporated association, so far as the debts of the association contracted in good faith and paid by any of its members are concerned, and to establish a different rule from that laid down in Ward v. Brigham, 127 Mass. 24. The decision of this court is supported by the cases of Hill v. Beach, 12 N. J. Eq. 31; Hodgson v. Baldwin, 65 Ill. 532; Flagg v. Stowe, 85 Ill. 164. *Vide*, also, Ferris v. Thaw, 72 Mo. 446.

In Pettis v. Atkins, 60 Ill. 454; Bigelow v. Gregory, 73 Ill. 197; Abbott v. Smelting Co., 4 Neb. 416; Frost v. Walker, 60 Maine 468; Wells v. Cates, 18 Barb. 554; National Union Bank v. Landon, 45 N. Y. 410, and Tappan v. Bailey, 4 Met. 529, it is held that members of an unincorporated association, notwithstanding their subscription and payment for a specified number of shares of the capital stock of the association, are liable as co-partners for the debts of the association. These decisions we regard as applicable to the case at bar. By reference to the testimony it will be seen that in 1875, more than a year before the articles of association were signed by the defendants, the store was established and shares of stock were subscribed for and Woods was appointed to make the purchases and superintend the sales. All this was done, it is true, with the understanding that the promoters of the enterprise were to become a corporation, and the purpose of the promoters undoubtedly was to limit their liability to the amounts severally subscribed by them.

If by reason of an unexecuted intention to become a corporation the defendants could carry on the business of merchandising from 1875 until May, 1877, without incurring in the meantime the liability of partners, we do not see why they could not have continued so to act as a corporation for a much longer period, buying and selling through an agent, and enjoying all the privileges of a corporation without being liable to be sued as such. *No mere intention on the part of the members of an unincorporated association to be a corporation will suffice to restrict their individual liability to that imposed by the statute upon corporate shareholders. Not being a corporation, their liability can not be a corporate liability, but must be that of a joint-stock company, unless the provisions of the statute in relation to limited partnerships shall have been complied with, of which*

there is not even the slightest intimation in this case. There is no question but that the goods were purchased by Woods of the plaintiffs for the defendants, and went into the store of the defendants, and were sold by Woods for their benefit, and a ruling which would turn the plaintiffs out of court, and compel them to collect the whole amount of their claims from Woods, or the directors in charge, who could in turn go against the defendants for contribution under the decision of this court in Richardson v. Pitts, supra, would be not only manifestly unjust, but utterly indefensible. Under the logic of the case last cited, the defendants are liable as partners directly to the plaintiffs for the debts of the association incurred before they became incorporated.

For the debts incurred after they became a corporation, their liability will depend upon the fact of actual notice of their incorporation to the plaintiffs at the time such debts were incurred. When partners have dealt as such with a seller, and after becoming incorporated, continued to deal as before, having their bills made in the same way, without giving any notice of their altered condition, they will continue to be liable as partners, unless the seller have knowledge thereof derived from some other source. Whether the plaintiffs had such notice or knowledge is a question of fact for the jury.

For the reasons given, the judgment will be reversed, and the cause remanded. All the judges concur.

Note. See, 1857, Abbott v. Aspinwall, 26 Barb. (N. Y.) 202; 1858, Hill v. Beach, 12 N. J. Eq. 31; 1866, Medill v. Collier, 16 Ohio St. 599; 1874, Stowe v. Flagg, 72 Ill. 397; 1874, Whipple v. Parker, 29 Mich. 369; 1877, Flagg v. Stowe, 85 Ill. 164; 1878, Jessup v. Carnegie, 12 Jones & S. (N. Y.) 269; 1880, Ferris v. Thaw, 72 Mo. 446; 1881, Coleman v. Coleman, 78 Ind. 344; 1881, Kaiser v. Lawrence Sav. Bank, 56 Iowa 104, 41 Am. Rep. 85; 1883, Clegg v. Hamilton & W. Co. G. Co., 61 Iowa 121; 1884, Robinson v. Harris, 5 Ky. L. R. 928; 1884, Bamberger v. White, 6 Ky. L. R. 292; 1885, Smith v. Warden, 86 Mo. 382; 1891, Empire Mills v. Alston Grocery Co., 4 Texas App. 346, 12 L. R. A. 366; 1895, Taylor v. Branham, 35 Fla. 297, 17 So. Rep. 552; 1895, Jones v. Aspen Hardware Co., 21 Colo. 263, 52 Am. St. Rep. 220, *supra*, p. 637; 1896, Lehman v. Knapp, 48 La. Ann. 1148, 20 So. Rep. 674; 1896, New York Nat'l Ex. Bank v. Crowell, 177 Pa. St. 313, 35 Atl. Rep. 613; 1897, Liebold v. Green, 69 Ill. App. 527; 1898, Weir Furnace Co. v. Bodwell, 73 Mo. App. 389; 1899, Hequembourg v. Edwards, 155 Mo. 514, 50 S. W. Rep. 908; 1899, Christian & C. G. Co. v. Fruitdale L. Co., 121 Ala. 340, 25 So. Rep. 566. But see, *supra*, p. 625. Beach, § 162; Clark, § 45; Elliott, § 83; Morawetz, § 748; Taylor, §§ 148, 739; I Thompson, §§ 218, 506; III Thompson, §§ 2940, 2968–2993.

Sec. 180. (2) Does not result in a partnership liability; but if any liability, either a corporate one, or one resting only upon those who have participated in the acts, or authorized them to be done, or ratified them.

FAY AND ANOTHER v. NOBLE AND OTHERS.

1851. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 7 Cushing's (Mass.) Rep. 188–194.

This was a replevin for seventy-two tons of pig iron. The defendants pleaded the general issue, and specified in defense a title in themselves under a mortgage from the West Boston Iron Company.

At the trial in the court of common pleas, before Wells, C. J., the following facts were in evidence: "Prior to May, 1848, Leonard Fuller and one Kendall owned and carried on at Boston a machine shop and an establishment for making iron castings. On the 22d of March, 1848, they, with others, were incorporated as a manufacturing corporation, under the name of the West Boston Iron Company, for the purpose of carrying on the same business (St. 1848, ch. 70, 8 Special Laws 879); and in May, 1848, attempted to and supposed they did organize as such corporation; and Fuller and Kendall then transferred the real and personal estate employed by them in said business to the corporation, receiving payment therefor in shares of stock in the corporation. The shares so received by Fuller amounted to more than three-fourths of the whole number of shares into which the capital stock purported to have been divided. From the time of this supposed organization until November, 1848, Fuller acted as the general agent of the company, and, on the 25th of September, 1848, purporting to act in that capacity, borrowed money of the plaintiffs, gave the note of the company therefor, and conveyed the pig iron in question to the plaintiffs as collateral security for its payment.

The plaintiffs put into the case the records of said supposed organization and of the proceedings under the same, and contended that, from an inspection of these records, it appeared the company had not been legally organized as a corporation; and so the court rules against the objection of the defendants. Two witnesses, called by the plaintiffs, testified, in answer to questions by the defendants, that the proceedings therein recorded were truly set forth. To this evidence the plaintiffs objected, but the judge admitted it as evidence of the actual agreement of the associates among themselves whether they were to be regarded as corporators, as partners or otherwise, as to the manner in which the business should be transacted and of the extent of the authority given to Fuller as their agent.

In November, 1848, a reorganization of the company as a corporation took place, and on the 14th of that month the corporation so reorganized conveyed all their property to the defendants by the mort-

gage relied on by the defendants, who took possession under this mortgage of the iron in controversy.

The plaintiffs requested the judge to instruct the jury, among other things, that, as there had been no legal organization of the corporation at the time of the conveyance to the plaintiffs, the parties then holding shares therein and conducting the business for their common benefit were in law to be deemed partners, and could not, by any agreement among themselves limit the power of the members as such so as to affect the plaintiffs, unless knowledge of such limitation was brought home to the plaintiffs, the burden of proving which was on the defendants; that Fuller, as one of the partners and the managing partner and principal owner, had full powers to give the notes of the company to raise money and pledge their property for the payment thereof; and that although Fuller dealt with the plaintiffs as agent, they were not estopped to show and avail themselves of the fact that he was actually a partner and principal owner.

The presiding judge submitted the case to the jury, with instructions upon this point, of which the following is the material part:

"The proceedings, prior to November, 1848, did not prove a legal organization of the corporation, and consequently no corporate acts were done prior to November, 1848, when the new organization was effected. But, although not acting as a corporation, the individual associates were acting as an association connected together for the purpose of carrying on business; this association was not necessarily a partnership, with the usual powers and liabilities of a partnership. but it was a question of fact what were the terms of this agreement of association; and it being testified and proved that the writings offered as records of the corporation contained a true statement of the acts of the associates, these writings were admissible evidence to prove the actual agreement of the associates as between themselves; and it was for the jury, from this and other evidence, to determine what this agreement of association was. If it was a partnership without any limitation as to the powers of the individual members, each partner had a right to bind the partnership by a contract made for partnership purposes; and among other powers, had a right to borrow money in the name of the partnership, and pledge the partnership property as security for repayment. It was, however, competent for partners to limit the powers of individual members of the company by an agreement that the conduct of the business should be confided wholly to the management of agents chosen for that purpose; and where this was done, a partner not selected as agent could not bind the company by an agreement with an individual who knew the fact that the power of transacting the business of the concern had been delegated to these agents."

The jury returned a verdict for the defendants, and the plaintiffs excepted.

BIGELOW, J. Upon the evidence introduced at the trial of this case in the court below, the presiding judge ruled that prior to November, 1848, there was no legal organization of the corporation called the

West Boston Iron Company, and therefore no corporate acts were done prior to that time. The whole case was tried and submitted to the jury on this assumption. As this point was so ruled at the request of the plaintiffs, and as the verdict was in favor of the defendants, no exception was taken thereto, and we are not called upon to determine its correctness.

The plaintiffs contended and asked the court to rule that inasmuch as there had been no legal organization of said corporation prior to November, 1848, the parties holding shares in said unorganized corporation were in law to be deemed co-partners and subject to all liabilities as such. The court did not give this precise instruction to the jury, but directed them in substance that said parties, by virtue of their being subscribers for and holders of stock in said company, were either general co-partners, with the usual powers and liabilities as such, or co-partners acting under certain restrictions and limitations as to the rights and duties of individual members and through an agent with limited authority, and it was left to the jury to determine upon the nature and character of this co-partnership, and also the authority of Fuller as agent or co-partner to act in its behalf.

It seems to us, upon careful consideration of the case, that these instructions were not warranted by the facts proved, and although they do not form the precise ground of the exceptions taken by the plaintiffs, yet we think them so erroneous as to render it necessary to order the case to a new trial.

We are not aware of any authority, certainly none was cited at the argument, to warrant the instruction that in consequence of an omission to comply with the requisitions of law in the organization of a corporation, by which its proceedings were rendered void, persons who had subscribed for and taken stock in the company thereby became co-partners. The doctrine seems to us to be quite novel and somewhat startling. Surely it can not be, in the absence of all fraudulent intent (and none was proved or alleged in this case), that such a legal result follows as to fasten on parties involuntarily, for such a cause, the enlarged liability of co-partners; a liability neither contemplated nor assented to by them. The very statement of the proposition carries with it a sufficient refutation. No such result can follow unless a principle of law be established, founded on no authority, and required by no public exigency. Corporations are known and recognized legal entities, with rights and powers clearly defined and well understood, and wholly distinct and different from those of individuals and co-partnerships. Persons who subscribe for and take stock in them are subject to certain fixed and limited liabilities, which they voluntarily assume, and these liabilities are not to be extended and enlarged so as to affect innocent parties beyond the letter of the law. A co-partnership can not take upon itself the functions of a corporation, nor can a corporation or its members be made subject to the liabilities of a copartnership, in the absence of all statutory provisions imposing such liabilities. The personal liability of the members of a joint-stock company or co-partnership is inconsistent with the character and

nature of a corporation, of which the law properly recognizes only the creature of the charter, and knows not the individuals. Ang. & Ames on Corp., 535, 536. On looking into Revised Statutes, ch. 38 and 44, to the provisions of which the corporation in question was made subject, we find various enactments by which officers and members are made individually liable for debts contracted by corporations in case of non-compliance with certain requisitions; but no provision is made by which such individual liability attaches by reason of any omission to organize in the manner prescribed by law. The statute, it is true, prescribes the mode of organization, but it annexes no penalty or liability to the neglect or omission to comply with it. We are unable to see, therefore, any principle of law upon which the instructions given to the jury on this point can rest.

It follows, as a necessary consequence of what we have already said, that the records of the corporation were improperly admitted and submitted to the jury as evidence of an agreement or understanding among the shareholders in the corporation as to their own rights and liabilities as members of a co-partnership, and of the extent of authority given to Fuller as agent of such co-partnership. They were not made or kept for any such purpose. They were only the records and by-laws of a corporation, not the agreements of individuals, in the nature of articles of co-partnership; and they could have no legitimate tendency to prove the facts for which they were offered and used at the trial.

Without examining at greater length the rulings of the court set out in the bill of exceptions, we think it manifest that the whole trial proceeded under a misapprehension. *If the court were correct in deciding that there was no organization of the corporation, and that all its proceedings were void, the case resolved itself into a few simple elements. Being unorganized, and incompetent to act as a corporation, it could not create agents, or confer any authority on any one to act in its behalf, and therefore all those who acted or purported to act as its agents were acting without authority. There was no principal to appoint an agent. It is a familiar principle of law that a person who acts as agent without authority or without a principal is himself regarded as a principal, and has all the rights and is subject to all the liabilities of a principal. Story on Agency, section 264. If a person, purporting to act as agent of a corporation which had no valid existence, makes contracts and does other acts as its agent, he becomes the principal, and is personally liable therefor.* If he purchases property, as agent, without authority, the title vests in him, so far at least as regards third persons, and he has the sole right to dispose of it to others. Story on Agency, section 264*a*, note; Hampton v. Speckenagle, 9 S. & R. 212. *Applying this principle to the case at bar, it is very clear that Fuller was not the agent of a co-partnership, for none existed; he was not the agent of individuals, as such, because he was not authorized to act; he was not the agent of the West Boston Iron Company, because if the court were right in deciding that it had never organized, and that its proceedings were void,*

it never had the power to appoint him agent. Clearly, then, he acted without authority from any one. If he purchased, he purchased for himself. In him only did the property vest, and as against all but the vendors he had the sole right to dispose of it to others. In this view, the question of co-partnership which was submitted to the jury was wholly immaterial, and diverted their attention from the real point in issue. We are therefore of opinion that there was a mistrial, and that the verdict must be set aside and a new trial had at the bar of this court.

To same effect, 1879, Ward v. Brigham, 127 Mass. 24; First National Bank v. Almy, 117 Mass. 476; Trowbridge v. Scudder, 11 Cush. 83; 1892, Rutherford v. Hill, 22 Ore. 218, 29 Am. St. R. 596; Humphreys v. Mooney, 5 Colo. 282; Gartside Coal Co. v. Maxwell, 22 Fed. Rep. 197.

See the following cases holding there is not necessarily a partnership liability; many, however, are cases of estoppel. 1846, State v. How, 1 Mich. (1 Man.) 512; 1872, Blanchard v. Kaull, 44 Cal. 440; 1874, Fuller v. Rowe, 57 N. Y. 23; 1880 Humphreys v. Mooney, 5 Colo. 282; 1884, Gartside Coal Co. v. Maxwell, 22 Fed. Rep. (U. S. C. C.) 197; 1885, Johnson v. Corser, 34 Minn. 355; 1890, Snider's Sons' Co. v. Troy, 91 Ala. 224, *supra*, p. 656; 1890, Cory v. Lee, 93 Ala. 468, 8 So. Rep. 694; 1892, Rutherford v. Hill, 22 Ore. 218, 29 Am. St. R. 596; 1894, Railroad Gazette v. Wherry, 58 Mo. App. 423; 1894, Wilson Cotton Mills v. C. C. R. Cotton Mills, 115 N. C. 475; 1895, Clark v. Richardson, 17 Ky. L. Rep. 514, 31 S. W. Rep. 878; 1895, First National Bank v. Harper, 61 Minn. 375, 63 N. W. Rep. 1097; 1805, American Mirror & G. B. Co. v. Bulkley, 107 Mich. 447, 65 N. W. Rep. 291; 1896, First Nat'l Bank v. Dovetail B. & G. Co., 143 Ind. 534, 42 N. E. Rep. 924; 1896, Gow v. Collen & P. L. Co., 109 Mich. 45, 66 N. W. Rep. 676; 1896, Hogue v. Capital Nat'l Bank, 47 N. B. 929, 66 N. W. Rep. 1036; 1897, Sentell v. Hewitt, 50 La. Ann. 3, 22 So. Rep. 970; 1898, Cole v. Great B. L. & L. Co., 8 Kan. App. 860, 54 Pac. Rep. 920; 1899, Richards v. Minn. Sav. Bk., 75 Minn. 196, 77 N. W. Rep. 822. See, also, *supra*, p. 625; text-book references, *supra*, p. 672; 1903, Cannon v. Brush El. Co., 96 Md. 446, 94 Am. St. R. 584, 54 Atl. 121.

TITLE IV. THE BODY CORPORATE, ITS ANATOMY, INTERNAL STRUCTURE AND CONSTITUTION.

CHAPTER 8.

MEMBERS, PARTS, ORGANS OF ACTION, WITH THEIR FUNCTIONS AND MUTUAL RELATIONS.

SUBDIVISION I. MEMBERS, INTEGRAL PARTS AND ORGANS OF ACTION.

ARTICLE I. MEMBERS.

Sec. 181. Necessity of members.

"It is plain that a joint-stock company or trading corporation can not possibly exist without stockholders or members. It would be a contradiction in terms to speak of an association existing without associates composing it." 1 Morawetz, § 33.

Note. See, also, *supra*, §§ 96, 97.

Sec. 182. Acquisition of membership.

(1) Non-stock companies.

THE AMERICAN LIVE STOCK COMMISSION COMPANY v. THE CHICAGO LIVE STOCK EXCHANGE.[1]

1892. IN THE SUPREME COURT OF ILLINOIS. 143 Ill. Rep. 210-241, 36 Am. St. Rep. 385.

[Bill by commission company against stock exchange for an injunction.]

MR. CHIEF JUSTICE BAILEY. * * * The live stock exchange is a corporation, not for pecuniary profit, organized March 13, 1884, under the laws of this state, the objects for which it was organized, as declared by its articles of incorporation, being: "To establish and maintain a commercial exchange; to promote uniformity in the customs and

[1] Statement of facts abridged and rearranged. Arguments omitted, and only so much of opinion given as relates to the single point.

usages of our merchants; to provide for the speedy adjustment of all disputes between its members; to facilitate the receiving of live stock, as well as provide for good management and the inspection thereof, thereby guarding against the sale or use of unsound or unhealthy meats; to secure to members a corporation in furtherance of their legitimate purposes." Said corporation has no capital stock, and is itself engaged in no commercial business, but limits its corporate enterprise to furnishing to its members facilities for carrying on, each for himself, the business of buying, selling and dealing in live stock, meats and other like commodities, and to adopting and enforcing by-laws, rules and regulations by which the business of its members shall be conducted and governed [pp. 225–6].

The complainant is a joint-stock corporation, organized May 3, 1889, under the laws of this state, with a capital stock of $100,000, divided into shares of $100 each, the shareholders consisting principally, if not exclusively, of persons and firms engaged in the business of shipping live stock to the Union Stock Yards at Chicago for sale. The principal office of said corporation is located at the stock yards, and the objects for which said corporation was formed, as declared by its articles of incorporation, are as follows:

"To engage in the business of buying, selling and handling live stock upon commission at the Union Stock Yards, state of Illinois, and at such other points throughout the United States as may be deemed advisable, and also to encourage the stockholders of said corporation to raise, improve, feed and ship to market live stock; and in order to better effectuate said latter object, it is hereby expressly stipulated and agreed by and between the parties hereto, that the net earnings of said corporation shall be distributed among the stockholders thereof annually in the following manner, to wit: Sixty-five per cent. of said net earnings shall be distributed to said stockholders in the ratio of the number of stock shipped by each stockholder to the said corporation for sale during the current year for which said dividend shall be declared, and the remaining 35 per cent. of said net earnings shall be distributed to the shareholders in said corporation in the ratio of the amount owned by each shareholder in said corporation. It is hereby further expressly agreed and stipulated that no one person shall have the right to subscribe for or own more than twenty-five shares of stock in said corporation at any time during the existence of said proposed corporation."

Said corporation, on being organized, appointed Rogers as its manager, and he applied for admission as a member of the exchange, and was admitted a member thereof, his initiation fee being paid by the presentation of an outstanding certificate of membership which had been purchased with the money of the complainant. The evidence shows, and upon this point there seems to be no dispute, that when Rogers applied for membership no disclosure was made by him as to the plan upon which the complainant corporation was organized, and particularly the obligation which it assumed by its articles of incorporation, to distribute annually among its shareholders sixty-

five per cent. of its net earnings, in the proportion of the number of live stock shipped by each to said corporation for sale. Rogers was admitted to membership upon investigation by the exchange of his own personal character and credit, and in ignorance of this peculiar feature of the scheme upon which the corporation represented by him was organized.

The complainant thereupon embarked in the business of receiving consignments of live stock, both from its shareholders and others, and in selling the same on commission at the stock yards, the rates of commission charged by it in all cases being in conformity to the schedule of rates established by the exchange. Said business was managed by Rogers, who, being a member of the exchange, was enabled to avail himself in the management of said business of all the privileges which such membership afforded.

In November, 1889, the complainant having realized a considerable sum of money as the net profits of its business up to that time, distributed such net profits to its shareholders as required by its articles of incorporation, and the exchange being informed of such distribution, and regarding it as a virtual evasion of its rules establishing minimum rates of commissions, instituted proceedings against the complainant and its manager for a violation of its rules. Rogers set up, in defense of these charges, in substance, that the complainant was not a member of the exchange nor subject to its jurisdiction; that so far as his action as a member of the exchange was concerned he had strictly conformed to said rules by charging and collecting the rates of commissions thereby established, and having collected them, he had accounted for and paid the same over to his principal, the complainant, as it was his legal duty to do, and that he had no responsibility for the disposition which the complainant had subsequently seen fit to make of the same. These suggestions seem to have been acquiesced in by the exchange, as the proceedings against both the complainant and its manager appear to have been thereupon abandoned.

The exchange, however, for the purpose, as may well be presumed, of protecting itself against similar evasions of its rules in the future, amended its eighth rule so as to provide, in substance, that no person should be received for membership in the exchange who, in any manner, acts for or represents any other live stock corporation whose charter, regulations, rules or by-laws provided for discrimination in rates or charges for commissions between stockholders and other patrons or customers, whether under the guise of dividends, drawbacks or any other scheme or device whatever, and that no member of the exchange should act as agent or otherwise for any live stock corporation whose charter, regulations, rules or by-laws provide for such discrimination, and subjecting a member thus offending to suspension or expulsion. At the same time rule nine was so amended as to prohibit all members of the exchange from buying any live stock or causing the same to be bought, at the stock yards from any corporation or live stock company which is or may be regularly selling live stock for non-residents on commission, unless some one or more of the stockholders of

such company are members of the exchange in good standing [pp. 230–2].

The case sought to be made by the complainant is presented under two aspects: First, it is claimed that, either by itself or through its general manager, the complainant is or is entitled to be admitted a member of the exchange, and it accordingly prays for an injunction restraining the exchange from taking any steps to try the complainant for a violation of its rules, or to impose upon the complainant's privileges as a member any illegal or unreasonable restraints, and it also prays that the certificate of membership in Roger's hands be issued to the complainant. Secondly, it claims that if it is not a member and entitled to the privileges of membership, the exchange should be restrained from putting in force certain rules it has adopted for the government of its own members, and particularly its amendments to rules 8 and 9.

We are unable to see upon what principle it can be justly claimed that the complainant is a member of the exchange or entitled to the privileges of membership, or that it is in a position where it can insist upon being admitted to membership as a matter of right. Whatever may have been its rights while Rogers, its manager, was a member, those rights no longer exist, as by its own admission Rogers is no longer its manager, and is no longer a member of the exchange. Nor can there be any just pretense that the complainant itself is a member or has ever applied for membership. The exchange is a corporation, having rules or by-laws determining the qualifications for membership and prescribing the mode in which members may be admitted, and there is no pretense that the complainant has ever brought itself within the terms of said rules or by-laws, so as to be entitled to membership. Rule 8 of the exchange provides as follows:

"On and after May 1, 1884, any person of good character and credit and of legal age, whose interests are centered at the Union Stock Yards, on presenting a written application indorsed by two members, and stating the name and business avocation of the applicant, after ten days' notice of such application shall have been posted on the bulletin of the exchange, may be admitted to membership in the association upon approval by at least seven affirmative ballot-votes of the board of directors, and upon payment of an initiation fee of $500, or on presentation of a certificate of unimpaired or unforfeited membership duly transferred, and by signing an agreement to abide by the rules, regulations and by-laws of the association, and all amendments that may in due form be made thereto."

Said association had an undoubted right to adopt this rule, and as it prescribes the mode and the only mode in which membership in the exchange can be obtained, no one can justly claim to be a member who has not been admitted in the mode thus prescribed.

It may well be questioned whether, under this rule, a corporation in its corporate character can be admitted to membership in the exchange, as said rule seems to contemplate only the admission of natural persons. But even if that were otherwise, there is no pretense

that the complainant itself has ever made application for membership, or that any of the subsequent steps necessary to vest an applicant with the character and rights of membership have been taken, or that they have resulted favorably to the complainant. Nor is it pretended that since Rogers ceased to be the complainant's manager, and thereby ceased to be its representative on the exchange, any formal application for membership has been made by Titus, its general manager, or by any other person in its behalf, but the evidence, on the other hand, is clear and undisputed that no such application has been made. The fact alleged in the bill, if it be a fact, that the complainant has requested the exchange to issue the certificate of membership formerly held by Rogers to Titus avails the complainant nothing, as the exchange is under no obligation to admit a member upon such request, but can, in conformity with its rules, admit to membership only upon formal application duly presented and approved in the manner in said rules prescribed. *The equitable or even legal ownership of the unimpaired or unforfeited certificate of membership formerly issued to Rogers and duly transferred to it, does not constitute it a member, or entitle it to any rights as such. The only way in which the complainant can avail itself of such certificate, is by tendering it in lieu of the prescribed initiation fee in case the complainant or its representative, on proper application, shall be admitted to membership, or, in case such application should not be granted, then by selling it for a consideration to some other person who may desire to become a member.*

It may also be noticed, in immediate connection with the point now under consideration, that a court of chancery has no power to order the exchange to issue the certificate of membership formerly held by Rogers to the complainant or its general manager, so as to constitute it or him a member. Before an applicant can become a member his application must, among other things, be indorsed by two members, and must receive the approval of at least seven members of the board of directors, voting by ballot. Members and directors of such corporations, in acting upon applications for membership, are necessarily entitled to a freedom which is not subject to judicial compulsion. No two members can be compelled to indorse an application, nor can any seven members of the board of directors be compelled to vote in its favor, but both are entitled to act upon their own judgment and according to their own choice. In other words, a court of chancery will not undertake to force upon a corporation of this character a member against the will of those whose duty it is to pass upon applications for membership.

The complainant then, not being a member of said exchange, nor entitled, either directly or indirectly, to any of the rights arising from membership therein, the question is presented whether it can complain of any of the rules adopted by the exchange for the government of the conduct of its own members, or invoke the aid of a court of equity to restrain their enforcement [pp. 227–230]. * * *

Held, it can not.

Judgment affirmed.

Sec. 183. Same. (2) Stock companies.

(A.) By subscription.

(1) Statutory contract.

See Sedalia, etc., Co. v. Wilkerson, *supra*, p. 459; Philadelphia Savings Institution, *supra*, p. 464; Coppage v. Hutton, *supra*, p. 469.

Sec. 184. Same. (2) Common law contracts.

1. Agreements to subscribe.

See Thrasher v. Pike, *supra*, p. 471; Strasburgh v. Echternacht, *supra*, p. 473.

2. Agreements subscribing.

Bryant's Pond, etc., v. Felt, *supra*, p. 474; Hudson Real Estate Co. v. Tower, *supra*, p. 478; Peninsular Co. v. Duncan, *supra*, p. 482; Tonica, etc., Ry. v. McNeely, *supra*, p. 491; Minneapolis Co. v. Davis, *supra*, p. 492.

3. Agreement with promoter.

Minneapolis Co. v. Davis, *supra*, p. 492; San Joaquin Land Co. v. West, *supra*, p. 497; West v. Crawford, *supra*, p. 500.

4. Underwriting.

In re Licensed Victuallers, *supra*, p. 502.

5. Application, allotment, etc.

In re Florence Land & Pub. Works Co., *supra*, p. 504.

Sec. 185. Same. (B.) Transfer, see *infra*, p. 1654, *et seq.*

Sec. 186. Same. (C.) Estoppel, see *supra*, p. 510.

ARTICLE II. INTEGRAL PARTS.

Sec. 187. In general.

"Many aggregate corporations are composed of distinct parts, which are called integral parts, without any one of which the cor-

poration would not be complete, although none of them are by themselves a corporation. Thus, where a corporation consists of a mayor, alderman and commonalty, the mayor, the alderman and the commonalty are three integral parts; but neither of them has any corporate capacity distinct from the other two, and, therefore, the mayor can not, in his political character of mayor, take in succession anything as a sole corporation; nor the aldermen, as a select body, take anything to them and their successors as an aggregate corporation. In many aggregate corporations there is one particular person, who is called the head, and who forms one of the integral parts; such is the mayor of a city corporation, and the chancellor in the general corporations of the English universities. The corporation of St. Mary's church, in Philadelphia, consisting of three clerical and eight lay members, was considered by the court to be a corporation, composed of two distinct classes or integral parts.[1]'' Angell and Ames, Corporations, § 97.

Sec. 188. Same.

''A corporation was founded by the name of Brothers and Sisters, and *all the Sisters are dead*, and the Brothers make lease, and held void, for then it was no corporation.'' Manwood v. Lovelace, Time of Queen Eliz., 6 Viner's Abr. 282, 12.

Sec. 189. Same. Directors are not integral parts.

ROSE v. TURNPIKE CO.[2]

1834. In the Supreme Court of Pennsylvania. 3 Watts (Pa.) Rep. 46–49.

[Action of assumpsit by the Turnpike Company against Rose. By the act of incorporation a president, six managers and a treasurer were to be elected for one year and until such other officers should be chosen; and meetings were to be held on the first Monday of June of each year for that purpose, ''and at such other times as they shall be summoned by the managers, in such manner and form as shall be prescribed by their by-laws.'' The first election was held September 4, 1827; the next August 28, 1828; the next September 8, 1829, and afterward on the first Monday of June, 1830, 1831 and 1832, and suit was brought after the last date. The defendant contended that in consequence of the neglect to elect officers on the day fixed by the

[1] 7 Serg. & R. 517.

[2] Statement of facts abridged. Arguments and parts of opinion omitted.

charter previous to 1830, the corporation was dissolved, and the suit could not be maintained.]

SERGEANT, J. The principle seems to be settled in England that a corporation is dissolved when an integral part is gone and the remaining parts are incapable of restoring it or of doing any corporate act. The question seems chiefly to have arisen in relation to municipal corporations composed of mayor, alderman and burgesses, instituted for the government of towns in their judicial concerns, police or trade. When these corporations have fallen into such a state by the loss of an integral part that they are incapacitated from continuing their succession or accomplishing the purpose for which they were created, the crown has treated them as dissolved and granted a new charter. To prevent the occurrence of a dissolution, when the mayor or head officer was an integral part, and there was a failure to elect, the statute 11 Geo. 1, ch. 4, was passed, providing for an election on another day.

Our corporations bear little resemblance to the English municipal corporations, either in design or constitution. The present, like many of our corporations for civil purposes, either by special act of assembly or under the act of 1791, is not a corporation composed of several integral parts. The stockholders constitute the company, and the managers and officers are their agents, necessary for the conduct and management of the affairs of the company, but not essential to its existence as such nor forming an integral part. The corporation exists *per se*, so far as is requisite to the maintenance of perpetual succession and holding and preserving its franchises. The non-existence of the managers does not imply the non-existence of the corporation. The latter is dormant during that time; its functions are suspended for want of the means of action, but the capacity to restore its functionaries by means of elections remains.

The total dissolution of a body politic, its political death and resolution into its original elements, would be attended with such momentous consequences that it ought not lightly to happen. Not only would it affect its property right and responsibilities, but the beneficial purposes for which it was created would be frustrated, and the community as well as individuals holding stock be injured. No class of corporations would be exempt. Whether religious, charitable or literary; whether for turnpikes, bridges, banks, insurances, canals, railroads or any other purpose, all must be embraced within the rule, and if by accident, inadvertence or design there is one omission to elect managers on the day appointed, or the election made is void, the whole edifice of the corporation falls into ruins, and can only be constructed by legislative interference; even then, perhaps, after a lapse of time, and with some doubts as to its power to revest former rights and to restore its identity. I see no reason why the company may not retain all their rights, powers and privileges, though there be a suspension of the power of action; nor why this power of action, though dormant for a time, may not be revived by a new election of

the managers and officers competent to carry on its affairs conformably to the directions of the charter. That may be done on the day appointed by the act, it not being required that the managers, officers or any other persons should preside at or do any act in reference to the election which is conducted entirely under the control of the stockholders. * * *

ARTICLE III. ORGANS OF ACTION.

Sec. 190. In general.

"As has been stated by Kyd, there are three different kinds of assemblies in corporations, which he styles legislative, electoral and administrative. 1. The legislative assembly possesses the power of making laws; such as the court of common council in London, the court proprietors of the Bank of England and of the East India and South Sea Companies. [Also the convocation in the University of Oxford, and the congregation or senate in the University of Cambridge.] 2. The electoral assembly is that which is authorized to elect officers; such are, in general, the proprietors in stock companies; and the body at large of every corporation, when the power of election has not been vested in a minor body. 3. The administrative have the management of particular affairs, such as the courts of assistants in the city companies of Europe, the court of directors of a bank and other stock companies. The same body of men may, therefore, and frequently do, possess distinct powers. * * * In private corporations (which, to some extent, may be said to be towns in miniature) the electoral power is generally in the body at large, though it may be vested in a body selected solely to make elections, or in the legislative or administrative assembly. The qualification of persons to exercise the above powers must, of course, depend upon the charter and the by-laws. By the constitution of the railway companies in England, the proper organs through which they may act are threefold: 1. The general assembly of the company. 2. The board of directors; and 3. A duly constituted agent."—Angell and Ames on Corporations, § 98.

"The various classes of persons by whom the affairs of a corporation are practically conducted are: 1. *Officers*, being those who are parts of the organization; 2. *Agents*, who are not parts of the organization, but represent it to the public; and 3. *Servants*, who do not even represent it, but only labor to advance its objects."—1 Abbott's Digest of Corporation Law, p. 2.

Sec. 191. Same.

THE METHODIST EPISCOPAL CHURCH v. SHERMAN.[1]

1874. IN THE SUPREME COURT OF WISCONSIN. 36 Wis. 404–409.

[Suit by the church to recover on an alleged agreement by the defendant to pay one hundred dollars necessary to complete the church edifice. The Rev. Dr. Hatfield was engaged to conduct the services at the dedication, and he was requested by an informal meeting of the trustees, pastor and class leaders to solicit subscriptions during the dedication exercises, but was not appointed agent to receive such by any vote of either trustees or the corporation. He called for subscriptions and named a person to write down names and amounts as subscribed. Defendant agreed to take or be put down for the last hundred dollars necessary, and his name was so put down. A few days later, and before any meeting had been held, one of the trustees called on the defendant to perform his agreement, at which time he undertook to revoke his promise. Judgment below was for the plaintiff and defendant appealed.]

RYAN, C. J. * * * The respondent is a corporation aggregate, having a board of trustees to manage its affairs. We need not stop to consider how far the power to contract is in the aggregate body or in the select body. It must be wholly in the one or the other, or partly in both. There may be a doubt whether it can contract by parol, except through an agent authorized by vote. A. & M. Turnpike Co. v. Hay, 7 Mass. 107. But, pretermitting that question, *it could certainly contract only through the aggregate body by vote, or through the select body by vote, or through an agent authorized by vote of one body or the other, or both.* Angell and Ames, §§ 231, 232.

It does not appear in the record that Dr. Hatfield was appointed agent to receive subscriptions by vote of either body. On the contrary, it does appear by the evidence of one of the trustees that his only show of authority was a request at an informal meeting of the trustees, pastor and class leaders. This gave him no authorty for the corporation.

He solicited subscriptions, during a religious service, for a religious purpose. Manifestly there was present no formal meeting of the corporation aggregate or of the select body. The appellant then made the offer when there was present no body or agent authorized to accept it for the corporation. It remained a mere offer, which the appellant might retract until accepted by the corporation. Addison on Con., 36. * * *

Judgment reversed.

Note. In Cammeyer v. United German Lutheran Church, 2 Sandf. Ch. (N. Y.) 186 (1844), it was held that "where the exercise of corporate acts is vested

[1] Statement of facts abridged. Arguments and part of the opinion omitted.

in a select body, an act done by the persons composing that body, in a mass meeting of all the corporators, or in union, or amalgamated with other like bodies, parts of the corporation, is not a valid corporate act." See, also, cases *infra*, modes of action, pp. 833–854.

As to who is a corporate officer, see, 1825, Dedham Bank v. Chickering, 3 Pick. (Mass.) 335; 1827, Union Bank v. Ridgely, 1 Harr. & G. (Md.) 324; 1843, Commonwealth v. Cuyler, 5 W. & S. (Pa.) 275; 1844, Commonwealth v. Wyman, 49 Mass. (8 Met.) 247; 1846, Burr v. McDonald, 3 Gratt. (Va.) 215; 1853, Union Co. v. James, 21 Pa. St. 525; 1854, *Ex parte* Bailey, 27 Eng. L. & Eq. 190; 1857, Commonwealth v. Tuckerman, 76 Mass. (10 Gray) 173; 1872, Commonwealth v. Christian, 9 Phila. (Pa.) 556; 1890, Brand v. Godwin, 8 N. Y. Supp. 339.

As to how officers differ from mere agents, see Salem v. Gloucester Bank, 17 Mass. 1; Foster v. Essex Bank, 17 Mass. 479; Ehrenzeller v. Union Canal Co., 1 Rawle (Pa.) 181, 188; Weatherby v. Saxony, etc., Co., 29 Atl. Rep. 326 (N. J.)

As to difference between officers and servants, employes, etc., see, 1865, Hovey v. Ten Broek, 3 Rob. (N. Y.) 316; 1868, Coffin v. Reynolds, 37 N. Y. 640; 1874, Hill v. Spencer, 61 N. Y. 274; 1875, Adams v. Goodrich, 55 Ga. 233; 1882, Wakefield v. Fargo, 90 N. Y. 213; 1882, Gordon v. Jennings, L. R. 9 Q. B. Div. 45; 1887, Sleeper v. Goodwin, 67 Wis. 577; 1889, Vane v. Newcombe, 132 U. S. 220; 1890, Pendergast v. Yandes, 124 Ind. 159; 1890, Hand v. Cole, 88 Tenn. 400; 1891, Louisville, etc., R. Co. v. Wilson, 138 U. S. 501; 1894, Clark's Appeal, 100 Mich. 448; 1897, Palmer v. Van Santvoord, 153 N. Y. 612; 1898, Cocking v. Ward, — Tenn. Ch. App. —, 48 S. W. Rep. 287; 1899, Bristor v. Smith, 158 N. Y. 157.

Sec. 192. Qualification of agents and officers.

WIGHT v. SPRINGFIELD AND NEW LONDON RAILROAD COMPANY.[1]

1875. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 117 Mass. Rep. 226–228, 19 Am. Rep. 412.

[Petition for mandamus to compel respondent to admit petitioner to act as one of its directors. The city of Springfield was the lawful owner of 1,500 of the 2,000 shares of stock of the railroad company: at a duly called meeting of the shareholders of the railroad company, the city of Springfield was represented by five persons properly selected for that purpose, one of whom was the petitioner. At this meeting the petitioner received a large majority of the votes of the shares of stock for director, but he not being himself a shareholder, the president of the meeting refused to declare him elected, and the corporation, by its officers, have since refused to recognize him as a director, or allow him to act as such.]

GRAY, C. J. Although the directors of a railroad corporation are usually chosen by the stockholders from their own number, there is no rule of law that makes the holding of stock an indispensable qualification of a director, unless prescribed by some act of the legislature or by-law of the corporation. The only adjudication upon the subject cited at the argument supports this view. State v. McDaniel, 22 Ohio St. 354. And the statutes expressly requiring directors of banks and insurance companies to be members of the corporation, and the first directors of a railroad corporation incorporated under the gen-

[1] Statements of facts abridged, and only part of opinion given.

eral law to be associates, strengthens the conclusion that the legislature intended to leave the qualifications of directors in the permanent organization of such a corporation to the determination of the stockholders. * * *

Mandamus to issue.

Note. 1. Unless statute or charter prevents, a corporation can select whomsoever it pleases to be its officers, agents or servants: 1847, Hoyt v. Bridgewater C. M. Co., 6 N. J. Eq. (2 Halst.) 253, on 275; 1847, Sargent v. Webster, 54 Mass. (13 Metc.) 497, 46 Am. Dec. 743; 1870, Densmore Oil Co. v. Densmore, 64 Pa. St. 43; 1872, State v. McDaniel, 22 Ohio St. 354; 1876, British Provident Life, etc., Assn., L. R. 5 Ch. Div. 306; 1880, Opinion of Attorney-General, 7 Pa. Co. Ct. Rep. 178.

2. In general the corporation may by by-laws prescribe qualifications of its officers or directors: 1841, Dispatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; 1844, Cammeyer v. United Church, 2 Sandf. Ch. 186; 1862, Richards v. Merrimac & C. R. Co., 44 N. H. 127; 1870, People v. Northern R. Co., 42 N. Y. 217, on 230; 1871, Hazelhurst v. Savannah G. & N. A. R. Co., 43 Ga. 13; 1892, Cross v. West Virginia Cent. & P. R. Co., 37 W. Va. 342, 18 L. R. A. 582, 16 S. E. Rep. 587. But not contrary to statutory provisions: 1876, British Provident Life, etc., Assn., L. R. 5 Ch. Div. 306.

3. As to residence and citizenship, there is no rule, unless by statute or charter provision, that requires an officer or director to be a resident or citizen of the state creating the corporation. Statutes, however, frequently provide that a part of the directors shall be residents of the state creating the corporation. 1827, McCall v. Byram Mfg. Co., 6 Conn. 428; 1850, Conant v. Millaudon, 5 La. Ann. 542; 1868, Matthews v. Theological Sem. R. P. Ch., etc., 2 Brewst. (Pa.) 541; 1887, State v. Smith, 15 Ore. 98, 15 Pac. Rep. 137, 386; 1890, Commonwealth v. Detwiler, 131 Pa. St. 614, 18 Atl. Rep. 990, 992; 1892, Horton v. Wilder, 48 Kan. 222, 29 Pac. Rep. 566; 1893, Hulings v. Lumber Co., 38 W. Va. 351, 18 S. E. Rep. 620.

4. Neither is an officer or director required to be a shareholder, unless the statute, charter, or a by-law so provides: 1841, Dispatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; 1847, Hoyt v. Bridgewater Copper M. Co., 6 N. J. Eq. 253; 1872, State v. McDaniel, 22 Ohio St. 354; 1889, Fey v. Peoria Watch Co., 32 Ill. App. 618; 1898, Bristol Bank & T. Co. v. Jonesboro B. & T. Co., 101 Tenn. 545. But statute, charter or by-law frequently so requires, and then generally they must be holders in their own right and in good faith: 1841, Dispatch Line, etc., v. Bellamy, etc., 12 N. H. 205; 1852, Bartholomew v. Bentley, 1 Ohio St. 37; 1889, Bainbridge v. Smith, 41 Ch. Div. 462, 33 Am. & E. C. C. 172, n. 182; 1891, *In re* Newcomb, 18 N. Y. Supp. (N. Y.) 16; 1892, Chemical National Bank v. Colwell, 132 N. Y. 250; 1893, State v. Mfs. Assn., 50 Ohio St. 145, 24 L. R. A. 252; 1894, Frank v. Lewis Foundry & M. Co., 24 Pittsburg L. J. (N. S.) 33. But see, 1891, *In re* Argus Printing Co., 1 N. Dak. 434, 26 Am. St. Rep. 639, 36 Am. & E. Corp. C. 101, 48 N. W. Rep. 347, 12 L. R. A. 781, and 1894, Greenough v. Alabama G. S. R. Co., 64 Fed. Rep. (C. C.) 22; 1898, Haines v. Kinderhook & H. Ry. Co., 33 App. Div. (N. Y.) 154.

SUBDIVISION II. FUNCTIONS OF MEMBERS, DIRECTORS AND OFFICERS.

ARTICLE I. MEMBERS AND DIRECTORS.

Sec. 193. The members of the corporation wield such powers as are extraordinary or unusual in their nature, whereas the directors manage the ordinary business of the corporation; and fundamental changes in the character or business usually require action by both the shareholders and the executive and administrative officers.

METROPOLITAN ELEVATED R. CO. v. MANHATTAN ELEVATED R. CO.[1]

1884. IN THE COURT OF COMMON PLEAS, CITY AND COUNTY OF NEW YORK.[2] 11 Daly's (N. Y. Com. Pleas) Rep. 373–528, 14 Abb. New Cas. 103–316, 15 Am. & Eng. R. Cas. 1–94.

[Action to set aside a tripartite agreement made between the New York Elevated Railroad Company, the Metropolitan Elevated Railway Company and the Manhattan Elevated Railway Company, whereby the first two were to lease their roads to the latter, which assumed the performance of certain contracts and the payment of certain bonds of the former; the Manhattan Company being unable to perform its part of the agreements, after much litigation, and by way of settlement, supplementary agreements were entered into which would enable the Manhattan Company to continue in the control of the roads on the basis of concessions made by the other companies. These supplemental agreements were executed by the Metropolitan Company, by authority of its directors, without the assent or ratification of the shareholders. New directors of this company being elected, it brought suit to set aside the supplemental agreements on the ground of fraud, breach of trust, etc., on the part of the former directors.]

VAN BRUNT, J. * * * That the directors of a corporation are agents seems to be clearly recognized in all the cases in which the relations of directors and shareholders to their corporation have been discussed.

It is said in Twin Lick Oil Co. v. Marbury (91 U. S. 587, 589) that the directors are the officers or agents of the corporation, and

[1] Statement of facts greatly abridged. Only so much of the opinion as relates to the authority of directors is given. Copies of all agreements and leases are given in 14 Abb. N. C., pp. 125, 130 and 166, and are valuable as forms.

[2] No appeal was taken. All parties accepted this as a correct exposition of the law. The most eminent counsel in New York were engaged in the case.

represent the interests of that abstract legal entity, and of those who own the shares of its stock.

In Cumberland Coal, etc., Co. v. Sherman (30 Barb. 553, 571) the court says: "There can be no question at the present time that a director of a corporation is the agent or trustee of the stockholders."

In Angell & Ames on Corporations, § 771, it is stated that "The stockholders compose the company, and the managers, directors or officers are their agents, necessary for the management of the affairs of the company, but they are not essential to its existence as such, not forming one of the integral parts."

In Abbott v. American Hard Rubber Co. (33 Barb. 578) the court says, at the foot of page 591: "Boards of directors are agents of the corporation to manage its affairs and carry out the purpose and object of its formation."

The directors thus being the agents of the corporation, what are their powers and from whence are they derived, and how must corporate powers residing in the corporation, the right to exercise which is not vested in the directors, be brought into operation? These questions are so intimately connected that they must be disposed of together.

The powers of directors are such as are conferred by the charter of their corporation and the laws pertaining thereto, and such corporate powers as are not conferred by law upon the directors remain in the corporation to be exercised, or at least set in motion by its component parts, the shareholders.

In the case at bar the charter provided that the directors were to manage the business and affairs of the company; and the question involved in this branch of the case is whether this language conferred the right to exercise every corporate power possessed by the corporation or merely to manage the ordinary business and affairs of the company for the carrying on of which it was organized, leaving the right remaining in the shareholders composing the company to set in motion or confirm corporate action within the limits of its powers, but extraordinary and unusual in its nature.

Within the sphere of their duties the right of the directors is undoubtedly exclusive, and, further, all corporate acts must be done through them, as they are exclusive executive and administrative authority, but, nevertheless, all corporate powers do not reside in the board of directors.

It is true that the court says, in McCullough v. Moss (5 Denio 567, 575), that: "When a charter invests a board with the power to manage the concerns of a corporation the power is exclusive in its character. The corporators have no right to interfere with it, and courts will not, even on a petition of a majority, compel the board to do an act contrary to its judgment."

That case was an action to recover upon a promissory note, which the corporation in the exercise of its legitimate business could have made, and the question presented was whether execution was proved. The note was signed by the president and secretary of the company,

but no authority from the board of directors, who, by the charter, were to conduct the affairs of the company, to the president and secretary, was shown. Some resolution of the shareholders was shown, but it had no relation to this question, and then the court uses the language above quoted. This case nowhere decides that the directors are clothed with all the corporate powers. It may be cited as an authority for the proposition that the shareholders can not compel the directors to act in any manner against their judgment in the exercise of a corporate power which remains in the corporation.

For example, if the power to lease was vested in the corporation, but the directors could not, because of the limitation in the charter, exercise this power, the shareholders could not cause the lease to be executed and delivered, nor could they compel the directors to execute and deliver the same against their own judgment; all that the shareholders could do would be to authorize the directors to act or confirm an act of the directors which would be incomplete without such ratification.

The case of Hoyt v. Thompson (19 N. Y. 207) is also claimed to be an authority against the suggestion made above; but upon an examination it will be seen that much is said in respect to the relation of directors to their corporation, and their rights and powers, and the sources from which they are derived, which was not at all necessary to the decision of the question involved, and is directly contrary to the principles announced in the United States Supreme Court in a case where the direct question was presented.

The adjudication in the case of Hoyt v. Thompson had necessarily to be put upon the ground that the act under investigation was "ordinary business," and in that case a distinction was plainly recognized between "ordinary business" and such as was within the corporate powers, but unusual and not coming within the general business of the corporation. The court held that although the charter of the corporation declared that its powers should be exercised by a board of directors, consisting of a specified number, yet the board might delegate its authority to agents or to a quorum of less than a majority of the number.

The court further held that when a by-law of the corporation declared that five directors should be a quorum for the transaction of "ordinary business," the general business of the corporation was embraced in the authority thus delegated, including as incident thereto the power of pledging or assigning assets of the corporation for the purpose of securing a debt, it appearing that such pledge was made for the purpose of enabling the corporation to continue its business; and this is all that this case decides which is pertinent to the questions involved in the case at bar.

It is true that the learned judge who wrote the opinion in the case of Hoyt v. Thompson uses the following language:

"The board of directors of a corporation do not stand in the same relation to the corporate body which a private agent holds toward his principal. In the strict relation of principal and agent, all the authority of the latter is derived by delegation from the former, and

if the power of substitution is not conferred in the appointment, it can not exist at all. But in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke, these powers. They are derivative only in the sense of being received from the state in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers."

The whole of this argument was devoted to establishing the power of the board of directors to delegate the authority to manage the ordinary business of the corporation to five of their number, and had no other purpose.

That the directors convened as a board are *not* the primary possessors of all the powers which the charter confers is expressly held by the United States Supreme Court in the case of the Railway Company v. Allerton, 85 U. S. (18 Wall.) 233[1]. In that case the charter provided as follows:

"Section 3. The capital stock of said corporation shall be one hundred thousand dollars, and may be increased from time to time at the pleasure of said corporation.

"Section 4. All the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint."

An increase of the capital stock of the corporation by the directors, without the assent of the stockholders, was held to be void, as beyond the power of the board of directors, although the charter provided that all the corporate powers of the corporation should be vested in and exercised by a board of directors, etc., and that the powers thus granted to the directors refer only to the ordinary business transactions of the corporation. The necessary conclusion to be drawn from the reasoning employed in that case is, that the board of directors are the managers of the business which the corporation is chartered to carry on, and they have the control and management of that business; but that they have no power to effect organic and fundamental changes in the corporation or its business without the consent of the corporation. The Metropolitan Company was chartered for the purpose of making, constructing, maintaining and operating a railway upon certain streets, avenues, thoroughfares and places in the city of New York. This was its business, and this was all the business upon the execution of which it entered. Could it be imagined that a change more fundamental could possibly be made than that a corporation, chartered for the above purpose, should lease its road and properties to another corporation and deliver possession of the same for all time, and thus change its business from that of making, constructing, maintaining and operating a railroad to that of receiving rent for the use of such road?

In considering this question, it is not at all improper to look for a moment at the result arising from a rule that the directors are the primary possessors of all the powers which the charter confers. If

[1] *Supra*, p. 442.

the board of directors have the power, without the assent of the shareholders, to lease the properties of the corporation for all time, then the shareholders may be deprived of, not only the administration of their property through its agents, the directors, but its very possession, without a moment's warning. A board of directors are elected for one year to manage the business and affairs of the corporation, such business being the operating and maintaining a railroad. At the time of their election the shareholders have no intimation that anything else is to be done by the directors, and the expectation is that such directors, at the end of their year in office, will turn over the property committed to them to their successors in office, with an account of their stewardship. Can it be possible that this board, elected for only one year, without any notice or warning, has the power to terminate the business of the corporation and transfer all the properties to another corporation? It seems to me clearly not. This is not the management of the business of the corporation. It is terminating the business, to carry on which it was incorporated. It is just as fundamental and radical a change as an increase of its capital stock, or the entering upon a new business by a corporation authorized by its charter can possibly be. Although I have not intended to quote as authority any decision except those of our own state, or of the United States Supreme Court, I must refer to the language used by the learned court in the case of Cass v. Manchester, 13 Rep. 167, in which it was held that directors had no power to make a lease, even for five years, without the consent of the shareholders. The court says:

"But if this conclusion is the result of too strict a construction of the charter, we are of the opinion that the power in question is not exercisable independently of the judgments of the stockholders. The directors and officers of a corporation are its exclusive executive agents, and, as it can only act by and through them, the powers vested in the corporation are deemed to be conferred upon its representatives, but they are, nevertheless, trustees for the stockholders. The law recognizes the stockholders as the ultimately controlling power in the corporation, because they may, at each authorized election, entirely change the organization, and may at any time keep the trustees within the line of faithful administration, by an appeal to a court of equity. Hence, it has been held that the directors of a corporation can not alone increase its capital stock, where such increase was authorized by its charter 'at the pleasure of said corporation,' and where it was provided that 'all powers of such corporation shall be vested in and exercised by a board of directors,' etc.; and this for the reason that the general power to perform all corporate acts, refers to the ordinary business transactions of 'the corporation,' and not to a change so fundamental and organic. (18 Wall. 234.)

"The change proposed is not organic, but it is thorough and fundamental, as it affects the administration of the company's affairs. It involves a withdrawal from the control and management of the stockholders of the entire property of the corporation for at least five years; it will preclude, for a like period, the exercise by the stockholders of

their judgment as to the particular character and method of conducting the business affairs of the corporation; and it denies to the stockholders any right of suggestion or disapproval of the conditions, when such relinquishment of important corporate faculties may be conceded. Surely a power which will be attended with such consequences does not relate 'to the ordinary business transactions,' nor 'to the orderly and proper administration of the affairs' of the company; and hence can not be exercised by the directors without express authority to them."

In opposition to this view is cited by the learned counsel for the defendants the case of The Excelsior Fire Ins. Co. (16 Abb. Pr. 8, 14), in which it was said:

"The statute says 'the company is authorized to reduce the number of its directors,' etc. It makes no provision for a meeting of the stockholders for that purpose. In the absence of any provision of that character the power is vested in the board of directors. Stockholders, as such, possess no powers in the management of a corporation, except specially authorized so to do by their charter. Their power ends with the election of the directors."

Also, in Elwell v. Dodge (33 Barb. 336, 339), the court says:

"A general resolution of the directors delegating the power to transfer property or choses in action to meet the exigencies of the company, or a ratification of this particular transfer, by act or resolution of the board, or acceptance and appropriation of the fruits of the transaction, if a special resolution authorizing the transfer and use of this note was wanting, would be sufficient to sustain the indorsement as the act of the company, even as against the company, and might have been proved had the precise point now made been then taken."

The language of Judge Selden, in the case of Robertson v. Bullions (11 N. Y. 243, 250), is also referred to. He says:

"What, then, are the powers, rights and obligations of this class of corporate officers, and to what extent has this court jurisdiction over them? * * * These officers are trustees in the same sense with the president and directors of a bank or of a railroad company. They are the officers of the corporation, to whom is delegated the power of managing its concerns for the common benefit of themselves and all other corporators, and over whom the body corporate retains control through its power to supersede them at every recurring election."

In the Matter of St. Ann's Church (23 How. Pr. 285), Judge Emott says:

"The officers thus chosen are not trustees in the sense in which an individual becomes or is made a private trustee; they are simply officers of the corporation. As such officers they represent the corporation; they are its managing agents, and they may act for the corporation as fully as the directors or agents of an ordinary corporation may act in its behalf. A corporation ordinarily acts through its officers, and through them only. The power of managing its concerns is delegated to its officers, and they are to manage them for the common benefit of themselves and all the other corporators. These

officers are liable, it may be, to judicial proceedings to control their action where it is fraudulent or destructive of the rights and interests of the corporation. They are responsible, however, more directly and practically, to the corporate body itself, through the power of the corporators to supersede them at their elections."

In the case of Dana v. The Bank of the United States, 5 Watts & S. (Pa.) 223, 246, the following passage occurs:

"This, I take it (that is to say, the election), is the utmost that the stockholders can do according to the tenor and design of the act under which they must all act until an election of the directors shall come around, when the former, if dissatisfied with the conduct of the latter in managing the affairs of the bank, may turn any one, or more, or the whole of them, out of the direction, and place it in other hands."

The claim made by virtue of these decisions is that the stockholders have no power to do anything in relation to any matter whatever pertaining to their corporation, except that if dissatisfied with the conduct of their directors in managing the affairs of the corporation they may turn them out at the next election; and this is certainly the language of all the above decisions. But how inapplicable is such remedy to an act of the directors which has terminated the business of the corporation and placed all its property in other hands for a thousand years; will that give back the property to the corporation; will that set right any maladministration if the directors had the power to thus act? Clearly not, and the language was intended to apply to cases where the action taken was neither radical nor fundamental in its character. For mismanagement of the ordinary business of the company, the turning out of the directors is a reasonably adequate redress; but when the directors have divested the company of all its property, it is difficult to see how any remedy is afforded by turning them out. Further, the courts of this state, as has already been seen, expressly recognize the fact, notwithstanding the decision above mentioned, that the shareholders have certain other rights and privileges beside that of electing directors, viz.: The right to be consulted in respect to change of business, increase of capital stock, dissolving and winding up the affairs of the corporation, sale of any portion of its property necessary for the transaction of its business, etc.

It need hardly, therefore, be necessary, in view of the principles which have controlled the decisions already quoted, to discuss further the question that there are powers reserved to the corporation which can not be exercised by the directors without the assent of the shareholders, and that the shareholders, under some circumstances, at least, may exercise other functions than simply those of electing their board of directors. Nor is it necessary now to dwell upon the scope of the act of 1839, or to attempt to show that by this act the Metropolitan Railway Company had the power to lease its road and properties. That such power existed is now conceded by the counsel for the plaintiff, in view of the decision of the court of appeals in the case of Woodruff v. The Erie R. Co., 93 N. Y. 609.

It is claimed by the counsel for the defendants that as far as this state is concerned, at least, the power of a board of directors to lease without the assent of shareholders has been expressly recognized by the legislature of this state, and various acts of the legislature are cited, in which leases of railroads and consolidations of railroads are authorized to be made as the directors shall determine. It seems to me, that instead of these acts being an evidence of a legislative construction that, under the act of 1839, directors had the power to lease without the assent of shareholders, it was only because such acts could not be performed by the directors alone that it was thought necessary to confer express powers upon the directors. If the power was conferred upon the corporation the directors alone could not exercise it, and, therefore, the legislature conferred the power expressly upon the directors.

Attention has also been called to various cases where the assent of stockholders is provided for as a condition of corporate action.

It will be seen that in every case it is a limitation upon corporate action by requiring more than a majority of stockholders to assent, or the conferring of a new power upon corporations and affixing the conditions upon which such power is to be exercised.

I fail to see that legislation of this character in any way aids us in the determination of this question. If, however, a solution of the problem is to be reached by the light of legislative interpretation, chapter 349 of the Laws of 1880 seems to clearly indicate the necessity of stockholders' assent, given at a stockholders' meeting, to the leasing of the property of a railroad corporation; otherwise, what necessity for legislative intervention in the terms of the act referred to?

The cases of Fisher v. New York Central, etc., R. Co., 46 N. Y. 644, and The Central Cross Town R. Co. v. The Twenty-third Street R. Co., 54 How. Pr. 183, are cited as deciding that a lease may be made without the assent of the shareholders. I have failed to find any such adjudication in either of those cases. All that can be claimed for those cases is that they decide that a lease of its road, made by a railroad corporation, is not *ultra vires*, and they decide nothing more upon the question of power.

No question is raised or discussed as to the manner of the exercise of its power by the corporation. There was no person before the court seeking to impeach the lease, who could be heard upon the question of stockholders' assent. The only question was whether the lease was not actually void, not voidable.

There is no question but that, admitting that a board of directors alone have no power to lease the property of their corporation, and if such lease is executed by the directors without the assent of the stockholders, such stockholders may accept the lease or repudiate it, and that if they allow the parties to the lease to go on under the lease without any action being taken in respect thereto, within a reasonable time, they will be held to have acquiesced in the lease and ratified it. Therefore, conceding that the corporation has the power to lease,

when the action is taken and the stockholders have acquiesced, no third party can raise the objection that the stockholders have not formally assented.

In the cases cited the leases had long been in operation, and the time for dissent had long passed, and, therefore, the only question that could be raised was the power of the corporation to act at all. After an examination of the reasoning in all the adujdicated cases (which has been by no means cursory), after a consideration of the principles governing the relations of shareholders of a corporation and its directors, conceding that a corporation can do no act unless specially authorized thereto, except through its board of directors, I am irresistibly brought to the conclusion that acts making organic or fundamental changes in the character or business of the corporation, can not be done either by the directors alone, or by the shareholders alone; but that both the executive and administrative officers of the corporation must unite with the shareholders of the corporation, who confer the right to act upon the individuals intrusted with the office of directors; that directors are merely temporary officers of the corporation, by virtue of their office entitled to manage the business and affairs of the corporation during their term of office, without interference from the stockholders, but they can not say that a new board of directors, although duly elected by the stockholders, shall never thereafter interfere with the management of the properties of the corporation, because they have placed their possessions and management into other hands forever. * * *

Judgment for plaintiff.

Note. **Functions of shareholders.**—In general shareholders have the right to:

(1) Elect directors. 1865, Mottu v. Primrose, 23 Md. 482; 1881, State v. Merchant, 37 O. S. 251.

(2) Pass on amendments to the charter. 1818, Marlborough Manufacturing Co. v. Smith, 2 Conn. 579; 1850, Commonwealth v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450, *supra*, p. 417; 1854, Stark v. Burke, 9 La. Ann. 341; 1870, Hope v. Mut. F. Ins. Co., 47 Mo. 93; 1873, Railway Co. v. Allerton, 85 U. S. 233, *supra*, p. 442; 1885, Baker's Appeal, 109 Pa. St. 461; 1886, Venner v. Atchison, etc., R., 28 Fed. Rep. 581; 1899, *In re* Election of Directors of Newark Lib. Assn., 64 N. J. L. 217, 265, 43 Atl. Rep. 435; 1899, Alexander v. Atlantic & W. P. R. Co., 108 Ga. 449, 33 S. E. Rep. 866. But see *contra*, 1855, Dayton & C. R. Co. v. Hatch, 1 Disn. (Ohio) 84; 1858, Illinois River R. Co. v. Zimmer, 20 Ill. 654.

(3) Increase or reduce stock. 1860, New York & N. H. R. v. Schuyler, 32 Barb. 534; 1871, Eidman v. Bowman, 58 Ill. 444, 11 Am. Rep. 90; 1873, Chicago City Ry. Co. v. Allerton, 85 U. S. (18 Wall.) 233, *supra*, p. 442; 1897, McNulta v. Corn Belt Bank, 164 Ill. 427.

(4) Make by-laws. 1766, Rex v. Spencer, 3 Burr. 1837; 1868, Stevens v. Davison, 18 Gratt. (Va.) 819, 98 Am. Dec. 692; 1875, Morton Gravel Co. v. Wysong, 51 Ind. 4; 1876, People v. Sterling B. C., 82 Ill. 457, *contra*; 1876, Thayer v. Herrick, Fed. Cas. 13868; 1877, United Fire Assn. v. Benseman, 4 Weekly N. C. (Pa.) 1; 1893, Brinkerhoff v. Lumber Co., 118 Mo. 447, *infra*, p. 1162; 1894, Watson v. Sidney, F. W. P. Co., 56 Mo. App. 145.

(5) Control the issue of stock. 1867, Curry v. Scott, 54 Pa. St. 270; 1868, McManus v. P. & R. Co., 58 Pa. St. 330; 1883, Jones v. Morrison, 31 Minn. 140; 1891, Arkansas V. Ag. Soc. v. Eicholtz, 45 Kan. 164.

(6) Investigate the management. 1880, Star Line v. Van Vliet, 43 Mich. 364.

(7) Check *ultra vires* acts, and in this case a single dissenting shareholder can enjoin such act. 1850, Bagshaw v. Eastern, etc., R., 19 L. J. (Ch.) 410; 1851, Beeman v. Rufford, 1 Sim. N. S. 550; 1867, Hoole v. Great Western R., L. R. 3 Ch. App. 262; 1895, Pollock v. Farmers' L. & T. Co., 157 U. S. 429.

(8) Prevent the sale of the corporate property, unless the corporation is a failing one. 1861, Abbott v. Hard Rubber Co., 33 Barb. 578; 1874, Middlesex, etc., R. v. Boston, etc., R., 115 Mass. 347; 1892, People v. Ballard, 134 N. Y. 269.

(9) Provide for the admission of members. 1837, Comw. v. Gill, 3 Whart. 228.

(10) Remove members or officers. 1758, Rex. v. Richardson, 1 Burr. 517; 1865, Evans v. Philadelphia Club, 50 Pa. St. 107, *infra*, p. 1165; 1882, Imperial Hydropathic Hotel Co., L. R. 23 Ch. Div. 1; 1898, *In re* Griffing Iron Co., 41 Atl. Rep. (N. J.) 931.

(11) Dissolve the corporation or surrender the corporate franchises. 1813, Smith v. Smith, 3 Dessau. Eq. (S. C.) 557; 1843 State v. Atch. R. Co., 5 Rob. (La.) 63; 1870, Wilson v. Proprietors of Central Bridge, 9 R. I. 590; 1897, Pringle v. Eltringham C. Co., 49 La. Ann. 301, 6 A. & E. C. C. (N. S.) 385; 1898, Forrester et al. v. B. & M. C. C. & S. M. Co., 21 Mont. 544, 55 Pac. Rep. 229.

Functions of directors. These are usually stated to be to select the inferior officers, agents and servants of the corporation, fix their compensation and direct their actions. 1880, Batchelor v. Planters' National Bank, 78 Ky. 435; 1891, Sheridan Elec. L. Co. v. Chatham National Bank, 127 N. Y. 517, 28 N. E. Rep. 467; 1898, Granger v. Am. Brew. Co., 25 Miscl. (N. Y.) 302. Also to control in the ordinary business affairs of the corporation, such as policy of management, expediency of acting or contracting, accepting consideration for corporate property, or service, or appropriation of corporate funds to advance the corporate enterprise. And in these particulars, if they act in good faith, the stockholders can not control their acts. 1840, Burrill v. Pres. and Dir. of Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; 1850, Gillis v. Bailey, 21 N. H. 149; 1850, Commw. v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; 1863, Miller v. Rutland, etc., R. Co., 36 Vt. 452; 1880, Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; 1881, Cleveland & M. R. Co. v. Himrod Furnace Co., 37 Ohio St. 321; 1884, Louisville, E. & St. L. Ry. Co. v. McVay, 98 Ind, 391; 1885, Donohoe v. Mariposa L. & M. Co., 66 Cal. 317; 1891, Ellerman v. Chicago J. R., 49 N. J. Eq. 217, 35 Am. & E. C. C. 388; 1892, Wheeler v. Pullman I. & S. Co., 143 Ill. 197; 1896, Blood v. La Serena, 113 Cal. 221, 4 Am. & E. C. C. (N. S.) 451 (this case holding that stockholders can not direct certain officers to do acts of ordinary business by resolution, unless the directors authorize such acts also); 1899, Cupit v. Park City Bank, 20 Utah 292, 58 Pac. Rep. 839; 1902, Friedman v. Lesher, 198 Ill. 21, 92 Am. St. R. 255 (assignment).

ARTICLE II. OTHER OFFICERS.

Sec. 194. The president, etc.

NATIONAL STATE BANK v. VIGO COUNTY NATIONAL BANK.[1]

1895. IN THE SUPREME COURT OF INDIANA. 141 Ind. Rep. 352–357, 50 Am. St. Rep. 330.

[Action to set aside two mortgages held by Vigo Bank, purporting to have been executed by Sanford Tool Company by its president, "on his own motion and without any authority or permission to him

[1] Statement of facts abridged. Only part of opinion given.

given by said tool company, or its directors or stockholders," and without their consent or subsequent ratification. The Vigo Bank demurred; demurrer sustained and exceptions reserved. Sustaining the demurrer is the error assigned.]

MONKS, J. * * * The statute under which the tool company was organized provides that the business of the corporation shall be managed by a board of directors, a majority of whom shall constitute a quorum. Section 3854, R. S. 1881; section 5054, R. S. 1894.

Under this statute the directors have full authority to act for the corporation, and represent it in all the matters relating to the corporate business. Brooklyn Gravel Road Co. v. Slaughter, 33 Ind. 185; Board, etc., v. Lafayette, etc., R. Co., 50 Ind. 85.

The president of a corporation, by virtue of his office merely, has very little authority to act for the corporation; his powers depend upon the nature of the company's business and the authority given him by the board of directors. The board of directors may invest him with authority to act as the chief executive officer of the company; this may be done by resolution or by acquiescence in the course of dealing and manner of transacting the business of the corporation. Taylor Corp., §§ 202, 236, 238, and notes; Martin v. Webb, 110 U. S. 7; Northern, etc., R. Co. v. Bastian, 15 Md. 494; Dougherty v. Hunter, 54 Pa. St. 380; Stokes v. New Jersey Pottery Co., 46 N. J. Law 240; Louisville, etc., R. W. Co. v. McVay, 98 Ind. 391; 17 Am. and Eng. Encyc. of Law, pp. 135, 136, 137, and notes; Jones Chat. Mort., § 51.

When a contract is made in the name of a corporation by the president, in the usual course of business, which the directors have the power to authorize him to make, or to ratify after it is made, the presumption is that the contract is binding on the corporation until it is shown that the same was not authorized or ratified. Patterson v. Robinson, 116 N. Y. 193; Eureka Iron and Steel Works v. Bresnahan, 60 Mich. 332; 1 Morawetz Corp., § 538; 1 Beach Corp., § 203; 17 Am. & Eng. Ency. of Law, p. 124.

One dealing with the president of a corporation, in the usual course of business, and within the powers which the president has been accustomed to exercise without objection from the directors, has the right to assume that the president has been invested with those powers. 1 Morawetz Corp., § 538; 1 Beach Corp., § 203; First Nat'l Bank v. Kimberlands, 16 W. Va. 555; Eureka Iron and Steel Works v. Bresnahan, *supra*.

Each paragraph of the complaint, however, alleges that said mortgages were executed without any authority whatever, and were never ratified after they were executed, and we are of the opinion that the second, third and fourth paragraphs were sufficient to withstand the demurrer. * * *

Judgment reversed.

Note. See, also, as to *functions and powers of president.* 1872, Smith v. Smith, 62 Ill. 493; 1874, Titus v. Cairo, etc., R. Co., 37 N. J. L. 98; 1881,

Mining Co. v. Anglo-Cal. Bank, 104 U. S. 192; 1891, Wait v. Nashua Armory Assn., 66 N. H. 581, 49 Am. St. Rep. 630, 14 L. R. A. 356; 1895, Merrill v. Hurley, 6 S. D. 592, 55 Am. St. Rep. 859; 1896, Board of Trade v. Nelson, 162 Ill. 431, 53 Am. St. Rep. 312; 1896, Ford v. Hill, 92 Wis. 188, 53 Am. St. Rep. 902; 1897, Swasey v. Emerson, 168 Mass. 118, 60 Am. St. Rep. 368; 1897, White v. Taylor, 113 Mich. 543; 1897, Jones v. Williams, 139 Mo. 1, 61 Am. St. Rep. 436, 37 L. R. A. 682; 1897, Brush, etc., Co. v. Montgomery, 114 Ala. 433, 21 So. Rep. 960; 1898, Pacific Bank v. Stone, 121 Cal. 202; 1899, Chambers v. Lancaster, 160 N. Y. 342, 54 N. E. Rep. 707; 1899, Moore Mercantile Co. v. Arnold, 108 Ga. 449, 34 S. E. Rep. 176; 1899, White v. Elgin Creamery Co., 108 Iowa 522, 79 N. W. Rep. 283; 1902, St. Clair v. Rutlege, 115 Wis. 583, 95 Am. St. R. 964.

As to functions and powers of vice-president, see: 1872, Smith v. Smith, 62 Ill. 493; 1890, Huse v. Ames, 104 Mo. 91; 1891, Wait v. Nashua Armory Assn., 66 N. H. 581, 49 Am. St. Rep. 630, 14 L. R. A. 356; 1892, Shaffer v. Hahn, 111 N. C. 1; 1895, Missouri, etc., Co. v. Faulkner, 88 Tex. 649; 1897, Pond v. Nat'l Mtg. & D. Co., 6 Kan. App. 750.

As to powers of secretary, see: 1889, Read v. Buffum, 79 Cal. 77; 1893, Hastings v. Brooklyn, etc., Co., 138 N. Y. 473; 1895, Wolf & Gaines v. Davenport, etc., R. Co., 93 Iowa 218; 1899, Colorado S. Co. v. Am. Pub. Co., 97 Fed. Rep. 843.

As to functions and powers of treasurer, see: 1881, Mining Co. v. Anglo-Cal. Bank, 104 U. S. 192; 1889, Craft v. South Boston R. Co., 150 Mass. 207, 5 L. R. A. 641; 1893, Merchants' National Bank v. Citizens', etc., Co., 159 Mass. 505; 1894, Appeal of Philler, 161 Pa. St. 157; 1898, Chicago, etc., Co. v. Chicago National Bank, 176 Ill. 224; 1899, Colorado S. Co. v. Am. Pub. Co., 97 Fed. Rep. 843; 1899, First National Bank v. Garretson, 107 Iowa 196.

As to functions and powers of *general managers, general superintendents, general agents, cashiers, road-master, division superintendent, station-master, yard-master, station agent, foreman, conductor*, etc., see: 1884, The Louisville, Evansville & St. L. R. Co. v. McKay, 98 Ind. 391, where the cases are collected and discussed.

Further as to powers of *general manager*, see: 1898, Helena National Bank v. Rocky, etc., Co., 20 Mont. 379, 63 Am. St. Rep. 628; 1898, Butte & B. Con. M. Co. v. Mont. Ore. P. Co., 21 Mont. 539, 10 Am. & E. C. C. (N. S.) 415, *note* 419; 1899, New South Brewing, etc., Co. v. Shuck, 20 Ky. L. Rep. 2005, 10 A. & E. C. C. (N. S.) 423; 1901, Spelman v. Gold Coin Mining Co., 26 Mont. 76, 91 Am. St. R. 402, 66 Pac. 597.

Subdivision III. Internal Relations and Constitution.

Article I. The Corporate Franchises.

Sec. 195. The franchises of the corporation itself. "A corporation aggregate is an artificial body of men, composed of divers constituent members, *ad instar corporis humani*, the ligaments of which body politic or artificial body are the franchises and liberties thereof, *which bind and unite all its members together;* and the whole frame and essence of the corporation consists therein." Argument of Sergeant Pemberton in King v. London, Carth. 217 (1692).

See, also, People v. Utica Insurance Co., 15 Johns. (N. Y.) 358, *supra*, p. 113; Spring Valley Water-Works v. Schottler, 62 Cal. 69, *supra*, p. 120, on pp,

121, 123, 129; State, *ex rel.* Waring, v. Medical Society, 38 Ga. 608, *supra*, p. 136, on p. 137; Fietsam v. Hay, 122 Ill. 293, *supra*, p. 141, on pp. 141-142; Memphis & L. R. Co. v. Railroad Commrs., 112 U. S. 609, *supra*, p. 143, on pp. 146-147; Wales v. Stetson, 2 Mass. 143, *supra*, p. 150, on p. 151; Higgins v. Downward, 8 Hous. (Del.) 227, *supra*, p. 152, on pp. 155-156. Note to article iv, *supra*, p. 157.

Note. It has been said that "All the functions of a corporation are in one sense franchises. The right to hold property in the corporate name, to sue and be sued in that capacity, to have and use a corporate seal, and by that to contract, and some others perhaps, are franchises, which constitute the very definition of a corporation."—Chief Justice Redfield, in State v. Boston, etc., R. Co., 25 Vt. 442 (1853). Also Perley, C. J., in Pierce v. Emery, 32 N. H. 507 (1856), says: "A corporation is itself a franchise belonging to the members of the corporation; and a corporation, being itself a franchise, may hold other franchises, as rights and franchises of the corporation, * * * and being itself a franchise, consists and is made up of its rights and franchisees."

It is sometimes difficult to distinguish between a franchise and a mere license. Many of the courts hold that the right of way of a street railroad company or the right to lay gas or water pipes, or erect telegraph or telephone poles in the streets of a city granted by the city council is a *franchise*. See, 1883, Hovelman v. Kansas City R. Co., 79 Mo. 632, on 643; 1885, New Orleans, etc., R. Co. v. Delamore, 114 U. S. 501; 1888, State v. Madison, etc., R. Co., 72 Wis. 612; 1888, People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684, 2 L. R. A. 255; 1894, Detroit Citizens' S. R. Co. v. Detroit, 64 Fed. Rep. 628, 26 L. R. A. 667; 1896, Stevens v. City of Muskegon, 111 Mich. 72; 1897, Tower v. Tower & S. S. R. Co., 68 Minn. 500, 64 Am. St. Rep. 493; 1897, Wright v. Milwaukee, etc., R. Co., 95 Wis. 29, 60 Am. St. Rep. 74; 1897, Milwaukee Elec. R. Co. v. Milwaukee, 95 Wis. 39, 60 Am. St. Rep. 81; 1897, State v. East Fifth St. R. Co., 140 Mo. 539, 62 Am. St. Rep. 742, 38 L. R. A. 218; 1898, Suburban etc., Co. v. Inhabitants, etc., 41 Atl. Rep. 865 (N. J. Ch.); 1898, Ghee v. Northern Union Gas Co., 158 N. Y. 510; 1899, People v. Suburban R. Co., 178 Ill. 594; 1899, East St. L. C. R. Co. v. E. St. L., 182 Ill. 433; 1899, Township of Hamtramck v. Rapid R., 122 Mich. 472, 81 N. W. Rep. 337.

Other cases hold such grants to be licenses only. See, 1878, People v. Mutual, etc., Co., 38 Mich. 154; 1885, Galveston, etc., R. Co. v. Gulf City, etc., R. Co., 63 Texas 529; 1888, Atchison, etc., R. Co. v. Nave, 38 Kan. 744, 5 Am. St. Rep. 800, note 804; 1893, Lake Roland El. Co. v. Baltimore, 77 Md. 352, 20 L. R. A. 126; 1894, City of Belleville v. Citizens', etc., R. Co., 152 Ill. 171, 26 L. R. A. 681; See 1901, People v. Cent. U. Tel. Co., 192 Ill. 307, 85 Am. St. R. 338.

Sec. 196. Franchises of the members. "It is likewise a franchise for a number of persons to be incorporated and subsist as a body politic; with power to maintain perpetual succession, and do other corporate acts; *and each individual member of such corporation is also said to have a franchise or freedom.*" Blackstone's Comm., Bk. II, p. *37.

See, also, State, *ex rel.* Waring, v. Medical Society, 38 Ga. 608, *supra*, p. 136; Fietsam v. Hay, 122 Ill. 293, *supra*, p. 141; Memphis & L. R. Co. v. R. Commissioners, 112 U. S. 609, *supra*, p. 143.

Note. In Board of Trade of Chicago v. The People, 91 Ill. 80, it was held that a member did not have a *franchise* in his membership sufficient to give a court of appeals jurisdiction in appeal, under a statute authorizing appeals in cases involving a franchise. The court's argument is given above in note on pp. 161, 162. See cases *infra* on the right of corporations to expel members, p. 1165.

ARTICLE II. CONTRACTS CONTAINED IN THE CHARTER OF A CORPORATION.

Sec. 197. (1) In general. "The charter of a corporation having a capital stock is a contract between three parties, and forms the basis of three distinct contracts. The charter is a contract between the state and the corporation; second, it is a contract between the corporation and the stockholders; third, it is a contract between the stockholders and the state." Cook Stock and Stockholders, 3d ed.; § 492.

"The contracts which are ordinarily found in the charter of a private corporation fall into three classes: (1) Those between the state and the incorporators. * * * (2) Contracts between the corporation and the stockholders. * * * (3) Contracts between the corporation and persons dealing with the corporation, such as statements in the charter or law, that the capital stock shall be a certain amount." Elliott Corporations, § 98; Beach Corp., §§ 22–24.

By incorporation for business purposes, the corporators acquire from the state a franchise to employ certain methods of acting (which they could not otherwise lawfully exercise), and certain designated funds or property, in attaining or furthering certain specified objects. It is the dedication of certain funds, by the mutual and express consent of the state and the corporators, to the attainment of certain purposes, in a certain way. Because the state believes the purposes desirable, it authorizes the peculiar method; because the corporators deem the method necessary or desirable, and the end profitable, they contribute the funds. The peculiar method is by the state authorizing a changing body of persons, through a specified form of organization, and under a designated name, to act and be considered as one person in whom are vested the funds contributed, and upon whom is placed the duty of applying them to the purposes named. The state has the right to have the funds so applied; so does the corporation; so do the members; so do those who are selected to act in the corporate name; so do those who become creditors in the performance of the corporate functions. In this way there arise many implied contracts or grants of franchises, as to the purposes to be accomplished, the method of accomplishing them, and the application of the funds thereto, protected under the national constitutional provision that "no state shall pass any law impairing the obligation of contracts." (Art. i, § 10, cl. 1.

Sec. 198. Same.

TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD.[1]

1819. IN THE SUPREME COURT OF THE UNITED STATES. 4 Wheaton (17 U. S.) Rep. 518–715.

February 2, 1819. The opinion of the court was delivered by MARSHALL, Ch. J. This is an action of trover, brought by the trustees of Dartmouth College against William H. Woodward, in the state court of New Hampshire, for the book of records, corporate seal and other corporate property, to which the plaintiffs allege themselves to be entitled. A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June, and on the 18th of December, 1816, be valid and binding on the trustees, without their assent, and not repugnant to the constitution of the United States; otherwise, it finds for the plaintiffs. The superior court of judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States?

This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined: and the opinion of the highest law tribunal of a state is to be revised —an opinion which carries with it intrinsic evidence of the diligence, of the ability and the integrity with which it was formed. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the constitution. But the American people have said, in the constitution of the United States, that "no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." In the same instrument, they have also said, "that the judicial power shall extend to all cases in law and equity arising under the constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink.

[1] Facts are sufficiently stated in the opinions, and *supra*, p. 426. Arguments, and parts of the opinions of Story and Washington, JJ., omitted. The case was argued in the state court by Mason, Smith and Webster, for plaintiffs, and by Sullivan and Bartlett, for defendants; in the United States Supreme Court by Webster and Hopkinson, for plaintiff in error, and by Holmes and William Wirt, attorney-general, for defendants in error. The decision of the state court is reported (without the arguments of counsel) in 1 N. H. 111, and reprinted (with the arguments of counsel) in 65 N. H. 473. Farrar's Report (1817, 1819) contains decisions of both courts. The original charter and the acts of the state legislature are given in full in 4 Wheat. 519–551.

The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled "an act to amend the charter and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives of New Hampshire, and the governor and lieutenant-governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect. The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

[**The circumstances constituted a contract.**] *It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated, that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction every ingredient of a complete and legitimate contract is to be found.* The points for consideration are: 1. Is this contract protected by the constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?

1. [**Character of contracts protected by the constitution.**] On the first point it has been argued that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens; would extend to offices held within a state, for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious inter-

ference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt, and to restrain the legislature in future from violating the right to property. That anterior to the formation of the constitution a course of legislation had prevailed in many, if not in all, of the states which weakened the confidence of man in man, and embarrassed all transactions between individuals by dispensing with a faithful performance of engagements. To correct this mischief by restraining the power which produced it the state legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property under which some individual could claim a right to something beneficial to himself, and that since the clause in the constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description, to cases within the mischief it was intended to remedy.

The general correctness of these observations can not be controverted. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It has never been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunals, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

The parties in this case differ less on general principles, less on true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals, on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed while in being; whether, if they be without personal representatives, who may feel injured by a violation of the compact, the trustees be not so completely their representatives, in the eye of the law, as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter. It becomes then the duty of the court most seriously to examine this charter and to ascertain its true character.

[Provisions of the charter.] From the instrument itself, it appears that about the year 1754 the Rev. Eleazer Wheelock established, at his own expense and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England for carrying on and extending his undertaking. In this pious work he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others trustees of the money which had been and should be contributed; which appointment Dr. Wheelock confirmed by a deed of trust, authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut river, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English; and the proprietors in the neighborhood having made large offers of land on condition that the college should there be placed. Dr. Wheelock then applied to the crown for an act of incorporation; and represented the expediency of appointing those whom he had, by his last will, named as trustees in America to be members of the proposed corporation. "In consideration of the premises, for the education and instruction of the youth of the Indian tribes," etc., "and also of English youth, and any others," the charter was granted, and the trustees of Dartmouth College were, by that name, created a body corporate, with power, for the use of the said college, to acquire real and personal property, and to pay the president, tutors and other officers of the college such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of

said college," president thereof, with power, by his last will, to appoint a successor, who is to continue in office until disapproved by the trustees. In case of vacancy the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, being one of the trustees, shall exercise the office until an appointment shall be made. The trustees have power to appoint and displace professors, tutors and other officers, and to supply any vacancies which may be created in their own body by death, resignation, removal or disability; and also to make orders, ordinances and laws for the government of the college, the same not being repugnant to the laws of Great Britain, or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees. This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college, was conveyed to, and vested in, the corporate body.

From this brief review of the most essential parts of the charter, it is apparent that the funds of the college consisted entirely of private donations. It is, perhaps, not very important who were the donors. The probability is, that the Earl of Dartmouth and the other trustees in England were, in fact, the largest contributors. Yet the legal conclusion, from the facts recited in the charter, would probably be that Dr. Wheelock was the founder of the college. The origin of the institution was undoubtedly the Indian charity school, established by Dr. Wheelock, at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent; and the trustees who received the money were appointed by, and act under, his authority. It is not too much to say that the funds were obtained by him in trust, to be applied by him to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him in his last will as the trustees of his charity school compose a part of the corporation, and he is declared to be the founder of the college, and its president for life. Were the inquiry material, we should feel some hesitation in saying that Dr. Wheelock was not, in law, to be considered as the founder (1 Bl. Comm. 481) of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn, and these salaries lessen the expense of education to the students. It is then an eleemosynary (1 Bl. Comm. 471), and so far as respects its funds, a private, corporation.

[**Character of the corporation created.**] Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority? That education is an object of

national concern, and a proper subject of legislation, all admit. That there may be an institution, founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Doctor Wheelock, as the keeper of his charity school, instructing the Indians in the art of reading and in our holy religion, sustaining them at his own expense, and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have supposed that his private funds, or those given by others, were subject to legislative management, because they were applied to the purposes of education. When, afterwards, his school was enlarged, and the liberal contributions made in England and in America enabled him to extend his care to the education of the youth of his own country, no change was wrought in his own character or in the nature of his duties. Had he employed assistant tutors with the funds contributed by others, or had the trustees in England established a school, with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors; and the fact that they were employed in the education of youth could not have converted them into public officers, concerned in the administration of public duties, or have given the legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust, uncontrolled by legislative authority.

Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn; for its foundation is purely private and eleemosynary—not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are con-

sidered as the same, and may act as a single individual. They enable a corporation to manage its own affairs and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing the bodies of men in succession with these qualities and capacities that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power or a political character than immortality would confer such power or character on a natural person. It is no more a state instrument than a natural person exercising the same powers would be. If, then, a natural person employed by individuals in the education of youth or for the government of a seminary in which youth is educated would not become a public officer or be considered as a member of the civil government, how is it that this artificial being, created by law for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property in a particular form and for particular purposes, has the government a consequent right substantially to change that form or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases the sole consideration of the grant. In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable or public-spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design securely and certainly without an incorporating act. They apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, provided the government will confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power

which is not only not expressed, but is in direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither, in reason, can the incorporating act change the character of a private eleemosynary institution.

We are next led to the inquiry for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken, and the application for an act of incorporation, proceeds thus: "Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and also that the best means of education be established in our province of New Hampshire, for the benefit of said province, do of our special grace," etc. Do these expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighborhood? On this point, we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate that the "benefit intended for the province" is that which is derived from "establishing the best means of education therein," that is, from establishing in the province Dartmouth College, as constituted by the charter. But if these words, considered alone, could admit of doubt, that doubt is completely removed by an inspection of the entire instrument.

The particular interests of New Hampshire never entered into the minds of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these New Hampshire would participate, but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but becacse it was "most subservient to the great ends in view," and because liberal donations of land were offered by the proprietors, on condition that the institution should be there established. The real advantages from the location

of the college are, perhaps, not less considerable to those on the west than to those on the east side of Connecticut river. The clause which constitutes the incorporation, and expresses the object for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth, and any others." So that the objects of the contributors, and the incorporating act, were the same; the promotion of Christianity, and of education generally, not the interests of New Hampshire particularly.

From this review of the charter it appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally named by the founder and invested with the power of perpetuating themselves; that they are not public officers; nor is it a civil institution, participating in the administration of government, but a charity school, or a seminary of education, incorporated for the preservation of its property and the perpetual application of that property to the objects of its creation.

[**Right of trustees to complain.**] Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest so long as the corporation shall exist.

Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract as the constitution intended to withdraw from the power of state legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the constitution is solicitous, and to which its protection is extended.

The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him and them to perpetuate their beneficent intention. It was granted. An artificial, immortal being was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors or their posterity, but for something, in their opinion, of inestimable

value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives; they are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty as they would themselves have distributed it had they been immortal. So, with respect to the students who are to derive learning from this source, the corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount collectively to a most important interest. These are, in the aggregate, to be exercised, asserted and protected by the corporation. They were as completely out of the donors, at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

According to the theory of the British constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion which that government has chosen to avoid, but its power is not questioned. Had parliament, immediately after the emanation of this charter and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then, as now, the donors would have no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interests in the property confided to their protection. Yet the contract would, at that time, have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice and in law, it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.

[Method of interpreting the constitutional provision.] It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution when the clause under consideration was introduced into that instrument. It is

probable that interferences of more frequent occurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further and to say that had this particular case been suggested the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.

On what safe and intelligible ground can this exception stand? There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the constitution not warranted by its words? Are contracts of this description of a character to excite so little interest that we must exclude them from the provisions of the constitution as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration as to compel us, or rather permit us, to say that these words, which were introduced to give stability to contracts, and which, in their plain import comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations they are identified with, and personated by, the trustees; and their rights are to be defended and maintained by them. Religion, charity and education are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court and claim or defend by the corporation. Are they of so little estimation in the United States that contracts for their benefit must be excluded from the protection of words, which in their natural import include them? Or do such contracts so necessarily require new modeling by the authority of the legislature that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration?

All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited proves that they are not. The framers of the constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science by reserving to the government of the Union the power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." They have, so far, withdrawn science and the useful arts from the action of the state governments. Why, then, should they be supposed so regardless of contracts made for the advancement of literature, as to intend to exclude them from provisions made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the constitution; neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind to enable us to determine that one great inducement to these gifts is the conviction felt by the giver that the disposition he makes of them is immutable. It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time that an act of incorporation constitutes no security for the institution; believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive, hope, that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our constitution were strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy and repeated interferences produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful to justify the construction which makes it.

[**Reasons suggested for making an exception of such corporations.**] The motives suggested at the bar grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption, that if allowed to continue themselves, they now are, and must remain forever, what

they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the legislature. It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees, deriving their power from a regal source, must, necessarily, partake of the spirit of their origin; and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college and to guide the students.

Before we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter by the crown; but at whose suggestion were they named? By whom were they selected? The charter informs us. Dr. Wheelock had represented "that for many weighty reasons it would be expedient that the gentlemen whom he had already nominated, in his last will, to be trustees in America should be of the corporation now proposed." When, afterwards, the trustees are named in the charter, can it be doubted that the persons mentioned by Dr. Wheelock in his will were appointed? Some were probably added by the crown, with the approbation of Dr. Wheelock. Among these is the doctor himself. If any others were appointed at the instance of the crown, they are the governor, three members of the council and the speaker of the house of representatives of the colony of New Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the crown. If, in the revolution that followed, they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation, which suspicion might excite, would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably with his approbation, were among the most eminent and respectable individuals in New Hampshire.

The only evidence which we possess of the character of Dr. Wheelock is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavors, would lead to the opinion that he united a sound understanding to that humanity and benevolence which suggested his undertaking. It surely can not be assumed that his trustees were selected without judgment. With as little probability can it be assumed, that while the light of science and of liberal principles pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that while the human race is rapidly advancing, they are stationary. Reasoning *a priori*, we should believe, that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors; men as well fitted for the government of a college as those who might be

chosen by other means. Should this reasoning ever prove erroneous, in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere possibility of the contrary would not justify a construction of the constitution which should exclude these contracts from the protection of a provision whose terms comprehend them.

The opinion of the court, after mature deliberation, is that this is a contract, the obligation of which can not be impaired without violating the constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this court.

2. [**Impairment of the obligation of this contract.**] We next proceed to the inquiry whether its obligation has been impaired by those acts of the legislature of New Hampshire to which the special verdict refers?

From the review of this charter which has been taken it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown it was expressly stipulated that this corporation thus constituted should continue forever, and that the number of trustees should forever consist of twelve, and no more. By this contract the crown was bound, and could have made no violent alteration in its essential terms without impairing its obligation.

[**Effect of the American revolution.**] By the revolution the duties, as well as the powers, of government devolved on the people of New Hampshire. It is admitted that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department. It is too clear to require the support of argument that all contracts and rights respecting property remained unchanged by the revolution. The obligations then which were created by the charter to Dartmouth College were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter, at any time prior to the adoption of the present constitution of the United States, would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature to be found in the constitution of the state. But the constitution of the United States has imposed this additional limitation, that the legislature of a state shall pass no act "impairing the obligation of contracts."

It has been already stated that the act to "amend the charter, and enlarge and improve the corporation of Dartmouth College," increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

[**Effect of an act to amend the charter.**] On the effect of this law, two opinions can not be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees, appointed according to the will of the founder expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the state. The will of the state is substituted for the will of the donors in every essential operation of the college. This is not an immaterial change. The founders of the college contracted not merely for the perpetual application of the funds which they gave to the objects for which those funds were given; they contracted also to secure that application by the constitution of the corporation. They contracted for a system which should, so far as human foresight can provide, retain forever the government of the literary institution they had formed in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is reorganized, and reorganized in such a manner as to convert a literary institution, molded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given.

In the view which has been taken of this interesting case, the court has confined itself to the rights possessed by the trustees as the assignees and representatives of the donors and founders for the benefit of religion and literature. Yet, it is not clear that the trustees ought to be considered as destitute of such beneficial interest in themselves as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea that trustees may also be tutors with salaries. The first president was one of the original trustees; and the charter provides that in case of vacancy in that office, "the senior professor or tutor, being one of the trustees, shall exercise the office of president until the trustees shall make choice of and appoint a president." According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained; if it were admitted that those contracts only are protected by the constitution, a beneficial interest in which is vested in the party who appears in court to assert that interest, yet it is by no means clear that the trustees of Dartmouth College have no beneficial interest in themselves. But the court has deemed it unnecessary to investigate this particular point,

being of opinion, on general principles, that in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution.

It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the state court must, therefore, be reversed.

WASHINGTON, Justice. * * * 1. [**What is a contract?**] It may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other. Powell on Cont. 6. Under this definition, says Mr. Powell, it is obvious that every feoffment, gift, grant, agreement, promise, etc., may be included, because in all there is a mutual consent of the minds of the parties concerned in them upon an agreement between them respecting some property or right that is the object of the stipulation. He adds, that the ingredients requisite to form a contract are, parties, consent and an obligation to be created or dissolved; these must all concur, because the regular effect of all contracts is, on one side, to acquire, and on the other to part with, some property or rights; or to abridge, or to restrain natural liberty, by binding the parties to do, or restraining them from doing something which before they might have done or omitted. If a doubt could exist that a grant is a contract, the point was decided in the case of Fletcher v. Peck, 6 Cranch 87, in which it was laid down that a contract is either executory or executed; by the former, a party binds himself to do, or not to do, a particular thing; the latter is one in which the object of the contract is performed, and this differs in nothing from a grant; but whether executed or executory, they both contain obligations binding on the parties, and both are equally within the provisions of the constitution of the United States, which forbids the state governments to pass laws impairing the obligation of contracts.

If, then, a grant be a contract, within the meaning of the constitution of the United States, the next inquiry is, whether the creation of a corporation by charter be such a grant as includes an obligation of the nature of a contract, which no state legislature can pass laws to impair? *A corporation is defined by Mr. Justice Blackstone (2 Bl. Comm. 37) to be a franchise. It is, says he, "a franchise for a number of persons, to be incorporated and exist as a body politic, with a power to maintain perpetual succession, and to do corporate acts, and each individual of such corporation is also said to have a franchise or freedom." This franchise, like other franchises, is an incorporeal hereditament, issuing out of something real or personal, or concerning or annexed to, and exercisable within a thing corporate. To this grant, or this franchise, the parties are the king and the persons for whose benefit it is created, or trustees for them. The*

assent of both is necessary. The subjects of the grant are not only privileges and immunities, but property, or, which is the same thing, a capacity to acquire and to hold property in perpetuity. Certain obligations are created, binding both on the grantor and the grantees. On the part of the former, it amounts to an extinguishment of the king's prerogative to bestow the same identical franchise on another corporate body, because it would prejudice his prior grant. (*2 Bl. Comm.* 37.) *It implies, therefore, a contract not to reassert the right to grant the franchise to another, or to impair it.* There is also an implied contract that the founder of a private charity, or his heirs, or other persons appointed by him for that purpose, shall have the right to visit and to govern the corporation of which he is the acknowledged founder and patron, and also, that in case of its dissolution the reversionary right of the founder to the property, with which he had endowed it, should be preserved inviolate.

The rights acquired by the other contracting party are those of having perpetual succession, of suing and being sued, of purchasing lands for the benefit of themselves and their successors, and of having a common seal and of making by-laws. The obligation imposed upon them, and which forms the consideration of the grant, is that of acting up to the end or design for which they were created by their founder. Mr. Justice Buller, in the case of the King v. Pasmore, 3 T. R. 246, says that the grant of incorporation is a compact between the crown and a number of persons, the latter of whom undertake, in consideration of the privileges bestowed, to exert themselves for the good government of the place. If they fail to perform their part of it there is an end of the compact. The charter of a corporation, says Mr. Justice Blackstone (2 Bl. Comm. 484), may be forfeited through negligence or abuse of its franchises, in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the corporation is void. It appears to me, upon the whole, that these principles and authorities prove, incontrovertibly, that a charter of incorporation is a contract.

2. [**Impairment of this contract.**] The next question is, do the acts of the legislature of New Hampshire of the 27th of June and 18th and 26th of December, 1816, impair this contract within the true intent and meaning of the constitution of the United States? Previous to the examination of this question, it will be proper clearly to mark the distinction between the different kinds of lay aggregate corporations, in order to prevent any implied decision by this court of any other case than the one immediately before it.

We are informed by the case of Philips v. Bury, 1 Ld. Raym. 5; s. c. 2 T. R. 346, which contains all the doctrine of corporations connected with this point, that there are two kinds of corporations aggregate, viz., such as are for public government and such as are for private charity. The first are those for the government of a town, city or the like; and being for public advantage, are to be governed according to the law of the land. The validity and justice of their private laws and constitutions are examinable in the king's courts. Of

these there are no particular founders, and consequently no particular visitor; there are no patrons of these corporations. But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them, and are to be visited by them or their heirs, or such other persons as they may appoint. The only rules for the government of these private corporations are the laws and constitutions assigned by the founder. This right of government and visitation arises from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law invests him with the necessary power of inspecting and regulating it. The authorities are full to prove that a college is a private charity, as well as an hospital, and that there is, in reality, no difference between them except in degree, but they are within the same reason, and both eleemosynary.

These corporations, civil and eleemosynary, which differ from each other so especially in their nature and constitution, may very well differ in matters which concern their rights and privileges, and their existence and subjection to public control. The one is the mere creature of public institution, created exclusively for the public advantage without other endowments than such as the king or government may bestow upon it, and having no other founder or visitor than the king or government, the *fundator incipiens*. The validity and justice of its laws and constitution are examinable by the courts having jurisdiction over them; and they are subject to the general law of the land. It would seem reasonable that such a corporation may be controlled, and its constitution altered and amended by the government, in such manner as the public interest may require. Such legislative interferences can not be said to impair the contract by which the corporation was formed, because there is, in reality, but one party to it, the trustees or governors of the corporation being merely the trustees for the public, the *cestui que trust* of the foundation. These trustees or governors have no interest, no privileges or immunities, which are violated by such interference, and can have no more right to complain of them than an ordinary trustee, who is called upon in a court of equity to execute the trust. They accepted the charter for the public benefit alone, and there would seem to be no reason why the government, under proper limitations, should not alter or modify such a grant at pleasure. But the case of a private corporation is entirely different. That is the creature of a private benefaction for a charity or private purpose. It is endowed and founded by private persons, and subject to their control, laws and visitation, and not to the general control of the government; and all these powers, rights and privileges flow from the property of the founder in the funds assigned for the support of the charity. Although the king, by the grant of the charter, is, in some sense, the founder of all eleemosynary corporations, because, without his grant they can not exist, yet the patron or endower is the perficient founder, to whom belongs, as of right, all the powers and privileges which

have been described. With such a corporation, it is not competent for the legislature to interfere. It is a franchise, or incorporeal hereditament, founded upon private property, devoted by its patron to a private charity, of a peculiar kind, the offspring of his own will and pleasure, to be managed and visited by persons of his own appointment, according to such laws and regulations as he, or the persons so selected, may ordain.

It has been shown that the charter is a contract on the part of the government, that the property with which the charity is endowed shall be forever vested in a certain number of persons and their successors, to subserve the particular purposes designated by the founder and to be managed in a particular way. If a law increases or diminishes the number of the trustees, they are not the persons which the grantor agreed should be managers of the fund. If it appropriate the fund intended for the support of a particular charity to that of some other charity, or to an entirely different charity, the grant is in effect set aside, and a new contract substituted in its place, thus disappointing completely the intentions of the founder by changing the objects of his bounty. And can it be seriously contended that a law which changes so materially the terms of a contract does not impair it? In short, does not every alteration of a contract, however unimportant, even though it be manifestly for the interest of the party objecting to it, impair its obligations? If the assent of all the parties to be bound by a contract be of its essence, how is it possible that a new contract, substituted for or engrafted on another without such assent, should not violate the old charter? * * *

Upon the whole, I am of opinion that the above acts of New Hampshire, not having received the assent of the corporate body of Dartmouth College, are not binding on them, and, consequently, that the judgment of the state court ought to be reversed.

JOHNSON, Justice, concurred, for the reasons stated by the chief justice.

LIVINGSTON, Justice, concurred, for the reasons stated by the chief justice, and Justices WASHINGTON and STORY.

STORY, Justice. This is a cause of great importance, and as the very learned discussions as well here as in the state court show, of no inconsiderable difficulty. There are two questions to which the appellate jurisdiction of this court properly applies. 1. Whether the original charter of Dartmouth College is a contract within the prohibitory clause of the constitution of the United States, which declares that no state shall pass any "law impairing the obligation of contracts?" 2. If so, whether the legislative acts of New Hampshire of the 27th of June, and of the 18th and 27th of December, 1816, or any of them, impair the obligations of that charter?

[Nature of an aggregate corporation at common law.] It will be necessary, however, before we proceed to discuss these questions, to institute an inquiry into the nature, rights and duties of aggregate corporations at common law; that we may apply the principles drawn from

this source to the exposition of this charter, which was granted emphatically with reference to that law.

An aggregate corporation, at common law, is a collection of individuals, united into one collective body, under a special name, and possessing certain immunities, privileges and capacities, in its collective character, which do not belong to the natural persons composing it. Among other things, it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties. It is, in short, an artificial person, existing in contemplation of law and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage. Hence, such a corporation may sue and be sued by its own members, and may contract with them in the same manner as with any strangers. 1 Bl. Comm. 469, 475; 1 Kyd on Corp. 13, 69, 189; 1 Wooddes. 471, etc. A great variety of these corporations exist in every country governed by the common law, in some of which the corporate existence is perpetuated by new elections, made from time to time; and in others, by a continual accession of new members, without any corporate act. *Some of these corporations are, from the particular purposes to which they are devoted, denominated spiritual and some lay; and the latter are again divided into civil and eleemosynary corporations. It is unnecessary, in this place, to enter into any examination of civil corporations. Eleemosynary corporations are such as are constituted for the perpetual distribution of the free-alms and bounty of the founder, in such manner as he has directed;* and in this class are ranked hospitals for the relief of poor and impotent persons, and colleges for the promotion of learning and piety, and the support of persons engaged in literary pursuits. 1 Bl. Comm. 469, 470, 471, 482; 1 Kyd on Corp. 25; 1 Wooddes. 474; Attorney-General v. Whorwood, 1 Ves. 534; St. John's College v. Todington, 1 W. Bl. 84; s. c. 1 Burr. 200; Philips v. Bury, 1 Ld. Raym. 5; s. c. 2 T. R. 346; Porter's Case, 1 Co. 22*b*, 23.

Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties, and in many respects they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government is, in the strictest sense, a public corporation. So, an hospital created and endowed by the government for general charity. But a

bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge and turnpike companies. In all these cases the uses may, in a certain sense, be called public, but the corporations are private, as much so, indeed, as if the franchises were vested in a single person.

This reasoning applies in its full force to eleemosynary corporations. An hospital, founded by a private benefactor, is, in point of law, a private corporation, although dedicated by its charter to general charity. So a college founded and endowed in the same manner, although being for the promotion of learning and piety, it may extend its charity to scholars from every class in the community, and thus acquire the character of a public institution. This is the unequivocal doctrine of the authorities, and can not be shaken but by undermining the most solid foundations of the common law. Philips v. Bury, 1 Ld. Raym. 5, 9; s. c. 2 T. R. 346.

It was indeed supposed at the argument that if the uses of an eleemosynary corporation be for general charity, this alone would constitute it a public corporation. But the law is certainly not so. To be sure, in a certain sense, every charity which is extensive in its reach, may be called a public charity, in contradistinction to a charity embracing but a few definite objects. In this sense the language was unquestionably used by Lord Hardwicke in the case cited at the argument; Attorney-General v. Pearce, 2 Atk. 87, 1 Bac. Abr. tit. Charitable Uses, E, 589; and in this sense a private corporation may well enough be denominated a public charity. So it would be if the endowment, instead of being vested in a corporation, were assigned to a private trustee; yet in such a case no one would imagine that the trust ceased to be private, or the funds became public property. That the mere act of incorporation will not change the charity from a private to a public one is most distinctly asserted in the authorities. Lord Hardwicke, in the case already alluded to, says "the charter of the crown can not make a charity more or less public, but only more permanent than it would otherwise be, but it is the extensiveness which will constitute it a public one. A devise to the poor of the parish is a public charity. Where testators leave it to the discretion of a trustee to choose out the objects, though each particular object may be said to be private, yet in the extensiveness of the benefit accruing from them, they may properly be called public charities. A sum to be disposed of by A. B. and his executors at their discretion among poor-house keepers is of this kind." The charity, then, may in this sense be public, although it may be administered by private trustees, and for the same reason it may thus be public, though administered by a private corporation. The fact, then, that the charity is public, affords no proof that the corporation is also public; and consequently the argument, so far as it is built on this foundation, falls to the ground. If indeed the argument were correct, it would follow that almost every hospital and col-

lege would be a public corporation; a doctrine utterly irreconcilable with the whole current of decisions since the time of Lord Coke.

When, then, the argument assumes that because the charity is public the corporation is public, it manifestly confounds the popular with the strictly legal sense of the terms. And if it stopped here it would not be very material to correct the error. But it is on this foundation that a superstructure is erected which is to compel a surrender of the cause. When the corporation is said at the bar to be public, it is not merely meant that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control and direct the corporation, and its funds and its franchises, at its own good will and pleasure. Now, such an authority does not exist in the government, except where the corporation is in the strictest sense public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself. If it had been otherwise, courts of law would have been spared many laborious adjudications in respect to eleemosynary corporations and the visitorial powers over them from the time of Lord Holt down to the present day. Rex v. Bury, 1 Ld. Raym. 5; s. c. Comb. 265; Holt 715; 1 Show. 360; 4 Mod. 106; Skin. 447, and Lord Holt's opinion from his own manuscript, in 2 T. R. 346. Nay, more, private trustees for charitable purposes would have been liable to have the property confided to their care taken away from them without any assent or default on their part, and the administration submitted, not to the control of law and equity, but to the arbitrary discretion of the government. Yet, whoever thought before that the munificent gifts of private donors for general charity became instantaneously the property of the government; and that the trustees appointed by the donors, whether corporate or unincorporated, might be compelled to yield up their rights to whomsoever the government might appoint to administer them? If we were to establish such a principle it would extinguish all future eleemosynary endowments, and we should find as little of public policy as we now find of law to sustain it.

[Foundation and visitation of corporations.] An eleemosynary corporation, then, upon a private foundation, being a private corporation, it is next to be considered what is deemed a foundation and who is the founder. This can not be stated with more brevity and exactness than in the language of the elegant commentator upon the laws of England: "The founder of all corporations (says Sir William Blackstone), in the strictest and original sense, is the king alone, for he only can incorporate a society; and in civil corporations, such as mayor, commonalty, etc., where there are no possessions or endowments given to the body, there is no other founder but the king; but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation, the one *fundatio incipiens*, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it,

in which sense the first gift of the revenues is the foundation, and he who gives them is, in the law, the founder; and it is in this last sense we generally call a man the founder of a college or hospital." 1 Bl. Comm. 480, 10 Co. 33.

To all eleemosynary corporations a visitatorial power attaches as a necessary incident; for these corporations being composed of individuals subject to human infirmities are liable, as well as private persons, to deviate from the end of their institution. The law, therefore, has provided that there shall somewhere exist a power to visit, inquire into, and correct all irregularities and abuses in such corporations, and to compel the original purposes of the charity to be faithfully fulfilled. 1 Bl. Comm. 480. The nature and extent of this visitatorial power has been expounded with admirable fullness and accuracy by Lord Holt in one of his most celebrated judgments. Philips v. Bury, 1 Ld. Raym. 5; s. c. 2 T. R. 346. And of common right by the donation the founder and his heirs are the legal visitors, unless the founder has appointed and assigned another person to be visitor. For the founder may, if he please, at the time of the endowment, part with his visitatorial power; and the person to whom it is assigned will, in that case, possess it in exclusion of the founder's heirs. 1 Bl. Com. 482. This visitatorial power is, therefore, an hereditament founded in property, and valuable in intendment of law, and stands upon the maxim that he who gives his property has a right to regulate it in future. It includes also the legal right of patronage, for, as Lord Holt justly observes, "patronage and visitation are necessary consequents one upon another." No technical terms are necessary to assign or vest the visitatorial power; it is sufficient if, from the nature of the duties to be performed by particular persons under the charter, it can be inferred that the founder meant to part with it in their favor, and he may divide it among various persons, or subject it to any modifications or control by the fundamental statutes of the corporation. But where the appointment is given in general terms, the whole power vests in the appointee. Eden v. Foster, 2 P. Wms. 325; Attorney-General v. Middleton, 2 Ves. 327; St. Johns College v. Todington, 1 W. Bl. 84; s. c. 2 Burr. 200; Attorney-General v. Clare College, 3 Atk. 662; s. c. 1 Ves. 78. In the construction of charters, too, it is a general rule that if the objects of the charity are incorporated, as, for instance, the master and fellows of a college, or the master and poor of a hospital, the visitatorial power, in the absence of any special appointment, silently vests in the founder and his heirs. But where trustees or governors are incorporated to manage the charity, the visitatorial power is deemed to belong to them in their corporate character. Philips v. Bury, 1 Ld. Raym. 5; s. c. 2 T. R. 346; Green v. Rutherford, 1 Ves. 472; Attorney-General v. Middleton, 2 Ves. 327; Case of Sutton Hospital, 10 Co. 23. 31.

When a private eleemosynary corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the crown can

not, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises, or add to them, or add to or diminish the number of the trustees, or remove any of the members, or change or control the administration of the charity, or compel the corporation to receive a new charter. This is the uniform language of the authorities, and forms one of the most stubborn and well-settled doctrines of the common law.

But an eleemosynary, like every other corporation, is subject to the general law of the land. It may forfeit its corporate franchises by *misuser* or *non-user* of them. It is subject to the controlling authority of its legal visitor, who, unless restrained by the terms of the charter, may amend and repeal its statutes, remove its officers, correct abuses and generally superintend the management of the trusts. Where, indeed, the visitatorial power is vested in the trustees of the charity, in virtue of their incorporation, there can be no amotion of them from their corporate capacity. But they are not, therefore, placed beyond the reach of the law. As managers of the revenues of the corporation they are subject to the general superintending power of the court of chancery, not as itself possessing a visitatorial power, or a right to control the charity, but as possessing a general jurisdiction in all cases of an abuse of trust to redress grievances and suppress frauds. 2 Fonbl. Eq., B. 2, pt. 2, ch. 1, § 1, note *a*; Coop. Eq. Pl. 292; 2 Kyd on Corp. 195; Green v. Rutherford, 1 Ves. 462; Attorney-General v. Foundling Hospital, 4 Bro. C. C. 165; s. c. 2 Ves. Jr. 42; Eden v. Foster, 2 P. Wms. 325; 1 Wooddes. 476; Attorney-General v. Price, 3 Atk. 108; Attorney-General v. Lock, 3 Atk. 164; Attorney-General v. Dixie, 13 Ves. 519; *Ex parte* Kirby Ravensworth Hospital, 15 Ves. 304, 314; Attorney-General v. Earl of Clarendon, 17 Ves. 491, 499; Berkhamstead Free School, 2 Ves. & B. 134; Attorney-General v. Corporation of Carmarthen, Cooper 30; Mayor, etc., of Colchester v. Lowten, 1 Ves. & B. 226; Rex v. Watson, 2 T. R. 199; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. 371; Attorney-General v. Middleton, 2 Ves. 327. And where a corporation is a mere trustee of a charity, a court of equity will go yet further, and though it can not appoint or remove a corporator, it will yet, in a case of gross fraud or abuse of trust, take away the trust from the corporation and vest it in other hands. Mayor, etc., of Coventry v. Attorney-General, 7 Bro. P. C. 235; Attorney-General v. Earl of Clarendon, 17 Ves. 491, 499.

Thus much it has been thought proper to premise respecting the nature, rights and duties of eleemosynary corporations growing out of the common law. We may now proceed to an examination of the original charter of Dartmouth College.

(Stating facts as to recitals of charter and its terms as above.)

[**Terms of the charter.**] Such are the most material clauses of the charter. It is observable, in the first place, that no endowment whatever is given by the crown, and no power is reserved to the crown or government in any manner to alter, amend or control the charter. It

is also apparent, from the very terms of the charter, that Dr. Wheelock is recognized as the founder of the college, and that the charter is granted upon his application, and that the trustees were in fact nominated by him. In the next place, it is apparent that the objects of the institution are purely charitable, for the distribution of the private contributions of private benefactors. The charity was in the sense already explained a public charity, that, is for the general promotion of learning and piety, but in this respect it was just as much public before as after the incorporation. The only effect of the charter was to give permanency to the design, by enlarging the sphere of its action and granting a perpetuity of corporate powers and franchises, the better to secure the administration of the benevolent donations. As founder, too, Dr. Wheelock and his heirs would have been completely clothed with the visitatorial power, but the whole government and control, as well of the officers as of the revenues of the college being with his consent assigned to the trustees in their corporate character, the visitatorial power, which is included in this authority, rightfully devolved on the trustees. As managers of the property and revenues of the corporation, they were amenable to the jurisdiction of the judicial tribunals of the state, but as visitors, their discretion was limited only by the charter, and liable to no supervision or control, at least, unless it was fraudulently misapplied.

From this summary examination it follows that Dartmouth College was, under its original charter, a private eleemosynary corporation, endowed with the usual privileges and franchises of such corporations, and among others, with a legal perpetuity, and was exclusively under the government and control of twelve trustees, who were to be elected and appointed, from time to time, by the existing board, as vacancies or removals should occur.

[Is this charter a contract?] We are now led to the consideration of the first question in the cause, whether this charter is a contract within the clause of the constitution prohibiting the states from passing any law impairing the obligation of contracts. In the case of Fletcher v. Peck, 6 Cranch 87, 136, this court laid down its exposition of the word "contract" in this clause in the following manner: "A contract is a compact between two or more persons, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one that is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is always estopped by his own grant." This language is perfectly unambiguous, and was used in reference to a grant of land by the governor of a state, under a legislative act. It determines, in the most unequivocal manner, that the grant of a state is a contract, within the clause of the constitution now in ques-

tion, and that it implies a contract not to reassume the rights granted; *a fortiori*, the doctrine applies to a charter or grant from the king.

But it is objected that the charter of Dartmouth College is not a contract contemplated by the constitution, because no valuable consideration passed to the king as an equivalent for the grant, it purporting to be granted *ex mero motu*, and further that no contracts, merely voluntary, are within the prohibitory clause. It must be admitted that mere executory contracts can not be enforced at law, unless there be a valuable consideration to sustain them, and the constitution certainly did not mean to create any new obligations or give any new efficacy to nude pacts. But it must, on the other hand, be also admitted that the constitution did intend to preserve all the obligatory force of contracts which they have by the general principles of law. Now when a contract has once passed *bona fide* into grant, neither the king nor any private person who may be the grantor can recall the grant of the property, although the conveyance may have been purely voluntary. A gift completely executed is irrevocable. The property conveyed by it becomes, as against the donor, the absolute property of the donee; and no subsequent change of intention of the donor can change the rights of the donee. 2 Bl. Com. 441, Jenk. Cent. 104. And a gift by the crown of incorporeal hereditaments, such as corporate franchises, when executed comes completely within the principle, and is, in the strictest sense of the terms, a grant. 2 Bl. Com. 317, 346; Shep. Touch., ch. 12, p. 227. Was it ever imagined that land, voluntarily granted to any person by a state, was liable to be resumed at its own good pleasure? Such a pretension would, under any circumstance, be truly alarming, but in a country like ours, where thousands of land-titles had their origin in gratuitous grants of the states, it would go far to shake the foundations of the best settled estates. And a grant of franchise is not, in point of principle, distinguishable from a grant of any other property. If, therefore, this charter were a pure donation, when the grant was complete, and accepted by the grantees, it involved a contract that the grantees should hold and the grantor should not reassume the grant as much as if it had been founded on the most valuable consideration.

But it is not admitted that this charter was not granted for what the law deems a valuable consideration. For this purpose, it matters not how trifling the consideration may be, a pepper-corn is as good as a thousand dollars. Nor is it necessary that the consideration should be a benefit to the grantor. It is sufficient if it import damage or loss, or forbearance of the benefit, or any act done or to be done, on the part of the grantee. It is unnecessary to state cases; they are familiar to the mind of every lawyer. Pillans v. Van Mierop, per Yates, J., 3 Burr. 1663; Forth v. Stanton, 1 Saund. 211; Williams' note 2, and the cases there cited.

With these principles in view, let us now examine the terms of this charter. It purports, indeed, on its face, to be granted "of the special grace, certain knowledge and *mere motion*" of the king, but these words were introduced for a very different purpose from that now

contended for. It is a general rule of the common law (the reverse of that applied in ordinary cases) that a grant of the king, at the suit of the grantee, is to be construed most beneficially for the king and most strictly against the grantee. Wherefore, it is usual to insert in the king's grants a clause that they are made, not at the suit of the grantee, but of the special grace, certain knowledge and mere motion of the king, and then they receive a more liberal construction. This is the true object of the clause in question, as we are informed by the most accurate authorities. 2 Bl. Comm. 347; Finch's Law 100; 10 Rep. 112; 1 Shep. Abr. 136; Bull. N. P. 136. But the charter also, on its face, purports to be granted in consideration of the premises in the introductory recitals.

(Stating recitals as to founding by Dr. Wheelock, at his own expense, contributions made by others, etc., and the location of the college.)

[**Implied contracts with the founder, trustees and benefactors.**] Can it be truly said that these recitals contain no legal consideration of benefit to the crown, or of forbearance of benefit on the other side? Is there not an implied contract by Dr. Wheelock, if a charter is granted, that the schools shall be removed from his estate to New Hampshire, and that he will relinquish all his control over the funds collected, and to be collected in England under his auspices and subject to his authority? That he will yield up the management of his charity school to the trustees of the college? That he will relinquish all the offers made by other American governments, and devote his patronage to this institution? It will scarcely be denied that he gave up the right any longer to maintain the charity school already established on his own estate; and that the funds collected for its use and subject to his management were yielded up by him as an endowment of the college. The very language of the charter supposes him to be the legal owner of the funds of the charity school, and in virtue of this endowment, declares him the founder of the college. It matters not whether the funds were great or small; Dr. Wheelock had procured them by his own influence, and they were under his control to be applied to the support of his charity school; and when he relinquished his control he relinquished a right founded in property acquired by his labors. Besides, Dr. Wheelock impliedly agreed to devote his future services to the college, when erected, by becoming president thereof, at a period when sacrifices must necessarily be made to accomplish the great design in view. If, indeed, a peppercorn be, in the eye of the law, of sufficient value to found a contract, as upon a valuable consideration, are these implied agreements, and these relinquishments of right and benefit, to be deemed wholly worthless? It has never been doubted that an agreement not to exercise a trade in a particular place was a sufficient consideration to sustain a contract for the payment of money; *a fortiori*, the relinquishment of property which a person holds, or controls the use of as a trust, is a sufficient consideration; for it is parting with a legal right. Even a right of patronage (*jus patronatus*) is of great value in intendment

of law. Nobody doubts that an advowson is a valuable hereditament; and yet, in fact, it is but a mere trust, or right of nomination to a benefice, which can not be legally sold to the intended incumbent. 2 Bl. Comm. 22, Christian's note. In respect to Dr. Wheelock, then, if a consideration be necessary to support the charter as a contract, it is to be found in the implied stipulations on his part in the charter itself. He relinquished valuable rights and undertook a laborious office in consideration of the grant of the incorporation.

This is not all. *A charter may be granted upon an executory as well as an executed or present consideration. When it is granted to persons who have not made application for it until their acceptance thereof, the grant is yet in fieri. Upon the acceptance there is an implied contract on the part of the grantees, in consideration of the charter, that they will perform the duties and exercise the authorities conferred by it.* This was the doctrine asserted by the late learned Mr. Justice Buller, in a modern case. Rex v. Pasmore, 3 T. R. 199, 239, 246. He there said, "I do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of incorporation to be a compact between the crown and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place" (i. e., the place incorporated). It will not be pretended that if a charter be granted for a bank, and the stockholders pay in their own funds, the charter is to be deemed a grant without consideration, and therefore revocable at the pleasure of the grantor. Yet here the funds are to be managed, and the services performed exclusively for the use and benefit of the stockholders themselves. And where the grantees are mere trustees to perform services without reward, exclusively for the benefit of others for public charity, can it be reasonably argued that these services are less valuable to the government than if performed for the private emolument of the trustees themselves? In respect, then, to the trustees also there was a valuable consideration for the charter, the consideration of services agreed to be rendered by them in execution of a charity, from which they could receive no private remuneration.

There is yet another view of this part of the case which deserves the most weighty consideration. The corporation was expressly created for the purpose of distributing in perpetuity the charitable donations of private benefactors. By the terms of the charter the trustees and their successors in their corporate capacity were to receive, hold and exclusively manage all the funds so contributed. The crown then, upon the face of the charter, pledged its faith that the donations of private benefactors should be perpetually devoted to their orginal purposes without any interference on its own part, and should be forever administered by the trustees of the corporation, unless its corporate franchises should be taken away by due process of law. *From the very nature of the case, therefore, there was an implied contract on the part of the crown with every benefactor that if he would give his money it should be deemed a charity protected by*

the charter, and be administered by the corporation according to the general law of the land. As soon, then, as a donation was made to the corporation, there was an implied contract springing up and founded on a valuable consideration that the crown would not revoke or alter the charter or change its administration without the consent of the corporation. There was also an implied contract between the corporation itself and every benefactor upon like consideration, that it would administer his bounty according to the terms and for the objects stipulated in the charter.

In every view of the case, if a consideration were necessary (which I utterly deny) to make the charter a valid contract, a valuable consideration did exist as to the founder, the trustees and the benefactors. And upon the soundest legal principles the charter may be properly deemed, according to the various aspects in which it is viewed, as a several contract with each of these parties in virtue of the foundation or the endowment of the college, or the acceptance of the charter or the donations to the charity.

[Implied contract with the corporation itself.] And here we might pause; but there is yet remaining another view of the subject, which can not consistently be passed over without notice. *It seems to be assumed by the argument of the defendant's counsel that there is no contract whatsoever, in virtue of the charter, between the crown and the corporation itself.* But it deserves consideration, whether this assumption can be sustained upon a solid foundation.

If this had been a new charter, granted to an existing corporation, or a grant of lands to an existing corporation, there could not have been a doubt that the grant would have been an executed contract with the corporation, as much so as if it had been to any private person. But it is supposed that as the corporation was not then in existence, but was created and its franchises bestowed, *uno flatu*, the charter can not be construed a contract, because there was no person *in rerum naturæ* with whom it might be made.

Is this, however, a just and legal view of the subject? If the corporation had no existence, so as to become a contracting party, neither had it for the purpose of receiving a grant of the franchises. The truth is that there may be a priority of operation of things in the same grant, and the law distinguishes and gives such priority wherever it is necessary to effectuate the objects of the grant. Case of Sutton Hospital, 10 Co. 23; Buckland v. Fowcher, cited 10 Co. 27–8, and recognized in Attorney-General v. Bowyer, 3 Ves. Jr. 714, 726–7: s. p. Highmore on Mort. 200, etc. From the nature of things the artificial person called a corporation must be created before it can be capable of taking anything. *When, therefore, a charter is granted, and it brings the corporation into existence, without any act of the natural persons who compose it, and gives such corporation any privileges, franchises or property, the law deems the corporation to be first brought into existence, and then clothes it with the granted liberties and property. When, on the other hand, the corporation is to be brought into existence by some future acts of the corporators, the*

franchises remain in abeyance until such acts are done, and when the corporation is brought into life the franchises instantaneously attach to it. There may be, in intendment of law, a priority of time, even in an instant, for this purpose. Highmore on Mort. 200, etc. And if the corporation have an existence before the grant of its other franchises attaches, what more difficulty is there in deeming the grant of these franchises a contract with it than if granted by another instrument at a subsequent period?

It behooves those also who hold that a grant to a corporation not then in existence is incapable of being deemed a contract on that account, to consider whether they do not at the same time establish that the grant itself is a nullity for precisely the same reason. Yet such a doctrine would strike us all as pregnant with absurdity, since it would prove that an act of incorporation could never confer any authorities or rights of property on the corporation it created. It may be admitted that two parties are necessary to form a perfect contract, but it is denied that it is necessary that the assent of both parties must be at the same time. If the legislature were voluntarily to grant land in fee to the first child of A. to be hereafter born, as soon as such child should be born the estate would vest in it. Would it be contended that such a grant, when it took effect, was revocable, and not an executed contract upon the acceptance of the estate? The same question might be asked in a case of a gratuitous grant by the king or the legislature to A. for life, and afterward to the heirs of B., who is then living. Take the case of a bank, incorporated for a limited period upon the express condition that it shall pay out of its corporate funds a certain sum as the consideration for the charter, and after the corporation is organized a payment is duly made of the sum out of the corporate funds; will it be contended that there is not a subsisting contract between the government and the corporation by the matters thus arising *ex post facto* that the charter shall not be revoked during the stipulated period? Suppose an act declaring that all persons, who should thereafter pay into the public treasury a stipulated sum, should be tenants in common of certain lands belonging to the state in certain proportions; if a person, afterward born, pays the stipulated sum into the treasury, is it less a contract with him than it would be with a person *in esse* at the time the act passed? We must admit that there may be future springing contracts in respect to persons not now *in esse*, or we shall involve ourselves in inextricable difficulties. And if there may be in respect to natural persons, why not also in respect to artificial persons created by the law for the very purpose of being clothed with corporate powers? *I am unable to distinguish between the case of a grant of land or of franchises to an existing corporation and a like grant to a corporation brought into life for the very purpose of receiving the grant. As soon as it is in esse, and the franchises and property become vested and executed in it, the grant is just as much an executed contract as if its prior existence had been established for a century.*

[**Are these contracts protected by the constitution?**] Supposing, however, that in either of the views which have been suggested, the charter of Dartmouth College is to be deemed a contract, we are yet met with several objections of another nature. It is, in the first place, contended that it is not a contract within the prohibitory clause of the constitution, because that clause was never intended to apply to mere contracts of civil institutions, such as the contract of marriage, or to grants of power to state officers, or to contracts relative to their offices, or to grants of trust to be exercised for purposes merely public, when the grantees take no beneficial interest.

[**Offices.**] It is admitted that the state legislatures have power to enlarge, repeal and limit the authorities of public officers in their official capacities, in all cases where the constitutions of the states respectively do not prohibit them; and this, among others, for the very reason that there is no express or implied contract that they shall always, during their continuance in office, exercise such authorities; they are to exercise them only during the good pleasure of the legislature. But when the legislature makes a contract with a public officer, as in the case of a stipulated salary for his services during a limited period, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens. Will it be contended that the legislature of a state can diminish the salary of a judge holding his office during good behavior? Such an authority has never yet been asserted to our knowledge. It may also be admitted that corporations for mere public government, such as towns, cities and counties, may in many respects be subject to legislative control. But it will hardly be contended that even in respect to such corporations, the legislative power is so transcendent that it may at its will take away the private property of the corporation, or change the uses of its private funds acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporators? If a municipal corporation be capable of holding devises and legacies to charitable uses (as many municipal corporations are), does the legislature, under our forms of limited government, possess the authority to seize upon those funds and appropriate them to other uses, at its own arbitrary pleasure, against the will of the donors and donees? From the very nature of our governments the public faith is pledged the other way, and that pledge constitutes a valid compact, and that compact is subject only to judicial inquiry, construction and abrogation. This court have already had occasion in other causes to express their opinion on this subject; and there is not the slightest inclination to retract it. Terrett v. Taylor, 9 Cranch 43; Town of Pawlet v. Clark, 9 Cranch 292.

[**Marriage contracts.**] As to the case of the contract of marriage, which the argument supposes not to be within the reach of the prohibitory clause because it is matter of civil institution, I profess not to feel the weight of the reason assigned for the exception. In a legal

sense, all contracts recognized as valid in any country may be properly said to be matters of civil institution, since they obtain their obligation and construction *jure loci contractus*. Titles to land, constituting part of the public domain, acquired by grants under the provisions of existing laws by private persons, are certainly contracts of civil institution. Yet no one ever supposed that when acquired *bona fide* they were not beyond the reach of legislative revocation. And so, certainly, is the established doctrine of this court. A general law regulating divorces from the contract of marriage, like a law regulating remedies in other cases of breaches of contracts, is not necessarily a law impairing the obligation of such a contract. It may be the only effectual mode of enforcing the obligations of the contract on both sides. A law punishing a breach of a contract by imposing a forfeiture of the rights acquired under it, or dissolving it because the mutual obligations were no longer observed, is, in no correct sense, a law impairing the obligations of the contract. Could a law compelling a specific performance by giving a new remedy be justly deemed an excess of legislative power? Thus far the contract of marriage has been considered with reference to general laws regulating divorces upon breaches of that contract. But if the argument means to assert that the legislative power to dissolve such a contract without such a breach on either side, against the wishes of the parties, and without any judicial inquiry to ascertain a breach, I certainly am not prepared to admit such a power, or that its exercise would not entrench upon the prohibition of the constitution. If, under the faith of existing laws, a contract of marriage be duly solemnized, or a marriage settlement be made (and marriage is always in law a valuable consideration for a contract), it is not easy to perceive why a dissolution of its obligations, without any default or assent of the parties, may not as well fall within the prohibition as any other contract for a valuable consideration. A man has just as good a right to his wife as to the property acquired under a marriage contract. He has a legal right to her society and her fortune; and to divest such right without his default and against his will, would be as flagrant a violation of the principles of justice as the confiscation of his own estate. I leave this case, however, to be settled when it shall arise. I have gone into it because it was urged with great earnestness upon us, and required a reply. It is sufficient now to say, that as at present advised, the argument derived from this source does not press my mind with any new and insurmountable difficulty.

[Trustees.] In respect also to grants and contracts, it would be far too narrow a construction of the constitution to limit the prohibitory clause to such only where the parties take for their own private benefit. A grant to a private trustee, for the benefit of a particular *cestui que trust*, or for any special, private or public charity, can not be the less a contract because the trustee takes nothing for his own benefit. A grant of the next presentation to a church is still a contract, although it limit the grantee to a mere right of nomination or patronage. 2 Bl. Comm. 21. The fallacy of the argument consists in as-

suming the very ground in controversy. It is not admitted that a contract with a trustee is, in its own nature, revocable, whether it be for special or general purposes, for public charity or particular beneficence. A private donation, vested in a trustee, for objects of a general nature, does not thereby become a public trust, which the government may, at its pleasure, take from the trustee, and administer in its own way. The truth is, that the government has no power to revoke a grant, even of its own funds, when given to a private person or a corporation for special uses. It can not recall its own endowments, granted to any hospital or college, or city or town, for the use of such corporations. The only authority remaining to the government is judicial, to ascertain the validity of the grant, to enforce its proper uses, to suppress frauds, and, if the uses are charitable, to secure their regular administration, through the means of equitable tribunals, in cases where there would otherwise be a failure of justice.

[Property contracts.] Another objection growing out of and connected with that which we have been considering, is, that no grants are within the constitutional prohibition, except such as respect property in the strict sense of the term; that is to say, beneficial interests in lands, tenements and hereditaments, etc., which may be sold by the grantees for their own benefit; and that grant of franchises, immunities and authorities not valuable to the parties as property are excluded from its purview. No authority has been cited to sustain this distinction, and no reason is perceived to justify its adoption. There are many rights, franchises and authorities which are valuable in contemplation of law, where no beneficial interest can accrue to the possessor. A grant to the next presentation to a church, limited to a grantee alone, has been already mentioned. A power of appointment, reserved in a marriage settlement, either to a party or a stranger, to appoint uses in favor of third persons, without compensation, is another instance. A grant of lands to a trustee to raise portions or pay debts, is, in law, a valuable grant, and conveys a legal estate. Even a power given by will to executors to sell an estate for payment of debts is, by the better opinions and authority, coupled with a trust, and capable of survivorship. Co. Litt., 113*a*, Harg. & Butler's note 2; Sugden on Powers 140; Jackson v. Jansen, 6 Johns, 73; Franklin v. Osgood, 2 John. Cas. 1; s. c. 14 Johns. 527; Zebach v. Smith, 3 Binn. 69; Lessee of Moody v. Vandyke, 4 Binn. 7, 31; Attorney-General v. Gleg, 1 Atk. 356; 1 Bac. Abr. 586 (Gwyllim's ed.). Many dignities and offices existing at common law are merely honorary and without profit, and sometimes are onerous. Yet a grant of them has never been supposed the less a contract on that account. In respect to franchises, whether corporate or not, which include a pernancy of profits, such as a right of fishery, or to hold a ferry, a market or a fair, or to erect a turnpike, bank or bridge, there is no pretense to say that grants of them are not within the constitution. Yet they may, in point of fact, be of no exchangeable value to the owners. They may be worthless in the market. The truth, however, is, that all incorporeal hereditaments, whether they be immunities, dignities,

offices or franchises, or other rights, are deemed valuable in law. The owners have a legal estate and property in them, and legal remedies to support and recover them, in case of any injury, obstruction or disseizin of them. Whenever they are the subjects of a contract or grant, they are just as much within the reach of the constitution as any other grant. Nor is there any solid reason why a contract for the exercise of a mere authority should not be just as much guarded as a contract for the use and dominion of property. Mere naked powers, which are to be exercised for the exclusive benefit of the grantor, are revocable by him for that very reason. But it is otherwise where a power is to be exercised in aid of a right vested in the grantee. We all know that a power of attorney, forming a part of a security upon the assignment of a *chose in action*, is not revocable by the grantor. For it then sounds in contract, and is coupled with an interest. Walsh v. Whitcomb, 2 Esp. 565; Bergen v. Bennett, 1 Caines' Cas. 1, 15; Raymond v. Squire, 11 Johns. 47. So, if an estate be conveyed in trust for the grantor, the estate is irrevocable in the grantee, although he can take no beneficial interest for himself. Many of the best settled estates stand upon conveyances of this nature; and there can be no doubt that such grants are contracts within the prohibition in question.

[**Franchises.**] *In respect to corporate franchises, they are, properly speaking, legal estates vested in the corporation itself as soon as it is in esse. They are not mere naked powers granted to the corporation, but powers coupled with an interest. The property of the corporation rests upon the possession of its franchises, and whatever may be thought as to the corporators, it can not be denied that the corporation itself has a legal interest in them. It may sue and be sued for them. Nay, more, this very right is one of its ordinary franchises. "It is likewise a franchise," says Mr. Justice Blackstone, "for a number of persons to be incorporated and subsist as a body politic, with power to maintain perpetual succession and do other corporate acts; and each individual member of such corporation is also said to have a franchise or freedom."* 2 Bl. Comm. 37; 1 Kyd on Corp. 14, 16. In order to get rid of the legal difficulty of these franchises being considered as valuable hereditaments or property, the counsel for the defendant are driven to contend that the corporators or trustees are mere agents of the corporation, in whom no beneficial interest subsists; and so nothing but a naked power is touched by removing them from the trust; and then to hold the corporation itself a mere ideal being, capable indeed of holding property or franchises, but having no interest in them which can be the subject of contract. Neither of these positions is admissible. The former has been already sufficiently considered, and the latter may be disposed of in a few words. The corporators are not mere agents, but have vested rights in their character as corporators. The right to be a freeman of a corporation is a valuable temporal right. It is a right of voting and acting in the corporate concerns, which the law recognizes and enforces, and for a violation of which it provides a remedy. It is founded on the same basis as the right of

voting in public elections; it is as sacred a right, and whatever might have been the prevalence of former doubts since the time of Lord Holt, such a right has always been deemed a valuable franchise or privilege. Ashby v. White, 2 Ld. Raym. 938; 1 Kyd on Corp. 16.

This reasoning, which has been thus far urged, applies with full force to the case of Dartmouth College. The franchises granted by the charter were vested in the trustees, in their corporate character. The lands and other property subsequently acquired were held by them in the same manner. They were the private demesnes of the corporation, held by it, not, as the argument supposes, for the use and benefit of the people of New Hampshire, but, as the charter itself declares, "for the use of the Dartmouth College." There were not, and in the nature of things could not be, any other *cestui que use*, entitled to claim those funds. They were, indeed, to be devoted to the promotion of piety and learning, not at large, but in that college and the establishments connected with it; and the mode in which the charity was to be applied, and the objects of it, were left solely to the trustees, who were the legal governors and administrators of it. No particular person in New Hampshire possessed a vested right in the bounty; nor could he force himself upon the trustees as a proper object. The legislature itself could not deprive the trustees of the corporate funds, nor annul their discretion in the application of them, nor distribute them among its own favorites. Could the legislature of New Hampshire have seized the land given by the state of Vermont to the corporation, and appropriated it to uses distinct from those intended by the charity, against the will of the trustees? This question can not be answered in the affirmative, until it is established that the legislature may lawfully take the property of A. and give it to B.; and if it could not take away or restrain the corporate funds, upon what pretense can it take away or restrain the corporate franchises? Without the franchises, the funds could not be used for corporate purposes; but without the funds, the possession of the franchises might still be of inestimable value to the college, and to the cause of religion and learning.

[**Rights of the trustees.**] Thus far the rights of the corporation itself in respect to its property and franchises have been more immediately considered; but there are other rights and privileges belonging to the trustees collectively and severally which are deserving of notice. They are intrusted with the exclusive power to manage the funds, to choose the officers and to regulate the corporate concerns according to their own discretion. The *jus patronatus* is vested in them. The visitatorial power in its most enlarged extent also belongs to them. When this power devolves upon the founder of a charity it is an hereditament, descendible in perpetuity to his heirs, and in default of heirs it escheats to the government. Rex v. St. Catherine's Hall, 4 T. R. 233. It is a valuable right, founded in property, as much so as the right of patronage in any other case. It is a right which partakes of a judicial nature. May not the founder as justly contract for the possession of this right in return for his endowment, as for any other equivalent? and if, instead of holding it as an hereditament, he as-

signs it in perpetuity to the trustees of the corporation, is it less a valuable hereditament in their hands? The right is not merely a collective right in all the trustees; each of them also has a franchise in it. Lord Holt says, "it is agreeable to reason and the rules of law, that a franchise should be vested in the corporation aggregate, and yet the benefit redound to the particular members, and be enjoyed by them in their private capacities. Where the privilege of election is used by particular persons, it is a particular right vested in each particular man." Ashby v. White, 2 Ld. Raym. 938, 952; Attorney-General v. Dixie, 13 Ves. 519. Each of the trustees had a right to vote in all elections. If obstructed in the exercise of it, the law furnished him with an adequate recompense in damages. If ousted unlawfully from his office, the law would, by a *mandamus*, compel a restoration.

It is attempted, however, to establish that the trustees have no interest in the corporate franchises, because it is said that they may be witnesses in a suit brought against the corporation. The case cited at the bar certainly goes the length of asserting that in a suit brought against a charitable corporation for a recompense for services performed for the corporation, the governors, constituting the corporation (but whether intrusted with its funds or not by the act of incorporation does not appear), are competent witnesses against the plaintiff. Weller v. Governor of the Foundling Hospital, 1 Peake's Cas. 153. But assuming this case to have been rightly decided (as to which, upon the authorities, there may be room to doubt), the corporators being technically parties to the record (Attorney-General v. City of London, 3 Bro. C. C. 171; s. c. 1 Ves. J. 243; Burton v. Hinde, 5 T. R. 174; Nason v. Thatcher, 7 Mass. 398; Phillips on Evid. 42, 52, 57 and notes; 1 Kyd on Corp. 304, etc.; Highmore on Mortm. 514), it does not establish that in a suit for the corporate property vested in the trustees in their corporate capacity, the trustees are competent witnesses. At all events, it does not establish that in a suit for the corporate franchises to be exercised by the trustees or to enforce their visitatorial power the trustees would be competent witnesses. On a *mandamus* to restore a trustee to his corporate or visitatorial power, it will not be contended that the trustee is himself a competent witness to establish his own rights, or the corporate rights. Yet, why not, if the law deems that a trustee has no interest in the franchise? The test of interest assumed in the argument proves nothing in this case. It is not enough to establish that the trustees are sometimes competent witnesses; it is necessary to show that they are always so in respect to the corporate franchises and their own. It will not be pretended that in a suit for damages for obstruction in the exercise of his official powers a trustee is a disinterested witness. Such an obstruction is not a *damnum absque injuria*. Each trustee has a vested right and legal interest in his office, and it can not be divested but by due course of law. The illustration, therefore, lends no new force to the argument, for it does not establish that when their own rights are in controversy the trustees have no legal interest in their offices.

The principal objections having been thus answered satisfactorily, at least, to my own mind, it remains only to declare, that my opinion, after the most mature deliberation, is that the charter of Dartmouth College, granted in 1769, is a contract within the purview of the constitutional prohibition.

[Effect of the revolution.] I might now proceed to the discussion of the second question; but it is necessary previously to dispose of a doctrine which has been very seriously urged at the bar, viz., that the charter of Dartmouth College was dissolved at the revolution, and is, therefore, a mere nullity. A case before Lord Thurlow has been cited in support of this doctrine. Attorney-General v. City of London, 3 Bro. C. C. 171; s. c. 1 Ves. Jr. 243. The principal question in that case was, whether the corporation of William and Mary College in Virginia (which had received its charter from King William and Queen Mary), should still be permitted to administer the charity under Mr. Boyle's will, no interest having passed to the college, under the will, but it acting as an agent or trustee, under a decree in chancery, or whether a new scheme for the administration of the charity should be laid before the court. Lord Thurlow directed a new scheme, because the college, belonging to an independent government, was no longer within the reach of the court. And he very unnecessarily added, that he could not now consider the college as a corporation, or as another report (1 Ves. Jr. 243) states that he could not take notice of it, as a corporation, it not having proved its existence as a corporation at all. If, by this, Lord Thurlow meant to declare, that all charters acquired in America from the crown were destroyed by the revolution, his doctrine is not law; and if it had been true, it would equally apply to all other grants from the crown, which would be monstrous. It is a principle of the common law, which has been recognized as well in this, as in other courts, that the division of an empire works no forfeiture of previously vested rights of property. And this maxim is equally consonant with the common sense of mankind, and the maxims of eternal justice. Terrett v. Taylor, 9 Cranch 43, 50; Kelly v. Harrison, 2 Johns. Cas. 29; Jackson v. Lunn, 3 Johns. Cas. 109; Calvin's Case, 7 Co. 27. This objection, therefore, may be safely dismissed without further comment.

[Impairment of the charter.] The remaining inquiry is, whether the acts of the legislature of New Hampshire now in question, or any of them, impair the obligations of the charter of Dartmouth College. The attempt certainly is to force upon the corporation a new charter against the will of the corporators. Nothing seems better settled at the common law than the doctrine that the crown can not force upon a private corporation a new charter, or compel the old members to give up their own franchises, or to admit new members into the corporation. Rex v. Vice-Chancellor of Cambridge, 3 Burr. 1656; Rex v. Pasmore, 3 T. R. 240; 1 Kyd on Corp. 65; Rex v. Larwood, Comb. 316. Neither can the crown compel a man to become a member of such corporation against his will. Rex v. Dr. Askew, 4 Burr. 2200. As little has it been supposed that under our limited govern-

ments the legislature possessed such transcendent authority. On one occasion, a very able court held that the state legislature had no authority to compel a person to become a member of a mere private corporation, created for the promotion of a private enterprise, because every man had a right to refuse a grant. Ellis v. Marshall, 2 Mass. 269. On another occasion, the same learned court declared that they were all satisfied that the rights legally vested in a corporation, can not be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation. Wales v. Stetson, 2 Mass. 143, 146. These principles are so consonant with justice, sound policy and legal reasoning that it is difficult to resist the impression of their perfect correctness. The application of them, however, does not, from our limited authority, properly belong to the appellate jurisdiction of this court in this case.

(Stating facts as to acts of 1816.)

It is apparent that in substance a new corporation is created, including the old corporators with new powers, and subject to a new control; or that the old corporation is newly organized and enlarged, and placed under an authority hitherto unknown to it. The board of trustees are increased from twelve to twenty-one. The college becomes a university. The property vested in the old trustees is transferred to the new board of trustees, in their corporate capacities. The quorum is no longer seven but nine. The old trustees have no longer the sole right to perpetuate their succession by electing other trustees, but the nine new trustees are, in the first instance, to be appointed by the governor and council, and the new board are then to elect other trustees from time to time as vacancies occur. The new board, too, have the power to suspend or remove any member, so that a minority of the old board, co-operating with the new trustees, possess the unlimited power to remove the majority of the old board. The powers, too, of the corporation are varied. It has authority to organize new colleges in the "university and to establish an institute and elect fellows and members thereof." A board of overseers is created (a board utterly unknown to the old charter), and is invested with a general supervision and negative upon all the most important acts and proceedings of the trustees. And to give complete effect to this new authority, instead of the right to appoint, the trustees are in future only to nominate, and the overseers are to approve, the president and professors of the university.

If these are not essential changes, impairing the rights and authorities of the trustees, and vitally affecting the interests and organization of Dartmouth College under its old charter, it is difficult to conceive what acts, short of an unconditional repeal of the charter, could have that effect. If a grant of land or franchises be made to A., in trust for special purposes, can the grant be revoked and a new grant thereof be made to A., B. and C., in trust for the same purposes, without violating the obligation of the first grant? If property be vested by grant in A and B., for the use of a college, or an hospital, of private foundation, is not the obligation of that grant impaired when the

estate is taken from their exclusive management and vested in them in common with ten other persons? If a power of appointment be given to A. and B., is it no violation of their right to annul the appointment, unless it be assented to by five other persons, and then confirmed by a distinct body? If a bank or insurance company, by the terms of its charter, be under the management of directors, elected by the stockholders, would not the rights acquired by the charter be impaired, if the legislature should take the right of election from the stockholders and appoint directors unconnected with the corporation? These questions carry their own answers along with them. The common sense of mankind will teach us that all these cases would be direct infringements of the legal obligations of the grants to which they refer, and yet they are, with no essential distinction, the same as the case now at the bar.

In my judgment it is perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation, or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter. If the legislature mean to claim such an authority, it must be reserved in the grant. The charter of Dartmouth College contains no such reservation; and I am, therefore, bound to declare, that the acts of the legislature of New Hampshire, now in question, do impair the obligations of that charter and are, consequently, unconstitutional and void.

In pronouncing this judgment, it has not for one moment escaped me, how delicate, difficult and ungracious is the task devolved upon us. The predicament in which this court stands in relation to the nation at large is full of perplexities and embarrassments. It is called to decide on causes between citizens of different states, between a state and its citizens, and between different states. It stands, therefore in the midst of jealousies and rivalries of conflicting parties, with the most momentous interests confided to its care. Under such circumstances, it never can have a motive to do more than its duty; and I trust, it will always be found to possess firmness enough to do that. Under these impressions, I have pondered on the case before us with the most anxious deliberations. I entertain great respect for the legislature, whose acts are in question. I entertain no less respect for the enlightened tribunal whose decision we are called upon to review. In the examination, I have endeavored to keep my steps *super antiquas vias* of the law, under the guidance of authority and principle. It is not for judges to listen to the voice of persuasive eloquence or popular appeal. We have nothing to do but to pronounce the law as we find it; and having done this, our justification must be left to the impartial judgment of our country.

DUVALL, Justice, dissented.

Judgment for $20,000 (as agreed) for plaintiff in error.

Note. Mr. Justice Miller, in his Lectures on Constitutional Law, p. 391, says: "It may well be doubted whether any decision ever delivered by any

court has had such a pervading operation and influence in controlling legislation as this. The legislation, however, has been that of the states of the Union. The decision is founded upon that clause of the constitution which declares 'That no *state* shall make any law impairing the obligation of contracts.'"

The case has been frequently and severely criticised, but notwithstanding this, as Chief Justice Waite (himself an enemy of the decision) says in Stone v. Mississippi, 101 U. S. 814: "The doctrines of Dartmouth College v. Woodward, announced by this court more than sixty [now eighty] years ago, have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the constitution itself. In this connection, however, it must be kept in mind that it is not the charter that is protected, but only any contract which the charter may contain. If there is no contract there is nothing in the grant on which the constitution can act; consequently, the first inquiry in all this class of cases is whether a contract has in fact been entered into, and if so, what its obligations are."

So. too, in 1894. Judge Gray, of the New York Court of Appeals in Matter of the City of Brooklyn, 143 N. Y. 596, on 609, says of the case: "The principle enunciated has been steadily adhered to, despite criticisms, and is not questioned here." And Mr. Justice Miller, in Pearsall v. Great Northern Railway, 161 U. S. 646, on 660, says: "The doctrine of this case has been subjected to more or less criticism by the courts and the profession, but has been reaffirmed and applied so often as to have become firmly established as a canon of American jurisprudence." See *infra*, p. 1413.

The first case I have found in which the power of the state to modify a corporate charter was discussed, is Currie's Administrators v. Mutual Assurance Society, 4 Henning & M. (Va.) 315, decided by the supreme court of appeals of Virginia in 1809—ten years before the decision of the Dartmouth College Case by the United States Supreme Court. This case is not cited or commented upon by the attorneys upon either side, or referred to in the decisions of the judges either in the state or the supreme courts. This seems strange when William Wirt, the attorney-general, himself a Virginian, was counsel for the defendant.

Upon one side it was argued: "A charter is not a law, but a compact between the sovereign authority of the state and a citizen. In England, though the parliament enacts every *law*, yet it grants no *charters*. These are granted by the king, who can not at his mere pleasure revoke them, but they remain unalterable as fate, unless the corporation do some act, or are guilty of some omission which, according to established rules and principles of law, produces a forfeiture. And then it is not competent for the *king* (one of the contracting parties) to determine the question, but belongs exclusively to the tribunals selected to decide all other controversies respecting charters." On the other side it was said: "A charter is not a compact between the state and the grantee of the charter. On the part of the state there is no contract, express or implied. The state is not bound either to give to, or to receive, to do, or to abstain from doing anything. On the part of the society there is no obligation to the state. On what ground, then, can it be said that there is a contract, when neither of the parties enter into any sort of obligation. The idea is absurd." Another view was: "That the constitution of the United States prohibits the legislature from passing such an act without the consent of the body corporate, I am not disposed to controvert, although it may well be questioned whether it was intended to apply to such a case. The provision in the constitution that '*no state shall pass a law impairing the obligation of contracts*,' can not be understood in the most extensive sense of the words so as to embrace, for instance, laws for suppressing usurious or gaming contracts, but must have a reasonable construction."

The court by Roane, J., said: "With respect to acts of incorporation, they ought never to be passed but in consideration of services to be rendered to the public. * * * It may be often convenient for a set of associated individuals to have the privileges of a corporation bestowed upon them; but if their object is merely *private* or selfish, if it is detrimental to, or not promo-

tive of the public good, they have no adequate claim upon the legislature for the privilege. But as it is possible that the legislature may be imposed upon in the first instance, and as the public good and the interests of the associated body may, in the progress of time, by the gradual and natural working of events, be thrown entirely asunder, the question presents itself whether, under such and similar circumstances, the hands of a succeeding legislature are tied up from revoking the privileges. My answer is, that they are not. In the first case, no consideration of public service ever *existed* and in the last, none *continues* to justify the privilege. It is the character of a legislative act to be *repealable* by a succeeding legislature; nor can a preceding legislature limit the power of its successor on the mere ground of volition only. That effect can only arise from a state of things involving public utility, which includes the observance of *justice* and good faith toward all men."

Cases and articles giving important facts relating to or taking views opposed to the decisions of the supreme court are: 1817, Trustees of Dartmouth College v. Woodward, 1 N. H. 111, 65 N. H. 473; 1853, Toledo Bank v. Bond, 1 Ohio St. 630; 1863, Chenango, etc., Co. v. Binghamton, 27 N. Y. 87, on 119; 1873, President James A. Garfield, "The Future of the Republic," 5 Leg. Gaz. 409, 2 vol. of his works, p. 46, 61, *et seq.*; 1874, Dubuque v. Illinois Central R. Co., 39 Iowa 56, on 95; 1878, Ashuelot R. Co. v. Elliot, 58 N. H. 451; 1881, East St. Louis v. Gas Co., 98 Ill. 415, on 443, by Walker, J.; 1882, People v. Stephens, 62 Cal. 209. on 236; 1886, The Dartmouth College Case and Private Corporations by Wm. P. Wells, 9 Am. Bar. Assn. Rep. 229, *et seq.*; 1886, Dow v. Northern R. Co., 67 N. H. 1, 36 Atl. Rep. 525, 6 Harv. L. R. 161, 213, 8 Harv. L. R. 295, 396, 27 Am. L. R. 71; 1892, Judge Seymour D. Thompson, "Abuses of Corporate Privileges," in 26 Am. L. R. 169, *et seq.*; 1893, E. A. Otis, in 27 Am. L. R. 525; 1894, G. P. Wanty, 4 Mich. L. J. 251; 1894, W. S. G. Noyes, 28 Am. L. R. 356, n. 440; 1895, Alfred Russell, Status and Tendencies of, 30 Am. L. R. 321.

The inside history of the political and religious controversy, and its influence upon the decision, are set forth fully in Shirley's Dartmouth College Causes; also a short and interesting sketch of the same is found in 27 Am. L. R., p. 525; the best reasoned legal attack upon it (in the writer's opinion) is the opinion of Chief Justice Bartley, in Toledo Bank v. Bond, 1 Ohio St. 629; the next best is that of Chief Justice Doe, in Dow v. Northern R., 67 N. H 1, 36 Atl. 525, 6 and 8 Harv. L. R. The most savage attack is that of Judge Thompson, in 26 Am. L. R. 169, and to which view, he says in his work on corporations, he still adheres, 4 vol., § 5380, n. 4. The best statement of both its beneficial and evil effects is that of Wm. P. Wells, in 9 Am. Bar Assn. Rep., p. 229. Perhaps the two views so ably expressed as follows, will continue to enlist the strongest minds of the country in upholding or destroying its doctrine and effects. Said Chancellor Kent in 1826: "The decision did more than any other single act proceeding from the authority of the United States to throw an impregnable barrier around all rights and franchises derived from the grant of government, and to give solidity and inviolability to the literary, charitable, religious and commercial institutions of our country," 1 Kent Comm. 419. On the other hand, Judge Cooley, in 1871, said: "It is under the protection of the decision in the Dartmouth College Case that the most enormous and threatening powers in our country have been created, some of the great and wealthy corporations having greater influence in the country at large, and upon the legislation of the country than the states to which they owe their corporate existence," Const. Lim., p. 279–80 n. (2d ed.).

A full statement of the various applications of the doctrines of the college case and their limitations is given by Mr. Justice Brown in Pearsall v. Great N. R. Co., 161 U. S. 646, on 659, *et seq.*, *infra*, p. 1413.

1. The charter contract. The charter of a private corporation, which contains a contract, can not be so modified by subsequent legislative act, unless the power to repeal or amend is reserved, as to impair the obligation of the charter contract: 1839, Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61; 1850, Commonwealth v. Cullen, 13 Pa. St. 133, *supra*, p. 417; 1865, Mayor of New York v. Second Ave. R., 32 N. Y. 261; 1872, Flint & F. P. R. Co. v.

Woodhull, 25 Mich. 99, *supra*, p. 398; 1876, Hays v. Commonwealth, 82 Pa. St. 518; 1877, University v. North Carolina, etc., 76 N. C. 103, 22 Am. Rep. 671; 1888, People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684; 1889, Grammar School v. Bailey, 62 Vt. 467; 1892, Platte Co. v. Dowell, 17 Colo. 376; 1892, Mayor, etc., v. Houston St. R., 83 Tex. 548, 29 Am. St. 679; 1893, Millburn v. South Orange, 55 N. J. L. 254; 1894, Mathews v. St. Louis S. F. R. Co., 121 Mo. 298; 1894, Reagan v. Farmers' L. & T. Co., 154 U. S. 362; 1894, Indianapolis v. Consumers' Gas Co., 140 Ind. 107, 49 Am. St. Rep. 183; 1896, Covington & L. Turnp. R. Co. v. Sandford, 164 U. S. 578; 1897, Railroad Co. v. Harris, 99 Tenn. 684; 1898, State, *ex rel.*, v. St. Louis, etc., 145 Mo. 551; 1898, Walla Walla City v. Walla Walla Water Co., 172 U. S. 1. See, also, *infra*, cases immediately following this note; 1904, Stanislaus Co. v. San Joaquin, etc., Co., 192 U. S. 201.

2. **Consideration necessary.** There must be some consideration moving to the state in order to support the contract; but the implied agreement upon the part of the corporation to perform the duties imposed upon it is a sufficient consideration to support all contracts contained in the charter at the time of its creation; a new consideration is essential to support subsequent contracts with the state. 1871, Salt Company v. East Saginaw, 80 U. S. (13 Wall.) 373; 1874, Tucker v. Fergeson, 89 U. S. (22 Wall.) 527; 1897, Grand Lodge v. New Orleans, 166 U. S. 143.

3. **Unexecuted powers.** But powers not acted upon, or unexecuted, are in the nature of an offer only on the part of the state, and can be withdrawn at any time before they are *acted upon*. 1896, Pearsall v. Great Northern Railway, 161 U. S. 646, *infra*, p. 1413; 1896, Bank of Commerce v. Tennessee, 163 U. S. 416; 1898, Galveston, H., etc., R. Co. v. Texas, 170 U. S. 226; 1904, Grand Rapids & Indiana Ry. Co. v. Osborn, 193 U. S 17.

4. **Laws giving new or different remedies.** Laws reasonably affecting the remedy only, do not impair the contract obligation. 1829, Vanzant v. Waddel, 2 Yerg. (Tenn.) 259; 1851, Carey v. Giles, 9 Ga. 253; 1881, Penniman's Case, 103 U. S. 714.

5. **Charitable and educational institutions.** The constitutional protection extends to public charitable and educational institutions: 1838, Regents of Univ. of Md. v. Williams, 9 G. & J. (Md.) 365, 31 Am. Dec. 72; 1847, Brown v. Hummel, 6 Pa. St. 86, 47 Am. Dec. 431; 1852, Vincennes Univ. v. State, 14 How. (55 U. S.) 268; 1887, Board of Education v. Bakewell, 122 Ill. 339; 1888, Liggett v. Ladd, 17 Ore. 89; 1889, Grammar School v. Bailey, 62 Vt. 467; 1894, Graded School District v. Trustees, 95 Ky. 436; 1895, Ohio v. Neff, 52 O. S. 375. See 1904, Wright v. Minnesota Mut. L. Ins. Co., 193 U. S. 657.

6. **Municipal charters.** But charters of public, or municipal, corporations may be changed or modified: 1835, People v. Morris, 13 Wend. 325, *supra*, p. 113; 1836, Armstrong v. Board, 4 Blackf. (Ind.) 208; 1850, East Hartford v. Bridge Co., 10 How. (51 U. S.) 511; 1856, Montpelier v. East Montpelier, 29 Vt. 12, 67 Am. Dec. 748; 1860, Aspinwall v. Commissioners of Davies Co., 22 How. (63 U. S.) 364; 1879, Newton v. Commissioners, 100 U. S. 548; 1886, Portland R. Co. v. City, 14 Ore. 188, 58 Am. Rep. 299; 1891, New Orleans v. N. O. W. W., 142 U. S. 79.

7. **Charter exemptions from taxation.** Exemptions from taxation, if sustained by a sufficient consideration, are contracts protected by the constitutional provision; but the later cases strictly require a sufficient consideration. 1853, Piqua Branch Bank v. Knoop, 16 How. (57 U. S.) 369; 1869, Home of Friendless and Washington Univ. v. Rouse, 8 Wall. (75 U. S.) 430, 439; 1871, Salt Company v. East Saginaw, 13 Wall. (80 U. S.) 373; 1877, Farrington v. Tennessee, 95 U. S. 679; 1881, Asylum v. New Orleans, 105 U. S. 362; 1883, Worth v. Railroad Co., 89 N. C. 291, 45 Am. Rep. 679; 1892, Louisville Water Co. v. Clark, 143 U. S. 1; 1892, Hamilton Gas L. Co. v. Hamilton, 146 U. S. 258; 1897, Grand Lodge F. & A. Masons v. New Orleans, 166 U. S. 143; 1899, Citizens' Savings Bank v. Owensboro, 173 U. S. 636, on 644; 1899, City of Louisville v. Bank of Louisville, 174 U. S. 439. See 60 L. R. A. 33.

8. **Power to regulate rates.** Unless there is a definite express grant of the power to regulate its own charges to a *quasi*-public corporation, the state may prescribe such rates as will permit a reasonable profit to the corporation 1876, Munn v. Illinois, 94 U. S. 113; 1876, Chicago, B. & Q. R. v. Iowa, 94 U.

S. 155; 1876, Peik v. C. & N. W. R., 94 U. S. 164; 1884, Laurel Fork R. Co. v. West Virginia, 25 W. Va. 324; 1886, Railroad Commission Cases, 116 U. S. 307; 1889, Chicago, M. & St. P. R. v. Minn., 134 U. S. 418; 1892, Budd v. New York, 143 U. S. 517; 1894, Reagan v. Farmers' L. & T. Co., 154 U. S. 362; 1894, Brass v. North Dakota, 153 U. S. 391; 1896, Covington & L. Turnp. R. Co. v. Sandford, 164 U. S. 578; 1898, Smyth v. Ames, 169 U. S. 466; s. c., 171 U. S. 361; 1898, Nebraska Tel. Co. v. State, 55 Neb. 627; 1899, Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, reversing Smith v. L. S. R. Co., 114 Mich. 460; 1899, City of Danville v. Danville Water Co., 180 Ill. 235; 1899, San Diego L. & T. Co. v. National City, 174 U. S. 739; 1899, Toledo v. N. W. O. Natl. Gas Co., 6 Ohio N. P. 531; 1899, Gould v. Edison El. Ill. Co., 29 Miscl. (N. Y.) 559; 1899, Bailey v. Fayette Gas-F. Co., 193 Pa. 175, 44 Atl. Rep. 251.

9. **Bridge franchises.** See Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35, on 68, *supra*, p. 309, and note, p. 320.

10. As to police power, eminent domain and taxation and power to repeal, see *infra*, pp. 1344, 1337, 1370.

Sec. 199. 2. Contract between the state and the corporation.

YEATON v. BANK OF THE OLD DOMINION.[1]

1872. In the Court of Appeals of Virginia. 21 Grattan's (Va.) Rep. 593–603.

[Action of assumpsit by the bank against Yeaton to recover the sum of $561.07, and interest; the defense was a *tender* of the amount in notes issued by the branch bank at Pearisburg. The mother bank was located at Alexandria, and the legislature reserved the "right to repeal, alter or modify the charter at its pleasure;" the branch bank was subject to the charter of the mother bank, and its notes were to "be received in payments of debts due the bank, whether contracted at the parent bank or at the branch bank." During the war, while Alexandria was in possession of the United States authorities, and Pearisburg not, the Virginia legislature authorized the branch bank to issue notes of smaller denomination than the original charter allowed; these notes became greatly depreciated, and were the ones *tendered* in payment of the debt. Neither the directors nor stockholders ever accepted any amendment of the charter. Judgment below was for the bank, and this is the error assigned.]

Christian, J. * * * The power of the legislature "to repeal, alter or modify the charter of any bank at its pleasure," must be held to be limited to this extent. It may certainly repeal the charter of any bank, but it can not compel a bank to accept an amendment or modification of its charter. Nor is any such amendment or modification of its charter binding upon the bank *without its acceptance*. Banks are private corporations, created by a charter or act of incorporation from the government, which is in the nature of a *contract*, and, therefore, in order to complete the creation of such corporations, something more than the mere *grant* of a charter is required; that is, in order to give to the charter the full force and effect of an executed contract, it must be *accepted*. It is clear that the government can not enforce the acceptance of a charter upon a private corporation with-

[1] Statement abridged. Only part of opinion given.

out its consent. * * * These well-settled principles are everywhere recognized as applicable to the original charters of incorporation, and upon principle and authority they apply with equal force to any *amendment* or *modification* of the charter as well as to the original charter. *Though the legislature may have the reserved power to amend or modify a charter of incorporation, it can no more force the corporation to accept such amendment or modification than it could have forced upon them the acceptance of the original charter without their consent. Under the reservation they can repeal or destroy the charter, without any consent on the part of the corporators, but as long as they remain in existence as a corporate body, they necessarily have the power to reject an amendment or modification of their charter.* The power reserved by the legislature gives the right certainly to repeal or destroy, but so far as the right to modify or alter is concerned, it is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the consent of the other contracting party. These principles grow out of the nature of charters or acts of incorporation, which are regarded in the nature of contracts. *The amendment or modification must be made by the parties to the contract, the legislature on the one hand and the corporation on the other, the former expressing its intention by means of a legislative act and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter, or by other acts showing its acceptance.*

The reservation of the right to alter, amend or repeal the act by which the corporation is created may be prudent and salutary, but it seems to be a necessary implication that if the legislature should undertake to make what in their opinion is a legitimate alteration or amendment, the corporation has the power to reject or accept it whatever may be the consequences. One consequence undoubtedly is, that the corporation can not conduct its operations in defiance of the power that created it; and if it does not accept the modification or amendment proposed, must discontinue its operations as a corporate body. But such amendment or modification can not be forced upon the corporation without its consent. Sage, etc., v. Dillard, etc., 15 B. Mon. R. 340; Allen v. McKean, 1 Sumner's R. 277; Durfee v. Old Colony and Fall River R. Co., 5 Allen's R. 230. Every amendment or modification of a charter of incorporation is nothing more than a *new contract*, which is not binding upon the corporate body until accepted by them. Applying these doctrines, which seem to be well settled, to the case before us, it is manifest that the Bank of Old Dominion can not be held bound by the acts of 1862 as amendments of its charter. * * *

It is no answer to this view that the *branch bank* at Pearisburg was within the territorial jurisdiction of the Richmond government, and subject to its authority. This bank was not an independent corporation. It had no charter; it was but a branch of its mother bank at Alexandria, *subject to its charter.* It was but the agent, the mother bank being its principal. It could do no act to bind its principal with-

out the consent and authority of that principal. Nor could the legislature authorize the branch bank which owed its existence to the charter of the mother bank to issue small notes, or to do any other act as a bank without the consent of the mother bank. The only authority which the legislature could exercise was that which it reserved under the power "to repeal, modify or alter" the charter of the mother bank. I have already shown that this was not done by the acts of 1862, which could not operate upon the Bank of the Old Dominion as a change or modification of its charter. * * *

Affirmed.

Note. See Commonwealth v. Cullen, *supra*, p. 417; Plank-Road v. Woodhull, *supra*, p. 398; Railway Co. v. Allerton, *supra*, p. 442; Ashton v. Burbank, *supra*, p. 87; and note to Dartmouth College v. Woodward, *supra*, p. 746; 1904, Newburyport Water Co. v. Newburyport, 193 U. S. 561.

Sec. 200. 3. Contract between the *state* and corporate *creditors*, and between *stockholders* and corporate *creditors*, in the case of statutory liability.

HAWTHORNE v. CALEF.[1]

1864. In the Supreme Court of the United States. 2 Wall. (69 U. S.) 10–23.

The constitution of the United States ordains that "no state shall pass any law impairing the obligation of *contracts*." With this provision in force, the state of Maine, on the 1st of April, 1836, incorporated a railroad company, the charter providing that "the *shares* of individual stockholders should be liable for the *debts of the corporation*." "And in case of *deficiency of attachable corporate property or estate*," the provision went on to say, "the *individual property, rights and credits* of any stockholder shall be liable to the *amount of his stock*, for all *debts of the corporation* contracted prior to the transfer thereof, for the term of six months after judgment recovered against said corporation, and the same may be taken in *execution on said judgment* in the same manner as if said judgment and execution were against him individually, or said creditor, after said judgment, may have his *action on the case* against said individual stockholder; but in no case shall the *property, rights* and *credits* of said stockholder be taken in execution, or attached as aforesaid, beyond the *amount of his said stock*." Another section provides that if sufficient corporate property to satisfy the execution could not be found, the officer having the execution should certify the deficiency on the execution, and give notice thereof to the stockholder whose *property he was about to take*, and if such stockholder should show to the creditor or officer sufficient attachable *corporate* property to satisfy the debt, "his *individual prop-*

[1] Arguments and parts of opinion omitted.

erty, rights and credits shall thereupon be exempt from attachment and execution."

The plaintiff, Hawthorne, who had supplied the corporation, then embarrassed and insolvent, with materials to build its road, having obtained judgment as a creditor against *it*, and being unable to get from *it* satisfaction (the company having, in fact, no property), sued the defendant, Calef, who was a stockholder, both at the time when the debt was contracted and when judgment for it was rendered, and no transfer of whose stock had been made. A few months *after* the debt was contracted, the legislature of Maine passed a statute repealing the "individual liability" clause of the charter.

On a question before the supreme court of Maine—the highest court of law in that state—whether such repeal was or was not repugnant to the clause above cited of the constitution, that court held that it was not; that the original provision—not making the stockholder *personally* liable in any way—did not constitute a "contract" between the creditor and him, within the meaning of the constitution, and that while, *but* for the repealing act, the plaintiff would have been entitled to recover of the stockholder individually to the extent of his stock, this repealing act had taken away and destroyed such right.

Judgment being given accordingly by the said court in favor of the state statutes, the correctness of such judgment was now on error before this court.

NELSON, J. The question upon the provisions of the charter of the railroad company—in connection with the sale of the property by the plaintiff to the corporation out of which this debt accrued—is whether a contract, express or implied, existed between him and the stockholder?

It is asserted in behalf of the latter that a contract existed only between the creditors and the corporation; and that the obligation of the stockholder rests entirely upon a statutory liability, destitute of any of the elements of a contract.

Without stopping to discuss the question upon the clause of the statute, we think that the case falls within the principle of Woodruff v. Trapnal, 10 How. 190; and Curran v. State of Arkansas, 15 How. 304, heretofore decided in this court.

In the first of these cases the charter of the bank provided that the bills and notes of the institution should be received in all payment of debts due to the state. The bank was chartered 2d November, 1836. On the 10th January, 1845, this provision was repealed, and the question was whether or not, after this repeal, the bills and notes of the bank outstanding at the time were receivable for debts due to the state. *The court held, after a very full examination, that the clause in the charter constituted a contract with the holders of the bills and notes on the part of the state, and that the repealing act was void as impairing the obligation of the contract.*

In the second case the charter of the bank contained a pledge or assurance that certain funds deposited therein should be devoted to

the payment of its debts. It was held by the court that this constituted a contract with the creditors, and that the acts of the legislature withdrawing these funds were void, as impairing the obligation of the contract.

Now, it is quite clear that the personal liability clause in the charter in the present case pledges the liability or guarantee of the stockholders to the extent of their stock to the creditors of the company, and to which pledge or guarantee the stockholders, by subscribing for stock and becoming members of it, have assented. They thereby virtually agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability. * * *

By the clause in the charter subjecting the property of the stockholder he becomes liable to the creditor, in case of the inability or insolvency of the company for its debts, to the extent of his stock. *The creditor had this security when the debt was contracted with the company over and above its responsibility. This remedy the repealing act has not merely modified to the prejudice of the creditor, but has altogether abolished, and thereby impaired the obligation of his contract with the company.* * * *

Reversed.

Note. See generally: 1845, Freeland v. McCullough, 1 Denio (N. Y.) 414, 43 Am. D. 685, note, 694; 1847, Corning v. McCullough, 1 N. Y. 47, 49 Am. D. 287, note, 308; 1857, Conant v. Van Shaick, 24 Barb. (N. Y.) 87; 1862, Story v. Furman, 25 N. Y. 214; 1870, *In re* Telegraph C. Co., L. R. 10 Eq. Cas. 384; 1871, Norris v. Wrenschall, 34 Md. 492; 1871, Lowry v. Inman, 46 N. Y. 119; 1873, Provident Sav. Inst. v. Jackson, etc., 52 Mo. 552; 1878, Sinking Fund Cases, 99 U. S. 700; 1881, Aultman's Appeal, 98 Pa. Stat. 505; 1883, Jerman v. Benton, 79 Mo. 148; 1884, Ninnick v. Iron Works, 25 W. Va. 184; 1887, Fourth National Bank v. Francklyn, 120 U. S. 747; 1888, Leavitt v. Lovering, 64 N. H. 607, 1 L. R. A. 58; 1888, McDonnell v. Alabama, etc., 85 Ala. 401; 1892, Kennedy v. Bank, 97 Cal. 93; 1896, McGowan v. McDonald, 111 Cal. 57, 52 Am. Stat. Rep. 149. But see, *contra*, 1858, Coffin v. Rich, 45 Maine 507, 71 Am. D. 559; 1867, Woodhouse v. Commw. Ins. Co., 54 Pa. Stat. 307.

Sec. 201. 4. Contract between the *state* and the *corporators* or members.

TOMLINSON v. JESSUP.[1]

1872. In the Supreme Court of the United States. 15 Wallace (82 U. S.) 454–459.

[Bill in equity by Jessup, a stockholder of the Northeastern Railroad Company against Tomlinson and other officers of South Carolina to enjoin them from levying a tax on the property of the road. Lower court granted the injunction, and appeal taken.]

Field, J. The constitution of South Carolina, adopted in 1868, declares that the property of corporations then existing or thereafter

[1] Statement except as given in opinion omitted.

created, shall be subject to taxation, except in certain cases, not material to the present inquiry. The subsequent legislation of the state carried out this requirement and provided for the taxation of the property of railroad companies; and the question presented is, whether the act of December, 1855, to amend the charter of the Northeastern Railroad Company, exempted the property of that company from such taxation. The company was incorporated in 1851, and at that time a general law of the state was in existence, passed in 1841, which enacted that the charter of every corporation subsequently granted, and any renewal, amendment or modification thereof, should be subject to amendment, alteration or repeal by legislative authority, unless the act granting the charter or the renewal, amendment or modification in express terms excepted it from the operation of that law. The provisions of that law, therefore, constituted the condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made. They were as operative and as much a part of the charter and amendment as if incorporated into them.

The act amending the charter of the Northeastern Railroad Company, passed in December, 1855, provided that the stock of the company, and the real estate it then owned, or might thereafter acquire, connected with or subservient to the works authorized by its charter, should be exempted from taxation during the continuance of the charter. This act contained no clause excepting the amendment from the provisions of the general law of 1841. It was, therefore, itself subject to repeal by force of that law.

It is true that the charter of the company when accepted by the corporators constituted a contract between them and the state, and that the amendment, when accepted, formed a part of the contract from that date and was of the same obligatory character. And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations can not be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the state by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the state control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation.

There is no subject over which it is of greater moment for the state to preserve its power than that of taxation. It has nevertheless been

sum which he deems within his means of payment, he may be called upon to contribute an amount utterly beyond those means, and which may render him bankrupt. No subscriber would be safe under such a law, or have any rule by which to determine the amount of stock he could afford to take. In vain would he look to the charter of the company, or to the provisions of the constitution and subsisting laws of the state, to learn the nature and extent of the liability he was about to incur, if that liability can, at the pleasure of the legislature, be indefinitely increased or modified by retroactive laws. * * *

Reversed.

Note. See, 1806, Wales v. Stetson, 2 Mass. 143, *supra*, p. 150; 1820, Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573; 1824, Natusch v. Irving, 2 Cooper Ch. 358; 1843, Hartford & N. H. R. Co. v. Crosswell, 5 Hill (N. Y.) 383; 1851, Stevens v. Rutland, etc., R., 29 Vt. 545; 1854, New Orleans, etc., R. Co. v. Harris, 27 Miss. 517; 1860, Simpson v. Westminster, etc., Co., 8 H. L. Cas. 712; 1861, Abbott v. Hard Rubber Co., 33 Barb. 578; 1863, Clearwater v. Meredith, 68 U. S. (1 Wall.) 25; 1867, Zabriskie v. Hackensack, etc., R., 18 N. J. Eq. 178, 90 Am. Dec. 617; 1869, Central R. Co. v. Collins, 40 Ga. 582, on 624; 1873, Railway Co. v. Allerton, 85 U. S. (18 Wall.) 223, *supra*, p. 442; 1879, Kent v. Quicksilver Mining Co., 78 N. Y. 159, *infra*, p. 790; 1880, Hoey v. Henderson, 32 La. Ann. 1069; 1885, Academy of Music v. Flanders, 75 Ga. 14; 1892, People v. Ballard, 134 N. Y. 269; 1893, Forrester v. Boston & M. C. C. & S. Co., 22 Mont. 430, 55 Pac. Rep. 229; 1899, Pronick v. Spirits Distrib. Co., 58 N. J. Eq. 97, 42 Atl. Rep. 586; 1901, Bedford v. Eastern B. & L. Assn., 181 U. S. 227.

Sec. 203. Same.

(*b*) That subscriptions are made in good faith.

WHITE MOUNTAINS RAILROAD CO. v. EASTMAN.[1]

1856. In the Supreme Judicial Court of New Hampshire. 34 N. H. Rep. 124–147.

[Appeal from report of commissioner of insolvency upon Eastman's estate, allowing the railroad company $2,642.12 upon a subscription made by decedent for thirty shares to the company's stock. The original subscription was made in writing in the company's subscription book, apparently upon the same terms as other subscriptions. but at the time it was made the proper agents of the corporation agreed in writing to release the decedent, at his or his administrator's election, from all liability upon twenty-five shares. This was the defense made.]

Sawyer, J. * * * The two contemporaneous writings upon the same subject, between the same parties, are to be considered together as one contract, unless upon other grounds the writing given by the corporation is to be held void. Thus considered in connection, effect would be given to all the stipulations on both sides, con-

[1] Statement abridged. Only small part of opinion given.

tained in both writings, as constituting together one agreement. If no person were to be affected by the contract but the parties themselves, it would be competent for them to agree that the intestate should take and pay for thirty shares, subject, however, to the condition that if within one year he should elect to reduce the number so subscribed for to five, or any other number not less than five, he might be at liberty so to do, and that the corporation, upon his paying for the thirty or other reduced number of shares, would give him proper certificates therefor, constituting him the owner of them. * * * If they, for the purpose of misleading and deceiving third persons having an interest in the subject of their contract, held out the subscription of the intestate, as shown upon their subscription book, as the contract between them and him, and concealed from those third persons the fact, material for them to know, that there was a secret stipulation making the contract an entirely different thing, the principles of common honesty would require that they should be compelled to stand to the agreement as they held it out to be. * * * That the proceeding is a fraud upon third persons is clear from the relation in which subscribers for stock in a corporation of this kind stand toward each other. *In the subscription of each person every other subscriber has a direct interest. Their respective subscriptions are contributions or advancements for a common object. The action of each in his subscription may be supposed to be influenced by that of the others, and every subscription to be based upon the ground that the others are what upon their face they purport to be.* * * *

The fact that one man has bound himself to place a certain amount of his money upon the risk involved in the enterprise is an inducement to others to venture in like manner. Seeing who are his associates, and the extent of the liability which they have assumed, he regulates his own upon that consideration; and *though in form and legal effect the contract of each is with the corporation, yet among the subscribers themselves it is to be regarded as an agreement with every other subscriber to bear that proportion of the common burthen to which he professes to bind himself by the contract which he holds out to them as his contract with the corporation.* * * * To hold that the secret stipulation is valid as between these parties would be to give full effect to the fraud by relieving the estate of the intestate from a part of that burthen which he held out to the other subscribers he had assumed, and throwing upon them the necessity of providing for it. To hold that by fraud the whole contract as between the parties is void would but increase the injustice as to the other subscribers, for it would throw upon them the whole of that proportion of the common burthen which the intestate held out to them he had assumed; while, on the other hand, by holding that the contract which the parties held out to them as the true one, was in fact the contract made by them—all secret stipulations rendering it other than that being void as fraudulent toward third persons—the contemplated fraud is defeated and perfect justice done to the other

subscribers, and at the same time in so holding no wrong is done to the parties of which either has reason to complain. * * *

Affirmed.

Note. See, 1827, Center & K. Turnpike Co. v. McConaby, 16 S. & R. (Pa.) 140; 1858, Graff v. Pittsburg & S. R. Co., 31 Pa. St. 489; 1859, LaGrange & M. Plank R. Co. v. Mays, 29 Mo. 64; 1869, Custar v. Titusville Gas & W. Co., 63 Pa. St. 381; 1875, Melvin v. Lamar Ins. Co., 80 Ill. 446, 22 Am. Rep. 199; 1876, Phoenix Warehouse Co. v. Badger, 67 N. Y. 294; 1878, Miller v. Hanover, Jc. & S. R. Co., 87 Pa. St. 95, 30 Am. Rep. 349; 1886, Galena & S. W. R. Co. v. Ennor, 116 Ill. 55; 1888, Topeka Manufacturing Co. v. Hale, 39 Kan. 23; 1889, Morrow v. Iron & Steel Co., 87 Tenn. 262, 3 L. R. A. 37.

Compare, 1872, Burke v. Smith, 16 Wall. 390; 1888, Morgan v. Struthers, 131 U. S. 246; 1888, Meyer v. Blair, 109 N. Y. 600, 4 Am. St. Rep. 500; 1889. Winston v. Dorsett Pipe & P. Co., 129 Ill. 64, 4 L. R. A. 507.

But under some circumstances conditional deliveries in escrow are valid. See, 1874, Bucher v. Dillsburg & M. R. Co., 76 Pa. St. 306; 1894, Great Western Tel. Co. v. Loewenthal, 154 Ill. 261. Also, Minneapolis Threshing Mac. Co. v. Davis, 40 Minn. 110, 12 Am. St. Rep. 701, 3 L. R. A. 796, *supra*, p. 492; Wight v. Shelby R. Co., 16 B. Mon. 4, *supra*, p. 536, and Cass v. P., V. & C. R. Co., 80 Pa. St. 31, *supra*, p. 538.

ARTICLE III. - THE CORPORATE FUNDS—CAPITAL STOCK.

Sec. 204. In general. "The legal relations resulting from incorporation subsist in respect of the object of incorporation specified in the charter or articles of association and the means of attaining this object, *i. e.*, the corporate funds and property. Roughly speaking, the general result of these relations is that the corporate funds become a so-called trust fund, set apart for the attainment of the object of incorporation." * * *

"The general outline is this: The state has the power or right to enforce the application of these funds to the objects of incorporation, at least, so far as the public is interested in their attainment; the shareholders have the right to apply these funds to these objects; and the creditors of the corporation have the right to prevent the diversion of these funds from the objects of incorporation to the injury of creditors. The result of the respective rights of these different classes of persons is that corporate property becomes a fund set apart for the attainment of certain purposes from which it can not be diverted without the consent of all whose legally protected interests would be injured by such diversion."—Taylor Private Corporations, §§ 32–34.

Sec. 205. Right to create a capital stock.

COOKE v. MARSHALL.[1]

1899. IN THE SUPREME COURT OF PENNSYLVANIA. 191 Pa. St. Rep. 315–323.

[*Quo warranto* to determine right to office of secretary of the Chartiers Cemetery Company. This company was created by act of 1862, with the usual corporate powers—nothing being said as to power to have a capital stock. The corporators organized, passed a resolution establishing the cemetery on the ground designated, "and for this purpose" fixed the capital stock at "$8,000, divided into 160 shares of the par value of $50 each." This was subscribed, and the corporation proceeded to business. Afterward increases were made, first to $50,000, and later to $150,000. In 1893, at an informal meeting of some of the shareholders, the board was increased from five to seven members, and Cooke was elected secretary; to these acts Marshall protested, and later he, in connection with other members, organized a new board, wholly ignoring all idea of corporate stock, elected "associates" and officers, and Marshall has ever since claimed to be secretary, and obtained possession of the seal and books of the company. The stock board, however, continued to control the management of the cemetery. Cooke brought the suit and obtained judgment below. Marshall appealed.]

GREEN, J. * * * The question then is, was the original creation and issue of stock lawful, and if so, were the subsequent increases lawful? The issue was made for the purpose of performing the original duty to establish a cemetery. It was necessary to acquire land in order to create the cemetery, and the corporators adopted the method of obtaining the land by issuing stock in payment for it. It is not denied that the corporation might have borrowed money for this purpose, and made a mortgage on the property to secure the payment of it, although no such power was expressly conferred by the charter. On the question whether capital stock might be issued for the same purpose where the charter has not specially authorized a capital stock, not a single authority is cited for or against in the paper-books of either party. There is no doubt that this particular corporation did possess full corporate powers, and there is also no doubt that it was not only authorized but expressly enjoined to create a cemetery of not less than thirty acres in extent, and after that to lay it out into lots and plots, and roads and walks, and to do various other things necessary to its proper development as a cemetery. No method of raising money to acquire the land and do these various things was provided in the charter. The ordinary method in which such things are done is by the creation and issue of capital stock, and it may be argued with apparent reason that it is a necessary implication from the grant of

[1] Arguments and part of opinion omitted. Statement abridged.

corporate existence and powers that a right to issue stock is conferred. * * * In this case, however, the charter confers no power to issue any stock, and for such a company as this no such power is needed. It is remarkable that it is so difficult to find either text-book discussion of this subject or adjudicated cases. Whether a corporation without capital provided for in its charter may create and issue capital stock is certainly a fundamental and radical matter in corporation law. In 1 Cook on Stock, etc., § 279, it is said, "The capital stock of all incorporated companies is generally fixed by the charters which give them an existence." Section 281, "In the absence of express authority from the state a corporation has no power whatsoever to increase or reduce the amount of its stock, and any attempt on the part of the corporation, either by the corporate officers or by the stockholders, to do so is wholly illegal and void. * * * Where the attempted increase or reduction of the stock is not authorized by the charter, not even the unanimous assent and agreement of all the parties concerned will legalize it." * * *

(Citing Droitwich P. S. Co. v. Curzon, L. R. 3 Ex. 35;[1] Scovill v. Thayer, 105 U. S. 143; Sutherland v. Olcott, 95 N. Y. 93; 1 Morawetz, § 434, to the same effect.)

It follows, hence, that the increase of stock being void, all the elections held thereunder since that time are void and confer no authority upon the persons elected.

This ruling would dispose of the present contention, but it is perhaps desirable that the original creation of the $8,000 of capital stock should be considered. It is extremely difficult to understand under the foregoing decisions how any issue of capital stock by this company can be regarded as valid. The company was chartered to establish a cemetery. While a cemetery company is not necessarily a religious or charitable corporation, yet in many instances it is of that character, and perhaps as a rule this is so; yet they may be established as merely private enterprises and carried on for profit. But, in either case, if the charter confers no right or power to create capital stock, it is difficult to understand how any right to create and issue such stock has any existence. If capital stock may neither be increased nor diminished without an express power to that effect, how can any stock be created or issued when there is no capital stock fixed by the charter, and no power is given to create it? In 1 Cook on Corporations, § 8, the following definition of capital stock is given: "Capital stock is the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation, and for the benefit of corporate creditors." * * *

(Citing Barry v. Merchants' Exchange, 1 Sandf. Ch. 280;[2] American Pig Iron S. Co. v. State Bd., etc., 56 N. J. L. 389; Salem Mill Dam Co. v. Ropes, 6 Pick. 23.)

Now, if the doctrine of these cases (and there are many more of them) be true, and the act of increasing or decreasing the capital

[1] *Infra*, p. 764. [2] *Infra*, p. 766.

stock of a corporation without specific charter power to do so is a void act because it is *ultra vires*, how can it be true that a corporation may issue any capital stock without having specific legislative authority to do so? We can not see. *If it is ultra vires to increase, it is ultra vires to issue any stock, where no power to do so is conferred by the charter. The power to create corporate capital stock is a legislative function, and, in any given case, in order that such stock may have a legal existence, the function must be exercised.*

Reversed.

Sec. 206. Power to increase the capital stock.

See RAILWAY CO. v. ALLERTON, 85 U. S. (18 Wall.) 233, *supra*, p. 442.

Note. See, also: 1827, Salem Mill D. Corp. v. Ropes, 23 Mass. (6 Pick.) 23; 1854, People v. Parker Vein Coal Co., 10 How. Pr. (N. Y.) 543; 1856, Mechanics' Bank v. New York, etc., R., 13 N. Y. 599; 1856, Ferris v. Ludlow, 7 Ind. 517; 1865, New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; 1878, Moses v. Ocoee Bank, 1 Lea (Tenn.) 398; 1881, Scovill v. Thayer, 105 U. S. 143; 1882, Grangers', etc., Ins. Co. v. Kamper, 73 Ala. 325; 1884, Sutherland v. Olcott, 95 N. Y. 93; 1889, Cartwright v. Dickinson, 88 Tenn. 476; 1891, Jones v. Railroad Co., 67 N. H. 119, 234; 1895, Einstein v. Rochester Gas, etc., Co., 146 N. Y. 46; 1897, Peck v. Elliott, 47 U. S. App. 605, 79 Fed. Rep. 10, 24 C. C. A. 425, 38 L. R. A. 616, and note.

But it seems that if the charter or articles of association provides that the stock may be fixed by the members, it may be changed from time to time by the members. See, 1897, Peck v. Elliott, 47 U. S. App. 605, 38 L. R. A. 616.

Overissued shares are void, even in the hands of *bona fide* holders: 1854, People v. Parker Vein Coal Co., 10 How. Pr. (N. Y.) 543; 1865, N. Y. & N. H. R. v. Schuyler, 34 N. Y. 30; 1867, Bruff v. Mali, 36 N. Y. 200; 1868, Sewell's Case, L. R. 3 Ch. App. 131, 138; 1882, People's Bank v. Kurtz, 99 Pa. St. 344; 1893, Hayden v. Charter Oak D. P., 63 Conn. 142; 1901, First Ave., etc., Co. v. Parker, 111 Wis. 1, 86 N. W. 604, 87 Am. St. R. 841.

But the corporation is liable to an innocent holder for the tort of the officer, if he was clothed with the general power to issue stock for the corporation: 1842, Daly v. Thompson, 10 M. & W. 309; 1857, Mandlebaum v. North Am. Min. Co., 4 Mich. 465; 1865, New York & N. H. R. v. Schuyler, 34 N. Y. 30, 49, 60; 1867, Bruff v. Mali, 36 N. Y. 200; 1868, Re Bahia, etc., R. Co., L. R. 3 Q. B. 584, 595; 1873, Tome v. Parkersburg Br. R., 39 Md. 36; 1882, Peoples' Bank v. Kurtz, 99 Pa. St. 344; 1889, Allen v. South Boston R., 150 Mass. 200; 1892, Ryder v. Bushwick R., 134 N. Y. 83; 1893, Hayden v. Charter Oak Driv. Park, 63 Conn. 142; 1893, Fifth Avenue Bank v. Forty-Second St., etc., R. Co., 137 N. Y. 231; 1897, Cincinnati, etc., R. v. Citizens' Nat'l Bank, 56 Ohio St. 351, 47 N. E. Rep. 249, 43 L. R. A. 777; 1901, First Ave. Land Co. v. Parker, 111 Wis. 1, 87 Am. St. R. 841, 86 N. W. 604.

Unless the stock is taken from such officer, as a part of a transaction in which he is personally interested at the time: 1884, Moores v. Citizens' National Bank, 111 U. S. 156; 1890, Farrington v. South Boston R., 150 Mass. 406; 1890, Wilson v. Metropolitan El. R., 120 N. Y. 145; 1891, Hill v. Jewett Pub. Co., 154 Mass. 172; 1893, Manhattan L. Ins. Co. v. Forty-Second, etc., R., 139 N. Y. 146.

Sec. 207. Power to decrease the capital stock.

DROITWICH SALT CO. v. CURZON.[1]

1867. In the English Court of Exchequer. L. R. 3 Exch. 35–43.

Kelly, C. B. * * * The plaintiffs are a company which were in existence long before the passing of the companies act, 1862. At the time of the passing of that act, or rather a short time afterward, when they called on the registrar to register them under the act, their nominal capital was 250,000*l.* But this capital was then farther stated to be "in 10,000 shares of 25*l.* each, all taken, 25*l.* having been paid on the first 5,000 shares, 15*l.* on the next 1,000 shares, and 5*l.* on the remaining 4,000 shares;" and it was also stated that the last 5,000 shares were issued at 25*l.* each "for the sums above mentioned." This amounts in substance to a declaration that the actual amount of capital had been reduced from 250,000*l.* to 160,000*l.*, thus: there had been a new issue of 1,000 shares on the original capital of 125,000*l.* at 15*l.* a share, and two subsequent issues of 4,000 shares at 5*l.* each. The aggregate amount subscribed was, therefore, 160,000*l.*, and this was the real capital of the company, although their nominal capital amounted to 250,000*l.* It is said that the words in the requisition for registration, "the last 5,000 shares were issued at 25*l.* each, *for the sums above mentioned*," amount to a statement that these shares were to be considered as fully paid up. Probably this is so, and at all events the registrar entered the company on the register, whether by inadvertence or otherwise, under the act of 1862, in the manner above described. Subsequently he was called upon to register a further change in the amount of capital. Resolutions were passed reducing the capital to 100,000*l.* in 10,000 fully paid-up shares of 10*l.* each. These resolutions were sent to the registrar and were recorded by him. In fact, he ought to have refused to record them. He did, however, perhaps per incuriam, enter the reduction of capital. Then he was called upon to register an increase of this reduced capital from 100,000*l.* to 125,000*l.* Notice was duly given to him of the proposed increase, but he refused to record the notice or the amount of the increase. Had he done so, then taking all the entries together as representing the constitution and condition of the company, the entry of 125,000*l.* would have amounted, in fact, to an entry, not of an increase, but of a reduction of the nominal capital of 250,000*l.*, as originally registered, to 125,000*l.* The question, therefore, really is, whether the company were entitled to reduce their nominal capital and to call upon the registrar to enter on the register a minute of that reduction?

Now, in the case of a company formed under the act of 1862, and

[1] Facts sufficiently stated in the opinion, part of which is omitted. Also arguments, and concurring opinions of Bramwell, Channell and Piggot, Barons, are omitted.

also in the case of a company already formed, which afterwards is registered under the act, it is imperative on the registrar to enter on the register the amount of nominal capital. With regard to companies limited by shares formed under the act, section 8 enacts that the memorandum of association shall, among other things, contain "the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount," and before registration the registrar (who has to give a certificate which is to be conclusive evidence that all the requisites of the act in respect of registration have been complied with) must satisfy himself that the matter to be registered—the memorandum of association—contains all the elements prescribed by the different clauses of section 8, and no alteration in any one of these elements can be made unless expressly authorized (section 12). The law is the same where an existing company applies for registration. Section 183 provides that, previous to registration, a statement of "the nominal capital of the company, and the number of shares into which it is divided," is to be delivered to the registrar, and his certificate of incorporation is to be conclusive evidence (section 192) that all the requisitions in the act contained in respect of registration have been complied with. It is quite clear, therefore, that the nominal amount of capital, and the number of shares into which it is divided, must be stated to the registrar, by whom that amount must then be entered on the register.

We next have to consider whether an existing company, when once registered, have any power under the act of 1862 to give effect to a provision contained in their original deed of settlement to reduce their capital. Now, there is an express power given to *increase* capital (section 12), but nowhere can there be found an express provision pointing to a power to reduce, after once the nominal amount of capital has been registered. Is it then, the effect of the sixth clause of section 196, to enable a company existing before the act, and registering under it, to exercise the power of reducing their capital; or rather, is it the effect of that article to legalize the continuance of a power already possessed under the original deed of settlement or articles of association? The language of the sixth clause is as follows (his lordship read the clause), and as far as that language goes it is not contended that there is anything in it to render lawful a reduction of capital. But there follows a proviso in these terms: "Nothing herein contained shall derogate from any power of altering its constitution or regulations which may be vested in any company registering under this act in pursuance of this part thereof by virtue of any act of parliament, deed of settlement, etc., constituting or regulating the company." Now, in construing this proviso, I take it that before the word "power" we ought to introduce the word "lawful," and that the proviso means that nothing in the act is to derogate from any "lawful power" before possessed by any company.

Is this power of reduction, then, a lawful power, a power which could be exercised consistently with justice, and with the objects of the act? If it applies, we must remember, to a company where the whole

amount of the shares has been paid up, there is no reason why it should not apply to a company where a portion only of the nominal amount registered has been paid up, and the shareholders are liable to contribute for the remainder. Now, it is impossible to contend that a company registered with a nominal capital of 250,000*l.*, made up of 25*l.* shares, of which say only 15*l.* or 20*l.* is paid, should have power to enforce the registrar to register resolutions reducing their capital to the amount actually paid up. If such a proceeding were permitted, the shareholders' liability would be limited, not, as was intended, by the amount of their shares, but by the amount of the already paid-up portion of their shares. Justice, the language of the act and the intention of the legislature alike forbid an interpretation which would lead to such a result. I, therefore, think that the nominal capital of this company having been registered at 250,000*l.*, it was not competent to the plaintiffs to reduce that capital. The registrar should not have registered the resolutions making that reduction, and when he was called on to make a further entry which would have affirmed the previous improper reduction of capital, he was justified in declining to make it. The defendant, therefore, is entitled to our judgment.

Note. See, also: 1856, Ferris v. Ludlow, 7 Ind. 517; 1896, Niagara Shoe Co. v. Tobey, 71 Ill. App. 250; 1897, *In re* Colmer, 1 Ch. 524; 1897, Shoemaker v. Washburn L. Co., 97 Wis. 585; 1897, Peck v. Elliott, 47 U. S. App. 605, 38 L. R. A. 616; 1898, *In re* National Dwellings' Soc., 78 L. T. (N. S.) 144; 1903, Hodge v. U. S. Steel Corp. — N. J. —, 60 L. R. A. 742.

Sec. 208. Nature, function and purpose of capital stock.

BARRY v. MERCHANTS' EXCHANGE COMPANY.[1]

1844. IN THE COURT OF CHANCERY OF NEW YORK. 1 Sandford's Chancery (N. Y.) Rep. 280–318.

[The Merchants' Exchange was incorporated in 1823, with a capital stock not to exceed $1,000,000; it was authorized to purchase, hold and convey so much real estate and to erect such buildings as the body corporate might deem necessary or proper for the purpose, and receive the rents and profits thereof, and divide the same amongst the stockholders at such times as the company might deem expedient; power to make by-laws was given, and the act was to be favorably construed for all beneficial purposes; $230,000 of stock was subscribed and paid and the exchange built at a cost, including the lot, of about $250,000. The building was destroyed in 1835 by fire; and it was determined to build a new and much larger one; subscriptions were called for the rest of the stock; this was soon taken, and the amount received therefrom invested in more land; then it was determined to borrow money—in all $700,000—by the issue of bonds to that extent, secured by mortgage upon the property; this was done and the property conveyed by deed of trust to K., to hold for the bond-

[1] Statement greatly abridged; arguments and much of opinion omitted.

holders. The company made default in payment of its debts and its property was taken possession of by K. Barry had performed work in the construction of the new building to the amount of about $10,000 —of which $7,400 had been paid in cash, $1,000 in bonds, and $1,600 remained unpaid; for this he sued and obtained judgment, which could not be paid. He brought his bill, alleging that the company had no right to issue bonds, and asking that the trustees' title be set aside, the bonds canceled, and a receiver be appointed, etc.]

SANDFORD, V. C. * * * It was argued that the amount fixed as the capital stock of the corporation was an absolute restriction upon the amount and value of the property, both real and personal, which they may hold permanently.

Some modifications of this position at once forced themselves upon the attention of the counsel. If the capital were the limit of the property of the corporation they could make no dividends or profits, for those are beyond the capital. Again, in the ever-varying and fluctuating values of all descriptions of property, a corporation that was within its capital last year, may, without a single new purchase or expenditure, be worth this year twenty per cent. beyond its capital by the increased value of the same property.

Hence the learned counsel were driven to rest their point upon a designedly permanent increase of property beyond the capital of the company. Still the rule encountered difficulties.

The object of corporators in all moneyed and business corporations is to make greater profits than they can command by the separate use of the same amount of capital. They put in their money, the capital stock, for the very purpose of having it increase in value, and more rapidly than in private adventures. And we have seen that unless positively enjoined by their charters, there is nothing to require them to divide the increase annually, or in any given time.

It was argued that in this particular case the design was one not referring to profits for ultimate division, but it was a permanent and solid investment of profits which never could be divided, and which became an essential and integral portion of the real capital of the company. That the exchange was an unit, indivisible, and composed of the capital stock and nearly as much more; the latter being added in anticipation of earnings or profits, and the whole incapable of partition or division.

On this subject of the capital stock of a corporation, the elementary treatises are comparatively barren.

It is the aggregate amount of the funds of the corporators, which are combined together under a charter for the attainment of some common object of public convenience or private utility. This amount is usually fixed in the act of incorporation, although we have seen in the statutes of 1823, one exception to this practice. It is thus limited, in reference to the convenience of the intended corporators, and for the information and security of the public at large. To the corporators, it prescribes the amount and subdivisions of their respective contributions to the common fund; the voice which each shall have in

its control and management; and the apportionment of the profits of the enterprise. To the community, it announces the extent of the means contributed and forming the basis of the dealings of the corporate body, and enables every man to judge of its ability to meet its engagements and perform what it undertakes. And when, as in most instances, the statute requires the stock to be paid in before the corporation can transact business, security to those contracting with it is thereby superadded to the information of its resources. These objects, for the public benefit, are sometimes defeated by fraud and deception, but they are such as the legislature have in view in limiting the amount of capital stock, and requiring a specified sum or proportion to be paid in.

One further consideration dictates the amount thus fixed. This is the probable and reasonable extent of the means requisite to the accomplishment of the end proposed, qualified in many cases by the unwillingness of the legislature to create these artificial beings with an undue amount of capital.

As no certain rule can be devised by which to estimate the means necessary to effect all the purposes of a contemplated incorporation, the amount of the capital in each case must be fixed in reference to the considerations which I have just enumerated, without any intention or expectation in ordinary cases of limiting to that sum the aggregate property which the corporation, when its capital is paid in and its operations commenced, shall from time to time possess or own. This is peculiarly true of the numerous incorporations which have sprung into being under the magic influence of the enterprise and ingenuity of our citizens, and in which, from their boldness or novelty, it was impracticable for human foresight to calculate the requisite means.

It is true that in one instance the authors of a most excellent treatise on corporations have spoken of capital stock, and the amount of property which they shall hold, as if they were synonymous terms; but they have said on a previous page, that every corporation aggregate has incidentally at common law a right to take, hold and transmit in succession, property real and personal to an unlimited extent or amount. 1 Angell & Ames on Corp. 87, ch. 5, § 1; 1 Kyd on Corp. 76, 78; 1 Black. Comm. 475; 2 Kent's Comm. 277, 2d ed., and a host of authorities are to the same effect. Angell & Ames also add that "the statutes of mortmain make no mention of personal property, and hence in England the power of corporations aggregate to take such property remains in general unlimited, unless restrained by the charters or acts of parliament establishing them." Treatise on Corp., 90, 92. And see 1 Kyd on Corp. 104.

The capital stock of a corporation is, like that of a co-partnership or joint stock company, the amount which the partners or associates put in as their stake in the concern. To this they add upon the credit of the company, from the means and resources of others, to such extent as their own prudence or the confidence of such other persons will permit. Such additions create a debt; they do not form capital. And if successful in their career, the surplus over and above their

capital and debts becomes profits, and is either divided among the partners and associates, or used still farther to extend their operations.

The proposition that a corporation is limited, even in its permanent ownership of property, to the amount fixed as its capital, is entirely new, and has not the sanction of authority or reason. The custom of retaining the profits, which I have before mentioned, has been long continued, and has worked in many of our corporations, and especially in banking institutions, an increase of their solid property and estate, as permanent as any that has been inferred in this case. Not that such increase has in those instances been so invested and mingled with the fruits of the original capital as to become indivisible therefrom; but the increase has in many of the instances been as fixed and permanent as the capital itself, and with no purpose or probability of its being returned to the stockholders until the concern should be wound up voluntarily, or by the expiration of the charters. Some further illustration of this question will occur in connection with the discussion of the power of borrowing after the payment of the capital.

Second. The second theory of the counsel for the complainant was, that the power of borrowing money was limited to the extent of the capital of the company; and when that capital was fully paid, the power ceased, except for mere temporary objects, and for short periods.

They therefore had no right to contract a permanent debt like these mortgages. That if they did not expect to pay the mortgages, it is still worse, because by the means used they created, or attempted to create, a public stock or funded debt.

It was urged that on the latter hypothesis they were exceeding the charter, because the direct consequence is, that they build at the expense of two millions, and out of the rents pay an interest to the bondholders, and a dividend to the stockholders; and the one to continue as long as the other, being to all intents a capital of two millions.

This argument is specious, for if the building be worth the two millions, which it is assumed to have cost, and the company owes one million, their clear property is but one million after all. Then as to the funded debt or stock created and secured by these mortgages. The fifth section of the act of incorporation was referred to as prohibiting this mode of effecting a loan. That section declares that the act shall not be construed to authorize the dealing or trading in, or the purchase or sale of any stock or funded debt created, or to be created, under any law of the United States, or of any particular state.

If the resemblance between these bonds and such stock or funded debt were complete in all things, this section would have no application to the borrowing of money upon their issue. But, in truth, the resemblance is very faint. The bonds were printed or engraved, and had coupons attached for convenience in the collection of interest. There the likeness ceased. These bonds were sealed obligations of

the company, *bonds*, in the technical sense of the word, and secured not by the public faith, or the mere corporate liability, but by mortgages on real estate.

But it was contended that the unrestricted power of borrowing, which the company claims for effecting the purposes of its charter, virtually confers upon the corporation unlimited power. That the purposes of the charter would, in this instance at least, be no restraint, because they could embrace accommodations for every description of commercial business, and the extent of their credit would be equally ineffectual, for there would be no limit to that, except in the prudence of the lender, and finally, that no such extravagant authority was granted to this corporation, expressly or by implication, and it is contrary to the spirit and policy of our laws and institutions.

This whole argument is, in my judgment, unsound. The danger of inordinate accumulation of property and consequent overshadowing power is wholly fallacious. The whole extent of the corporate credit is, in truth, measured and controlled by its capital. Every addition to its means beyond its paid-up capital (leaving profits out of view) must be by gift or contract, and if by contract, a debt ensues. If a corporation with a million of capital succeeds in running into debt two millions it has no more solid property, and is intrinsically worth no more than before, unless the property obtained on credit is worth more than it cost, and then the increase of property is only such excess of value. And if worth less than cost, then the company has by the operation sunk a part of its capital.

All experience shows that the financial management of corporations is, in general, less judicious and safe than that of individuals. Hence losses are likely to ensue from expansions upon credit; and the farther such credit is pushed by any corporation, the greater the danger that such losses will impair and finally consume its capital. The lenders of money are usually sagacious enough to protect their interests when dealing with corporations as well as with individuals; and few would lend money to a company which already owed debts greatly exceeding its whole capital stock, however flattering in appearance the investment might be. The laws of trade have placed an impassable barrier to the power of corporate borrowing, in the tendency of such institutions to make an improvident use of exuberant means, and in the caution and prudence of capitalists. It is utterly impossible for a corporation with a known limited capital to accumulate by means of its credit the gigantic property and power which the imagination of the counsel portrayed. * * *

In this case, then, I am satisfied that the Merchants' Exchange Company were authorized by law to borrow money for the completion of their building, to the extent adopted by them, and to secure its repayment by their corporate obligations, and by mortgages on their real estate.

I do not find that any limitation contained in their charter has been thereby exceeded, nor that any condition annexed to the grant of their

franchise has been broken, nor that they have failed to perform the duties enjoined upon them by the law of their creation. * * *

Bill dismissed.

Note. **Stock** is generally used synonymously with "shares of stock" with us, and indicates a definite proportional interest that the owner has in the management, dividends and final distribution of the surplus assets of the corporation upon dissolution. In England it seems that stock is a fund which can be divided and held in irregular amounts, like the government *stocks*, which can be bought in £99½ sums, as well as any other sums, while a share, or debenture, is of a fixed amount, as £100, incapable of subdivision.—Rapalje & L. Law Dictionary, 1224.

Common stock, or shares, are such as entitle all the owners thereof to equal (in proportion to number of shares owned) participation in the management of the corporation, and, in the absence of any preference shares, to a like equal portion of the profits and assets. The common shares quite frequently have a preference in the management of the corporation, though not in the profits.

Preferred stock, or shares, are such as entitle the owners thereof to some preference in the distribution of the profits or assets of the corporation over the owners of the common shares. There may be various classes of preferred, such as *first* and *second*, etc., preferred, with different kinds of preferences as the basis. But within each class the owners have equal rights in proportion to their holdings. The preference may be either as to *profits*, or *assets* when dissolved, or both. In the absence of special provisions, preferred shareholders have the right to participate in the management, and are subject to liabilities to the same extent as common shareholders.

Guaranteed stock, in the United States, is generally given the same meaning as preferred—the words being used interchangeably—and both meaning that the "preferred" or "guaranteed" shareholders shall not only receive dividends in preference to the common shareholders, each year there are profits to divide, but also that they will be entitled to arrears of dividends for the years there are no profits earned, whenever subsequent profits are sufficient to pay such dividends. 1860, Bates v. Androscoggin, etc., R., 49 Maine 491; 1866, Taft v. Hartford, etc., R., 8 R. I. 310; 1875, Lockhart v. Van Alstyne, 31 Mich. 76; 1881, Boardman v. Lake S. & M. S. R., 84 N. Y. 157; 1882, Elkins v. Camden, etc., R., 36 N. J. Eq. 233. And the rule seems to be the same in England. 1857, Henry v. Great Northern R., 1 De G. & J. 606; 1875, Webb v. Earle L. R., 20 Eq. Cas. 556. Of course it can be made *non-cumulative* if so expressed. 1871, Bailey v. Hannibal, etc., R., 1 Dillon 174. And a few cases hold it is non-cumulative, unless expressed to be *cumulative*. 1885, Belfast, etc., R. v. Belfast, 77 Maine 445; 1887, Hazeltine v. Belfast, etc., R. Co., 79 Maine 411. The term, however, is also applied so as to entitle the guaranteed shareholder to payment of arrears of dividends out of the property of the company, before dividing it up among common shareholders upon dissolution. It is also sometimes applied to indicate the liability for dividends without regard to there being any earnings from which to pay—such stock then seems to be nothing but an interest-bearing loan.

Interest-bearing stock. Some attempts have been made to issue stock upon condition that all sums paid in upon it shall bear interest until the improvement is completed and profits earned out of which to pay dividends; such stock is designated interest-bearing stock. Since there are no earnings out of which to pay dividends, it seems that the interest can come only out of the capital, if it is to be *paid* before profits are earned, and would therefore, in effect, be a reduction of the capital to that extent, of which creditors might complain; when the interest is to be paid as it accrues, and before there are earnings, such stock provisions are generally held to be void. 1854, Troy & B. R. Co. v. Tibbitts, 18 Barb. (N. Y.) 297, on 307; 1861, Miller v. Pitts. & C. R. Co., 40 Pa. St. 237, 80 Am. D. 570; 1867, Painesville & H. R. Co. v. King, 17 Ohio St. 534; 1869, Pittsburgh & C. R. Co. v. Allegheny

Co., 69 Pa. St. 126; 1887, Ohio College of Dental Surgery v. Rosenthal, 45 Ohio St. 183; 1892, Re Sharpe, L. R. 1 Ch. Div. 154.

But if the interest is not to be paid until there are earnings out of which to pay, such provisions will be held valid, and if possible such construction will be given to provisions of this kind: 1853, Wright v. Vt. & M. R. Co., 12 Cush. (Mass.) 68; 1857, Waterman v. T. & G. R. Co., 8 Gray (Mass.) 433; 1860, McLaughlin v. Det. & M. R. Co., 8 Mich. 100; 1860, Milwaukee & N. I. R. Co. v. Field, 12 Wis. *340; 1863, Rutland & B. R. Co. v. Thrall, 35 Vt. 536; 1872, Richardson v. Vt. & M. R. Co., 44 Vt. 613.

Special stock. "This is a peculiar kind of stock, now distinctly provided for by statute, but unknown to the general laws of the commonwealth until 1855. Its characteristics are, that it is limited in amount to two-fifths of the actual capital; it is subject to redemption by the corporation at par after a fixed time, to be expressed in the certificates; the corporation is bound to pay a fixed half-yearly sum or dividend upon it, as a debt; the holders of it are in no event liable for the debts of the corporation beyond their stock; and the issue of special stock makes all the general stockholders liable for all debts and contracts of the corporation until the special stock is fully redeemed. Statutes 1855, ch. 290; 1870, ch. 224, §§ 25, 39, cl. 4; Pub. Stats., ch. 106, §§ 42, 61, cl. 3; Williams v. Parker, 136 Mass. 204, 207." Allen, J., in 1885, American Tube Works v. Boston M. Co., 139 Mass. 5, on 9. See, also, 1886, Reed v. Boston M. Co., 141 Mass. 454. This sort of stock seems to be confined to Massachusetts, although other states have recognized redeemable stock. See 1875, Totten v. Tison, 54 Ga. 139; 1879, Culver v. Reno Real Estate Co., 91 Pa. St. 367.

For a valuable note upon the subject of *Preferred, Guaranteed, Interest-Bearing*, and *Special Stock*, see 27 L. R. A. 136.

Treasury stock. This is a term used to designate that part of the authorized stock left (after the required statutory amount for commencing business has been subscribed) in the possession of the corporation to be issued in the future by sale by the corporation or upon further subscription; it is also applied to the stock that has once been issued, but surrendered or forfeited to the corporation, and which may be reissued. See, 1890, Alling v. Wenzel, 133 Ill. 264, on 269. When the holding of such stock by the corporation in this way is legal, it is not merged, but lifeless; it can not be voted, nor draw dividends; but may be sold at the face or the market value. See 1 Cook Corporations, § 314, and cases cited.

Deferred stock, or bonds, are those upon which payment of dividends or interest is expressly postponed until some other class of owners of stock, bonds or other obligations are paid. 1 Cook Corp., §§ 14, 762.

Founders' shares are such as are issued to the promoters or founders of the corporation, and which entitle the holders to all the profits after certain fixed maximum dividends are paid to the other shareholders; though deferred until the ordinary dividends are paid to the other shareholders, they sometimes become enormously valuable. For the usual provisions of such, see 1 Cook Corp., § 14, pp. 52, 53, giving forms, and citing, 1893, Re MacDonald, etc., Co., 69 L. T. R. 567; 1895, Re London, etc., Corp., 73 L. T. R. 280; 1896, Re New Transvaal Co., 75 L. T. R. 272; 1897, Re London, etc., Ltd., 77 L. T. R. 146.

Debenture stock does not mean shares of stock, but is the English form of bond, evidenced generally by a certificate representing a portion of a lump debt, which may or may not be secured by mortgage. A similar security is issued in this country sometimes by a corporation giving a bondholder a certificate entitling him alone to a certain sum with interest on exchange for coupon bonds delivered to the company—like the United States government registered bond. For further descriptions and forms see 1 Cook Corp., §§ 14 and 777.

Scrip, is a certificate that the owner is, or will be, upon the performance of some condition, entitled to a share of something, as land, stock or other property. In England it certifies that the holder will be entitled to certain shares of stock when unpaid installments are paid. 1 Cook Corp., § 14, citing, 1876,

Goodwin v. Robarts, L. R. 1 App. Cas. 476. A form of *stock scrip* is given in full in, 1865, Brown et al. v. Lehigh Coal and Navigation Co., 49 Pa. St. 270, on p. 272; a form of *scrip dividend* issued by the New York Central and Hudson R. Co. is given in full in, 1874, Baily v. Railroad Company, 89 U. S. (22 Wall.) 604, on 608. See, also, 1884, Gordon v. Richmond, etc., R. Co., 78 Va. 501, on 506. For a discussion of the nature of *land scrip* see, 1892, Rogers, etc., v. N. Y. & T. Land Co., 134 N. Y. 197. See, also, 1 Cook Corp., § 535, and Angell and Ames Corp., ch. vi., Proprietors of Common and Undivided Lands.

Watered stock, is stock which upon its face purports to have been paid for at its full face value, but which, in fact, has been issued without the corporation receiving, or having the right to demand, the full face value either in money, property or service.

Spurious or overissued stock, is such as is issued in excess of the amount authorized. Such stock is void. See note p. 763.

Sec. 209. Same.

COMMERCIAL FIRE INSURANCE CO. v. BOARD OF REVENUE.[1]

1892. IN THE SUPREME COURT OF ALABAMA. 99 Ala. Rep. 1–12, 42 Am. St. Rep. 17.

[Proceeding by the insurance company to be released from taxation upon $51,000 worth of stock of the Montgomery Bank owned by it. The law under which plaintiff was organized authorized insurance companies "to invest their money in real and personal property, stocks or choses in action and to sell the same." The tax law provided for a tax upon the capital stock of corporations, except such portions as may be invested in property which is otherwise taxed as property, but when such corporation shall pay taxes on its shares, or the same is paid by shareholders, such corporation shall pay taxes only on its real and personal property. The insurance company claimed that $51,000 of its *capital stock* was invested in that much of the *capital stock* of the bank, and the bank had already paid the taxes upon this sum. The lower courts decided against this view, and this is the error assigned.]

STONE, C. J. * * * What is capital stock of corporations, and why are they required to have a capital stock paid in?

"*Capital stock is the sum fixed by the corporate charter as the amount paid in, or to be paid in by the stockholders, for the prosecution of the business of the corporation, and for the benefit of corporate creditors. The capital stock is to be clearly distinguished from the amount of property possessed by the corporation.* * * *At common law the capital stock does not vary, but remains fixed, although the actual property of the corporation may fluctuate widely in value, and may be diminished by losses or increased by gains.*"—Cook on Stock and Stockholders, § 3.

"A stockholder has no legal title to the property or profits of the corporation until a dividend is declared or a division made on the dissolution of the corporation." *Ib.*, § 4*a*.

[1] Statement abridged; arguments and much of opinion omitted.

"A stockholder in an insurance company has the same rights that a stockholder in any other corporation has." *Ib.*, § 4*a*.

"A share of stock may be defined as a right which its owner has in the management, profits and ultimate assets of the corporation. By the court of appeals of New York it is said that 'the right which a shareholder in a corporation has, by reason of his ownership of shares, is a right to participate according to the amount of stock in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts.'" *Ib.*, § 5.

In Neiler v. Kelly, 69 Pa. St. 403, Justice Sharswood said: "A share of stock is an incorporeal, intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation —with the right to receive, in the meantime, such profits as may be made and declared in the shape of dividends." * * *

(Citing 2 Morse on Banking, 669–72; 2 Morawetz Corp., §§ 787–9; Wood v. Dummer, 3 Mason 308; Semple v. Glenn, 91 Ala. 245.)

The foregoing quotations are made with a view of presenting clearly and fully the nature and object of capital stock in a corporation. As property it has peculiar attributes. Collectively it is the property of the corporation, while the ownership of the shares is in the shareholders. Sale and disposition of the shares by the several owners is free and untrammeled, save as the law or by-laws of the corporation may have prescribed rules. Not so with the capital stock. That is a security or pledge the law exacts as a condition on which it grants the corporate franchise—the right to incur liabilities for the discharge of which no responsibility rests on any natural person. It is the indispensable condition on which the law-making power grants the franchise, because the law and public policy so declare. And the capital stock is a trust fund; a trust for the benefit and security of the corporation's creditors. The directory, or governing body of the corporation, are trustees, charged with the duty of guarding the trust fund, and preserving it for the uses for which it was placed in trust. The uses are, *first*, to meet and discharge any liabilities and debts of the corporation which disaster may bring upon it; and, *second*, to restore to the shareholders, when the corporation is wound up, whatever of the capital stock and accumulated gains may remain on hand, after discharging the corporation's liabilities to creditors.

It is not intended to be affirmed that the governing board of the corporation is required to keep the capital stock unemployed in its locked vaults. It should be utilized with a view of making it productive in some line of investment or operation within the scope of its corporate powers. There is this limitation to its authorized use. It must be within the scope of the corporate powers, and must be done with reference to the interest and success of the corporation whose capital stock it is. When this is the case, there is fidelity in the execution of the trust.

If this trust fund be misapplied to objects or uses outside of the scope of the corporate powers, this is a breach of trust, and fastens a personal liability on those who perpetrate the wrong, commensurate with the injury, if any, caused by the misapplication. And persons receiving the trust fund so misapplied, knowing it to be such, make themselves trustees *in invitum*, and render themselves liable to the corporation whose funds are thus misapplied, or to the creditors of the corporation, for any diminution the trust fund may suffer in the transaction. * * *

What is meant by the language, "To invest their money in * * * stocks or choses in action, and to sell the same?" Will it or can it be contended that the authority to invest in stocks confers the power to subscribe to the capital stock of another corporation in process of organization? And if it confers the authority to subscribe for and become a stockholder in another corporation, in what description of corporation may the insurance company become a stockholder? The statute employs only the generic word stocks; and that word, if it include bank shares, applies equally to shares in all private corporations. Can the insurance company invest its capital stock, and thus become a stockholder in any and every description of private corporation, at the mere will and pleasure of its governing body? The vast variety of corporations now in use and operation need not be referred to, to show to what extreme results this interpretation would lead. Railroads, telegraph lines, telephones, express companies, mining and manufacturing enterprises, these are only a few of the numerous subjects of incorporation under the law. Can an incorporated insurance company under our statute subscribe for stock in the organization of each, all, or any of the numerous corporations now so common in human transactions? The statute has a different meaning.

Stocks—shares in corporations—have come to be, in a large degree, subjects of commercial dealing and speculation. The newspapers contain tables of the ruling prices of stocks, as their market value fluctuates. These notices refer to the shares of stock in organized corporations. Their sale neither increases nor diminishes the capital stock in the corporation; it neither adds to, nor takes from the corporation one dollar of its stock. It simply changes its ownership *pro tanto*. The capital remains in the corporation intact, and the security it furnishes, and is intended to furnish, the creditors of the corporation remains unimpaired.

When we speak of capital stock of a corporation, we are understood to refer to the sum subscribed in its organization. When we speak of stock, we mean the certificates issued by the corporation to the shareholders, which certificates, like titles to property, furnish the evidence of ownership of the shares of stock. *Capital stock is the aggregate of money or other valuable thing contributed, or paid into the common treasury as a condition of the exercise of corporate functions, and a security for their faithful and prudent exercise. It is the property of the corporation, charged with a trust, it is true; but nevertheless, in its possession and under its control. The stock,*

stocks or shares of stock do not belong to the corporation. They belong to the shareholders and are exclusively under the individual control of the several owners. The stocks which the statute authorizes insurance companies to invest their money in can not mean capital stock owned and to be held by the corporation. This, we have seen, is a trust fund. It means the stock owned by stockholders, usually evidenced by stock certificates. Stock, as a subject of commercial dealing, is what the legislature meant in the statute we are interpreting. The very connection in which the word is used in the statute confirms this interpretation. "To invest their money in * * * stocks or choses in action, and to sell the same," is the language employed. There is not even a comma between the words "stocks" and "choses in action," nor a shade of difference in the powers conferred as to each. The power to invest in and to sell is very appropriate language when applied to commercial dealings. It is very inapt, if the intention was to confer authority to subscribe for stock in the formation of another corporation. * * *

The tax is, by statute, levied on the capital stock of corporations. In the corporation's petition to be relieved of a part of the tax thus levied, it describes it as a tax on the capital stock. It avers "That said capital stock is invested, * * * $51,000 thereof in the capital stock of the Bank of Montgomery." The corporation owned its capital stock, and, presumptively at least, did not own the shares of its capital stock. Hence the propriety and reasonableness of the averment that it was so invested, and not shares in its capital stock, pretermitting, for the sake of argument, its want of corporate power to invest its capital stock. The exact and specific case made in the petition is that the capital stock of one corporation—the thing itself—is invested in the *capital stock* of another corporation. And, it may be added, this averment was necessary to give the petition a semblance of merit. Capital stock—the insurance company's capital stock—was the subject of the tax, and in order to maintain the discount or deduction claimed, it was necessary to aver and show that that specific subject of taxation—the capital stock—or some portion of it, had been "invested in property which is otherwise taxed as property." We are thus confronted with the question, can one and the same sum of money, at one and the same time, serve the purpose of capital stock for two corporations?

We have shown by the highest legal authority that the capital stock of a corporation is a trust fund for the security and benefit of the creditors of the corporation, and that the managing board fills the relation of trustee for its preservation and administration. *Corporations acting within the scope of corporate powers, fix no liability on their officers or on any one else. They charge only the corporation. Hence the purpose and policy of requiring a capital stock as security and indemnity of persons who become its creditors. The law-making power confers on them privileges—a franchise, a right to make contracts in its artificial name without fastening a liability on any natural person—and it exacts from them as a condition on which it*

grants this franchise, this privilege and power, that they place a capital stock in safe pledge for the security of their creditors. And this capital stock is a permanent investment, with no power in the shareholder to withdraw it until the corporation is wound up and all its debts paid, and no power in the managing board to permit it to be withdrawn at the expense of creditors. It is a trust fund in the corporation's treasury, to be used only in its interest, and whatever of profit or emolument it may yield belongs of right to the corporation, its creditors and shareholders. It must be kept within the corporation and under its control to meet the purpose for which it was required to be raised and paid in. It is not materially unlike any other pledge that is placed as a guaranty of faithful performance of debt or duty. It is a fixed pledge until the debt is paid, or the duty performed.

Such being the nature, the status of capital stock in a corporation, can one and the same fund supply this want and fill this condition for two corporations? The law required $100,000 of capital stock as a condition on which it granted the corporate franchise for that amount of capital to the Commercial Fire Insurance Company, and the same amount from the Bank of Montgomery as the condition on which it conferred a similar franchise on it. Will a single sum of $100,000 meet and satisfy this double demand? The law does not grant acts of incorporation in the undoubting faith and trust that they will be profitably and successfully administered. If there was neither distrust nor doubt, no guaranty, no pledge, no capital stock paid in should be required. The law, basing its action on experience, requires this guaranty, this security, because human enterprises often miscarry. Let us suppose that in the case before us disaster should overtake both corporations, and it should become necessary to exhaust the capital stock of each in the payment of its liabilities. Is it not manifest that the $100,000 the law required as a pledge and guaranty from each company would not be forthcoming? Fifty-one thousand dollars of the sum could not meet the double demand of that sum from the respective creditors of the two companies. One dollar can not pay two.

Let us take a further step. If corporation No. 1 can, of its $100,000 of capital stock, supply fifty-one of the $100,000 the law requires of corporation No. 2, and yet retain its $100,000 of stock, no sound argument can be formulated why it could not furnish the bank with the whole $100,000 of capital with the same result. And if corporation No. 1 can, from its own capital, furnish the capital stock of corporation No. 2, why can not corporation No 2 render the same service to corporation No. 3? And why can not this process be carried on indefinitely? Would not such proceedings be an utter subversion of the purpose and policy which require that corporations, as a condition of the franchise they ask to be clothed with, shall furnish this security for those with whom they propose to have dealings? These questions can receive but one answer, and that answer is, that corporations

have no authority to subscribe their own capital stock in the capital stock of another corporation in process of organization. * * *

Affirmed. Walker and McClellan, JJ., dissent.

Sec. 210. Capital, capital stock, surplus and franchise distinguished.

PEOPLE, EX REL. U. T. CO., v. COLEMAN.[1]

1891. IN THE COURT OF APPEALS OF NEW YORK. 126 N. Y. Rep. 433-450.

[Appeal from judgment of supreme court, dismissing a writ of *certiorari* to review assessment of trust company's capital. The company claimed that all its *capital stock* and *surplus* were invested in United States securities and exempt. The commissioners held that the capital stock, the actual value of which they were to assess, was the shares, and they ascertained such value by multiplying the nominal capital by the market price of the shares, and deducted therefrom ten per cent. of the nominal capital, the assessed value of the real estate and the investments in the United States securities.]

FINCH, J. The relator has been assessed upon an "actual value" of its capital stock derived entirely from the market value of its shares. These are selling at the large premium of something over five hundred dollars for each share of one hundred dollars, and the assessors have concededly taken that valuation, or the principal part thereof, as the "actual value" of the company's stock liable to taxation, instead of its own proved and established value. The relator challenges the assessment, and through all the proceeding has persistently raised and pressed the inquiry, not so much as to the mode or manner of ascertaining value, but rather as to what is the precise thing to be valued, whether the capital stock of the company or the capital stock held in shares by the corporators. If these are the same, or in any just sense equivalents, either might be valued without substantial error, but if they are not such we must determine which is to be valued before we can solve the problem of how to value it.

Now it is certain that the two things are neither identical nor equivalents. *The capital stock of a company is one thing, that of the shareholders is another and a different thing. That of the company is simply its capital, existing in money or property, or both; while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend earning power, of franchise and the good will of an established and prosperous business. The capital stock of the company is owned and held by the company in its corporate character; the capital stock of the shareholders they own and hold in different proportions as individuals. The one*

[1] Statement abridged; arguments and part of opinion omitted.

belongs to the corporation, the other to the corporators. The franchise of the company, which may be deemed its business opportunity and capacity, is the property of the corporation, but constitutes no part or element of its capital stock, while the same franchise does enter into and form part, and a very essential part, of the shareholder's capital stock. While the nominal or par value of the capital stock and of the share stock are the same, the actual value is often widely different. The capital stock of the company may be wholly in cash or in property, or both, which may be counted and valued. It may have in addition a surplus, consisting of some accumulated and reserved fund, or of undivided profits, or both, but that surplus is no part of the company's capital stock, and, therefore, is not itself capital stock. The capital can not be divided and distributed; the surplus may be. But that surplus does enter into and form part of the share stock, for that represents and absorbs into its own value surplus as well as capital, and the franchise in addition. So that the property of every company may consist of three separate and distinct things, which are its capital stock, its surplus, its franchise; but these three things, several in the ownership of the company, are united in the ownership of the shareholders. The share stock covers, embraces, represents all three in their totality, for it is a business photograph of all the corporate possessions and possibilities. A company also may have no surplus, but, on the contrary, a deficiency which works an impairment of its capital stock. Its actual value is then less than its nominal or par value, while yet the share stock, strengthened by hope of the future and the support of earnings, may be worth its par, or even more. And thus the two things—the company's capital stock and the shareholder's capital stock—are essentially and in every material respect different. They differ in their character, in their elements, in their ownership and in their values. How important and vital the difference is became evident in the effort by the state authorities to tax the property of the national banks. The effort failed, and yet the share stock in the ownership of individuals was held to be taxable as against them. The corporation and its property were shielded, but the shareholders and their property were taxed.

Now some degree of confusion and trouble have come in because these two different things are denominated alike capital stock, making the expression sometimes ambiguous. It is the important and decisive phrase in the law of 1857, under which the assessment here resisted was made, and requires of us to determine at the outset in which sense it was used. The section reads thus: "The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll, or shall have been exempted by law, together with its surplus profits or reserved funds exceeding 10 per cent. of its capital, after deducting the assessed value of its real estate and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value and taxed

in the same manner as the other real and personal estate of the county."

There are reasons in abundance for the conclusion that by the phrase "capital stock" the statute means not the share stock, but the capital owned by the corporation; the fund required to be paid in and kept intact as the basis of the business enterprise and the chief factor in its safety. One ample reason is derived from the fact that the tax is assessed against the corporation and upon its property and not against the shareholders, and so upon their property. In theory every tax is charged against some person, natural or artificial, resident or non-resident, known or unknown. It is assessed, not upon property irrespective of ownership, but against persons in respect to their property (23 N. Y. 215), and effects not merely a lien, but also a personal liability. On the assessment rolls in this case appeared the name of the relator as the person assessed, and the amount of the tax became a charge against it. Of course, it could only be assessed and taxed in respect to its own property, that which in its corporate character it owned and possessed, and so it follows inevitably that the statute concerns the company's capital stock, that is, its real and actual capital, and not in any respect the share stock which it does not own and whose possessors have not been assessed.

Another reason is founded on those terms of the statute which include and exclude respectively specific kinds or classes of property in the corporate ownership. Thus the assessment is to be laid not merely upon the capital stock of the corporation, but also upon its surplus. No such explicit direction was necessary, except upon the assumption that by the words "capital stock" was meant simply "capital," which would not include surplus, and so required that it be subjected by name to the valuation. If the share stock was meant its value would include surplus and make its specification not only needless but confusing. But while the statute includes surplus by specific mention, it excludes franchise by omitting it. The omission of franchise is emphasized by the careful inclusion of surplus. It is fully and definitely settled that the tax imposed by the statute is not upon franchise. (People v. Comrs. of Taxes, 2 Black. 620.) But if that be so, it is not upon the share stock, for that represents the value of the corporate franchise as a part of the total of the corporate property. And so, both by what it specifically includes and silently excludes, the statute itself informs us that by "capital stock" it means and intends the company's actual capital paid in and possessed, and not at all or in any sense the share stock. * * *

(Reviewing statutes and distinguishing the following cases: Oswego Starch Factory v. Dilloway, 21 N. Y. 449; People, *ex rel.*, v. Comrs. of Taxes, 23 N. Y. 192; People, *ex rel.*, v. Dolan, 36 N. Y. 59; People, *ex rel.*, v. Ferguson, 38 N. Y. 89; People, *ex rel.*, v. Bd. of Assrs., 39 N. Y. 81; People, *ex rel.*, v. Comrs. of Taxes, 95 N. Y. 554; People, *ex rel.*, v. Asten, 100 N. Y. 597; People, *ex rel.*,

v. Comrs. of Taxes, 104 N. Y. 240; People, *ex rel.*, v. Coleman, 107 N. Y. 541.)

Judgment reversed.

Note. See, 1851, State v. Morristown Fire Assn., 23 N. J. L. 195; 58 L. R. A. 513.

Capital stock, capital, shares, and property. Great confusion exists in the use of these terms; sometimes capital stock is used to mean the amount of stock a corporation is authorized to issue; sometimes the amount subscribed and issued; sometimes the amount actually paid in, with which the company proceeds to do business; sometimes the value (actual or nominal) of the sum total of the shares in the hands of the shareholders; sometimes the value of the property of the corporation, real and personal, including surplus and franchise.

Statutes frequently provide that the articles of incorporation shall state the amount of *capital stock*, and after 50 per cent. is subscribed, and 10 per cent. thereof is paid in, the corporation may organize and commence business—leaving it in the discretion of the corporation to call for further subscriptions or further payment upon subscriptions made. For example, if, under such a law, the articles of incorporation provide "the capital stock shall be $100,000," the corporation may commence business with $50,000 subscribed, upon which only $5,000 were actually paid in; there would, however, exist the capacity to call for the payment of $45,000 more, and also to issue $50,000 more by a new subscription, and to call for its payment.

If the whole amount authorized was always subscribed and paid in there would be little difficulty; the sums being the same, each could very properly be designated *capital stock;* yet there is opportunity here for confusion with the corporate property, for if the whole $100,000 were paid in and invested in property which increased in value to $150,000, it might be and sometimes is said that the *capital stock* is $150,000, instead of $100,000; approved usage, however, says there is still only $100,000 capital stock, but a surplus of $50,000, which, if it can be separated from the rest, can be paid to the shareholders as dividends; on the other hand, if there should be a loss of $50,000, it would seem wrong to say the *capital stock* is $100,000, yet approved usage still says the capital stock is $100,000, though there is a deficit of $50,000, and the *corporate property* is only $50,000, the corporation (at least for the protection of creditors) being required to make up such deficit before distributing subsequent earnings as dividends.

More difficulty arises when the whole amount authorized is not subscribed, and only a part of the latter is paid in; of course, in such event it could be made clear in each case what was meant by using the terms: Authorized capital stock, $100,000; subscribed capital stock, $50,000; paid-up capital stock, $5,000; and if such terms were always used in statutes, contracts, rules, etc., much confusion could be avoided. Unfortunately, however, *capital stock* and *capital* are the only terms used, as "The *capital stock* shall not be increased or decreased, except by consent of the state;" or, "The *capital stock* is a trust fund for the security of creditors;" or, "Dividends shall not be paid out of the *capital* of the company;" or, "The corporation shall be taxed only upon its *capital stock;*" or, "The *capital stock* shall be exempt from taxation;" or, "The *shares of stock* shall be taxed, or be exempt from taxation."

In the first case, increasing or decreasing the *capital stock*—the *authorized capital stock*—the amount named in the charter or articles of association is meant, not the property of the corporation, not the amount subscribed or paid in; but no greater subscription than the authorized amount can rightly be taken, and no payment, in the absence of a special statutory liability, can be required beyond the amount subscribed. The *property*, however, may be increased to any extent, or diminished to any extent, that does not interfere with the performance of its corporate functions or the payment of creditors. See Barry v. Merchants' Exchange, *supra*, p. 766.

In the second case—the capital stock as a trust fund—which is meant, the authorized, the subscribed, or the paid in amounts, or the property only of

the corporation? If all that is authorized is subscribed, paid in and invested in property, and there is no statutory liability, the creditor can not look further than to the actual property of the corporation, though it is much less than the capital stock named, if the loss is due to misfortune, and not fraud or improper appropriation of corporate funds by officers or members; on the other hand, if this property is more than the capital stock named, and is undivided in the hands of the corporation, the creditor can have it applied, if necessary, to the payment of his debt; yet until a lien has been acquired or insolvency converted it into a trust fund, the surplus over the amount of stock named can be distributed as dividends. But if the whole amount authorized is never subscribed, and the law allows business to be done with a smaller subscription, then as to a creditor, what is the capital stock? It is universally conceded that the *amount subscribed*, and not the amount authorized, is the *capital stock*, for there is no way by which a corporation can be required to secure additional subscriptions, or to compel any one to subscribe in order to pay creditors; in other words, unissued shares are not part of the *capital stock*, so far as creditors are concerned. Sturges v. Stetson, 1 Biss. (U. S.) 246, on 248, 10 Myer's Fed. D., § 142; Christensen v. Eno, 106 N. Y. 97.

On the other hand, the creditor has the right to have all the subscriptions paid up, if necessary, for his protection, and no part of the property returned to the shareholders that reduces it to a value less than the face value of the amount subscribed, if necessary, to pay his claims. Scovill v. Thayer, 105 U. S. 143; Wood v. Dummer, 3 Mason 308. So here, too, the amount subscribed, and not the amount paid in is the *capital stock* that is the primary basis of the company's credit; but this, too, is subject to the qualification made above—the creditor has the protection of the surplus earned until divided, and can claim no more than the actual property, if all subscribed has been once paid in good faith, and not lost through negligence, fraud or misappropriation.

As to the next—"dividends shall not be paid out of the capital"—*capital* is used to mean the amount of property of the company equal in value to the face value of the stock subscribed; all above that is surplus, and may be distributed in dividends; and in this sense *capital* is equivalent to *capital stock* subscribed as above explained. Williams v. Western Union Tel. Co., 93 N. Y. 162. The word *capital* is, however, more generally used to designate the actual property of the company derived from what has been paid in on the shares with undivided accumulations, whether the total is less or greater than the amount subscribed, and whether there have been losses or gains; in short, to designate the actual sum with which business is being done at any particular time.

As to taxation, there are many conflicting views: Taxation is supposed to be upon values without duplication. If placed upon *capital stock*, and the authorized capital stock was assessed at its face value, in case all was not subscribed, it would amount to an assessment upon a mere privilege, and would be in the nature of a franchise tax; if placed upon the face value of the amount subscribed, regardless of the sum paid in, it would be upon a mere possibility or power to call for further payments (except so far as paid up), and would also be in the nature of a franchise tax; if, upon the market value, this would be determined by the net amount of corporate property, the earning capacity and business opportunity exhibited by the corporation, and would, therefore, be equivalent to the total value of all the shares in the hands of the shareholders, and the tax so laid would be upon the same elements of value charged against the corporation; if, in addition to this, the corporate property, its lands, chattels and credits, was taxed against the corporation there would be double taxation to that extent; and if the shares in the hands of shareholders were also taxed at their market value there would be triple taxation, in the sense that the same actual elements of value or part of them would be taxed three times—twice to the corporation, and once to the shareholders.

Again, if *capital stock* is held to mean only the corporate property—lands, chattels and credits—and these alone are taxed, it is evident that in many

cases property rights of great value arising from the existence of the corporation are not taxed. When A. subscribes for a share of $100 face value, and pays in that sum, the corporation is the owner of the $100 as tangible property and A. is the owner of the intangible share, entitling him to have this $100 (if all creditors are otherwise satisfied) with all its net earnings during the corporate existence returned to him at the dissolution of the corporation, or from time to time before, in the case of the surplus earnings; though it is not considered a loan, it is in some respects similar, but without an obligation to repay before dissolution, or to pay interest in the meantime; these rights of the shareholder are considered A.'s property, and, in general, if he receives more in the way of dividends than he would receive as interest from a safe loan of $100, these intangible rights would be considered worth more as property—represented by a certificate of shares instead of a promissory note—than $100, or if the income was less than from a safe loan the share would be considered less valuable; the $100 that the corporation has is only $100 as its property, but because of its earning capacity, A.'s intangible rights arising from it, *his property in it* is worth more than $100; a valuation, therefore, of the corporate property alone as property does not reach all the elements of value in connection with the $100; its earning capacity does not add to the corporate property, but does add to A.'s property.

But inasmuch as the $100 A. has put in the corporation is put there mainly as an investment for gain, its value to him is determined almost wholly by its earning capacity, and very little by the fact that it is $100 property in the hands of the corporation; the reason for this is that the $100 can not be obtained by A. as his property until the corporation is dissolved, which may never occur, or only at an uncertain time in the future. However much property the corporation may actually have, the market value of its shares depends mostly upon the earning capacity of the property, and not upon the actual value of the property. As Mr. Justice Bigelow says in Commw. v. Hamilton Mfg. Co., 12 Allen (Mass.) 298, on 302: "The price for which all the shares would sell may greatly exceed the aggregate of the corporate property, or it may fall very far short of it. Undoubtedly the amount of property * * * is one of the considerations that enters into the market value of its shares; but such market value also embraces other elements; * * * it includes the profits and gains which have attended its operations, the prospects of its future success, the nature and extent of its corporate rights and privileges, and the skill and ability with which its business is managed, the estimate put on the potentiality of a corporation." So, too, the corporate *property* may be large, because it has all, or most of it, been purchased by the proceeds of bonds sold, and upon which the income is sufficient to pay large interest, but with nothing left for dividends—in which event the stock would be of but little value; yet possibly this would in some degree represent the net value of the property after the bonds were paid. But the corporation may in fact also have property to the value of a million dollars, and its shares be worth in the market but little, because the corporate property is unproductive—and the owner of the shares can in no way have the valuable property apportioned to him, but is bound to let it remain unproductive until dissolution of the corporation. From such considerations as these it seems clear that the *property* of the corporation and the capital stock of the corporation are different materially in value very frequently, the value of the capital stock being equivalent to the sum total of the value of the shares, and this being the business estimate of the earning capacity of the property as it is then employed—and not the value of the same property as it could and (if not owned by *that corporation*) would, probably, be employed. Because of these differences in value, and in ownership in the case of shares, it is generally held that a tax on the property of the corporation, and a tax on the shares of the stockholders are not double taxation—though both seem to be placed upon the same sources of value.

Although it is certain that confusion will continue to exist in the use of these terms, yet it is desirable that it be avoided as much as possible; and as an aid to that end it is suggested that terms be used as follows so far as possi-

ble: *Authorized capital stock*, to mean the total face value of all the shares the corporation has the right to issue; *capital stock*, to mean the sum total *subscribed*, equivalent in face value to the sum total of the face value of the shares issued; *capital*, the sum paid in as the fund with which it transacts business—or the total value of all the property of the corporation arising from the investment of this fund; *shares*, the intangible property of the individual shareholders, in face value equivalent to the *capital stock* of the corporation, and in actual value, the business estimate of the earning power of the *capital* of the corporation. It is believed that these views are sanctioned generally by text writers, and also by the best considered cases, where the uncertainty of statutes have not made it necessary to hold otherwise. Ang. & A., §§ 556, *et seq.*; Beach, § 465, *et seq.*; Boone, § 105, 112; Clark, p. 256, *et seq.*; Cook §§ 11, 12, 199; Elliott, §§ 299, 300; Lowell Transfer of Stock, ch. 1; Morawetz, §§ 137, 781; Taylor, §§ 124, 541, 545; I Thompson, §§ 1059–1085; II Thompson, § 2810; III Thompson, §§ 2956, 4288, *et seq.*

Below is given a collection of cases where these matters are considered:

Capital stock does not include unissued but authorized shares: 1858, Coddington v. Gilbert, 17 N. Y. 489; 1868, Fisk v. Chicago, etc., R., 36 How. Pr. (N. Y.) 20, on 22; 1877, Greenpoint Sugar Co. v. Whitin, 69 N. Y. 328, on 338; 1879, Pratt v. Munson, 17 Hun. (N. Y.) 475; 1887, Christensen v. Eno, 106 N. Y. 97.

2. *Capital stock means the amount subscribed, and not the sum paid in:* 1834, Bank of Utica v. City of Utica, 4 Paige Ch. (N. Y.) 399, on 402; 1842, People v. Supervisors of Niagara, 4 Hill (N. Y.) 20; 1844, Ward v. Griswoldville Mfg. Co., 16 Conn. 593; 1850, Hightower v. Thornton, 8 Ga. 486, 52 Am. D. 412; 1851, State v. Morristown Fire Assn., 23 N. J. L. 195, on 196; 1862, Bank of Commerce v. N. Y. City, 67 U. S. (2 Black) 620, on 628; 1882, Wetherbee v. Baker, 35 N. J. Eq. 501; 1891, Security Co. v. Town of Hartford, 61 Conn. 89, on 100, 101.

3. *Capital stock means the necessary property of the company purchased by the fund derived from the payments on the shares subscribed:* 1868, State v. Hood, 15 Rich. Law (S. C.) 177; 1875, State Railroad Tax Cases, 92 U. S. 575, on 602; 1880, Ohio and Mississippi R. Co. v. Weber, 96 Ill. 443; 1881, Bank v. Tennessee, 104 U. S. 493; 1883, Williams v. W. U. Tel. Co., 93 N. Y. 162; 1891, Security Co. v. Hartford, 61 Conn. 89, on 100–1; 1892, Wilkes Barre, etc., Bank v. Wilkes Barre, 148 Pa. St. 601; 1897, Union Bank v. City of Richmond, 94 Va. 316; 1898, Commonwealth v. N. Y., P. & O. R. Co., 188 Pa. St. 169, and cases on pp. 195, 198, 199 and 203.

But does not include *unnecessary* property: 1842, Inhabitants of Worcester v. Western R. Corp., 4 Metc. (Mass.) 564; 1847, Railroad v. Berks Co., 6 Pa. St. 70; 1855, Vermont Central R. Co. v. Burlington, 28 Vt. 193.

Neither does it include surplus: 1883, Williams v. W. U. Tel. Co., 93 N. Y. 162; 1891, People v. Coleman, 126 N. Y. 433, *supra*, p. 778. But see, 1898, Commw. v. N. Y., P. & O. R. Co., 188 Pa. St. 169.

4. *Capital stock does not mean the corporate property*—they are distinct things: 1819, McCulloch v. Maryland, 4 Wheat. (U. S.) 316; 1851, State v. Morristown Fire Assn., 23 N. J. L. 195, on 196; 1862, Bank of Commerce v. N. Y. City, 67 U. S. (2 Black) 620, on 628; 1866, Commonwealth v. Hamilton Mfg. Co., 12 Allen (Mass.) 298, on 302–4; 1877, Memphis & C. R. Co. v. Gaines, 3 Tenn. Ch. 604; 1878, Railroad Companies v. Gaines, 97 U. S. 697; 1886, Tennessee v. Whitworth, 117 U. S. 129, on 139; 1892, Railway Company v. Furnace Co., 49 O. S. 102; 1895, Wells v. Green Bay, etc., Co., 90 Wis. 442.

5. *Capital stock and shares of stock in hands of shareholders are the same:* 1845, Gordon v. Appeal Tax Court, 44 U. S. (3 How.) 133, on 147; 1852, The State v. Branin, 23 N. J. L. 484; 1861, People v. Commissioners of Taxes, 23 N. Y. 192, on 220; 1869, National Bank v. Commonwealth, 76 U. S. (9 Wall.) 353, on 359; 1875, Nichols v. New Haven & N. Co., 42 Conn. 103, on 120; 1886, Tennessee v. Whitworth, 117 U. S. 129.

6. *Capital stock and shares in the hands of the shareholders are not the same:* 1836, Union Bank v. The State, 9 Yerg. (Tenn.) 489; 1864, Lycoming Co. v. Gamble, 47 Pa. St. 106; 1865, Van Allen v. Assessors, 3 Wall (70 U. S.) 573.

on 583; 1869, National Bank v. Commonwealth, 76 U. S. (9 Wall.) 353, on 359; 1873, The Delaware Railroad Tax, 85 U. S. (18 Wall.) 206, on 229; 1877, Farrington v. Tennessee, 95 U. S. 679, on 686; 1884, State Bank v. City of Richmond, 79 Va. 113; 1896, Shelby Co. v. Union & P. Bank, 161 U. S. 149, on 154; 1895, Bank of Commerce v. Tennessee, 161 U. S. 134, on 146; 1897, Union Bank v. City of Richmond, 94 Va. 316; 1898, Bank v. Memphis, 101 Tenn. 154.

7. *Capital means the property of the company:* 1861, People v. Commissioners, etc., 23 N. Y. 192, on 219; 1862, Bank of Commerce v. N. Y. City, 67 U. S. (2 Black) 620, on 629; 1865, Van Allen v. Assessors, 70 U. S. (3 Wall.) 573, on 583; 1869, National Bank v. Commonwealth, 76 U. S. (9 Wall.) 353, on 359; 1874, Bailey v. Clark, 88 U. S. (21 Wall.) 284; 1878, Burrall v. Bushwick R., 75 N. Y. 211; 1880, Bradley v. Bauder, 36 Ohio St. 28, on 35; 1883, Williams v. Western U. Tel. Co., 93 N. Y. 162; 1886, Tennessee v. Whitworth, 117 U. S. 129, on 139; 1895, Wells v. Green Bay, etc., Co., 90 Wis. 442.

8. *Capital is the same as capital stock of the corporation:* 1883, Williams v. Western Union Tel. Co., 93 N. Y. 162; 1891, People v. Coleman, 126 N. Y. 433, *supra*, p. 778: 1892, Railway Co. v. Furnace Co., 49 Ohio St. 102; 1894, American, etc., Co. v. State Board, 56 N. J. L. 389; 1895, Tradesman Pub. Co. v. Car Wheel Co., 95 Tenn. 634.

9. *Capital is not the same as shares of stock in the hands of the shareholders:* 1865, Van Allen v. The Assessors, 70 U. S. (3 Wall.) 573, on 583; 1866, Commonwealth v. Hamilton Mfg. Co., 12 Allen (Mass.) 298, on 302–4; 1866, People v. Commissioners, 71 U. S. (4 Wall.) 244, on 255; 1866, Bradley v. The People, 71 U. S. (4 Wall.) 459; 1869, National Bank v. Commonwealth, 76 U. S. (9 Wall.) 353, on 359; 1880, Bradley v. Bauder, 36 Ohio St. 28; 1886, Tennessee v. Whitworth, 117 U. S. 129; 1897, New Orleans v. Citizens' Bank, 167 U. S. 371, on 402.

10. *Property of the corporation is not the same as shares of stock:* 1866, Commonwealth v. Hamilton Mfg. Co., 12 Allen (Mass.) 298, on 302–4; 1898, State v. Travelers' Ins. Co., 70 Conn. 590, on 603; 1899, Owensboro National Bank v. Owensboro, 173 U. S. 664.

Sec. 211. Capital stock—Kinds, *common and preferred.*

HAMLIN v. CONTINENTAL TRUST COMPANY.[1]

1897. In the United States Circuit Court of Appeals, Sixth Circuit (Ohio), 47 U. S. Appeals Rep. 422–438, 78 Fed. Rep. 664, 36 L. R. A. 826, 7 A. & E. C. C. N. S. 631.

[Certain unsecured creditors of the insolvent Toledo, St. L. & K. C. R. Co., in May, 1893, filed a bill on behalf of all the creditors to wind up the affairs of the railroad and distribute its assets; a receiver was appointed under this bill; the bondholders were not made parties to this suit, but in December, 1893, the Continental Trust Company, trustees for the holders of some $9,000,000 mortgage bonds, filed in the same court a bill to foreclose the mortgage, whereupon the same receiver was appointed as before, and the two cases ordered to be consolidated. Before any decree adjudicating claims or decreeing foreclosure, Hamlin *et al.*, appellants herein, asked to become parties defendant with leave to file an answer and cross-bill; this was granted,

[1]Statement of facts abridged. Only part of opinion given.

subject to the right of complainants, after further examination, to move to strike from the files, or strike out anything attacking the validity of the consideration for the mortgage bonds. Such motion was afterward made accordingly, and the court gave an opinion "denying the claim of the appellants (Hamlin *et al.*) to be creditors of the railroad company, or that as preferred stockholders they had any lien valid as against creditors, or any right or interest in or to the property of said company antagonistic to the corporation or to the class of common stockholders," and thereupon an order was entered "denying the appellants the right to intervene or file an answer or other pleading." This ruling, and the decree following it, are appealed from. Other facts are stated in the opinion.]

LURTON, Circuit Judge. * * * The case made by the petition, answer and cross-bill was substantially this: The appellants and those acting in concert with them are owners and holders of certificates of preferred non-voting stock issued by the Toledo, St. Louis and Kansas City Railroad Company. The total issue of these certificates was $5,805,000, and of this total the appellants and those represented by them hold about $2,000,000. They claim that these certificates are money obligations of the railroad company, secured by a lien next after the existing first mortgage bonds of said company. They aver that, though no mortgage was executed and registered to secure said certificates, they constitute a valid equitable mortgage, binding upon the corporation and upon all creditors who become such with notice of this equitable lien. These certificates are in form alike, and were issued simultaneously with the execution of the first mortgage sought to be foreclosed herein, and were registered by the trustee under said first mortgage. We here set out one of these certificates and one of the coupons attached:

"Toledo, St. Louis and Kansas City Railroad Company.

"No. Preferred capital stock. 10 shares.

"This is to certify that James M. Quigley, or bearer, is entitled to ten shares of one hundred dollars each, of the preferred non-voting capital stock of the Toledo, St. Louis and Kansas City Railroad Company.

"This stock constitutes a lien upon the property and net earnings of the company next after the company's existing first mortgage. It does not entitle the holder to vote thereon. After the first day of January, 1888, it is entitled to, and carries interest at the rate of 4 per cent. per annum, payable semi-annually, represented by interest coupons attached to this certificate. Such interest is only payable out of the net earnings of the company after the payment of interest upon its existing first mortgage bonds, and the cost of maintenance and operation. A statement showing the business of the company for the half of its fiscal year next preceding shall be exhibited at the office of the company in New York to the holder of this certificate, at the maturity of each interest coupon, and the net earnings applicable to such interest shall be reckoned for such period. Such interest is not to ac-

cumulate as a charge, and the coupons representing unearned interest must be surrendered and canceled on the payment in whole or in part of a subsequently maturing coupon. At any time after the first day of January, 1891, and before the first day of January, 1898, this certificate may be converted into the common capital stock of the company. If not converted, then to become a preferred four per cent. non-cumulative stock. The company will create no mortgage of its main line other than its first mortgage, nor of any part thereof, except expressly subject to the prior lien of this certificate, without the consent of the holders of at least two-thirds of this stock present at a meeting, of which reasonable personal notice must be given to each registered stockholder, and by publication for at least three successive weeks in two leading daily newspapers published in the cities of New York and Boston. One-third of the entire issue of this stock present in person or by proxy shall constitute a quorum. Nor will the company increase the issue of these certificates of stock without consent obtained as above. This certificate of stock shall be transferrable by delivery or by transfer on the book of the company in the city of New York, after a registration of ownership, certified hereon by the transfer agent of the company.

"Countersigned.

"American Loan and Trust Company, ———,

"By ———, President.

"Secretary. ———,

"New York, June 19, 1886. Secretary.

"Shares $100 each.

"The Toledo, St. Louis and Kansas City Railroad Company will pay to bearer on the first day of January, 1898, upon the surrender of this warrant, at its office or agency, in the city of New York, any amount that may be due hereon under the conditions set forth in the certificate of stock to which this is attached, not exceeding the sum of twenty dollars. Coupon No. 20. No. ——.

"Isaac White, Secretary." * * *

In the absence of charter regulation or prohibition by the law of the state under which a corporation is organized, a corporation at its organization may classify its stock, and provide for a preference of one class over another in respect of both capital and dividends. 1 Cook on Stock and Stockholders (3d ed.), §§ 267, 268, 278; Warren v. King, 108 U. S. 389; Lockhart v. Van Alstyne, 31 Mich. 76; Kent v. The Quicksilver Mining Company, 78 N. Y. 159; McGregor v. The Home Insurance Company of Newark, New Jersey, 33 N. J. Eq. 181; Miller v. Ratterman, 47 Ohio St. 141, 163.

In providing for the lien of this stock upon the "property" of the company next after the company's existing first mortgage, "property and net earnings" are coupled together. This is significant. The lien given on "net earnings" is the same kind of lien as that given on the "property" of the company. In such case it is a preference over

the usual rights and interests of another but subordinate class of stockholders. Neither do we think that the provision that this stock shall "become a preferred four per cent. non-cumulative stock," in the event the holder fails to avail himself of the privilege of converting it into common stock within the time allowed, is indicative that it was not preferred stock before the rejection of the option to become common stock. Before that it was a non-voting, non-cumulative preferred stock with the option to become common stock. After that time this option is lost, and with it the privilege of sharing equally with the other class of stock in the control of the corporation and in the distribution of dividends without the limitation prescribed as to the amount of such dividends. That seems to be the only result of rejecting the option.

There is a wide difference between the relation of a creditor and a stockholder to the corporate property. One can not well be a creditor as respects creditors proper, and a stockholder by virtue of a certificate evidencing his contribution to the capital of the corporation. Stock is capital, and a stock certificate but evidences that the holder has ventured his means as a part of the capital. It is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of repaying the principal of the capital stock until the debts of the corporation are paid. These principles are elementary. Warren v. King, 108 U. S. 389; 1 Cook on Stock and Stockholders (3 ed.), § 271. The chance of gain throws on the stockholder, as respects creditors, the entire risk of the loss of his contribution to capital. "He can not be both creditor and debtor by virtue of his ownership of stock." Warren v. King, *supra*. If the purpose in providing for these peculiar shares was to arrange matters so that under any circumstances a part of the principal of the stock might be withdrawn before the full discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby. 1 Cook on Stock and Stockholders (3d ed.), §§ 270, 271; Chaffee v. Rutland Railroad Company, 55 Vermont 110; McCutcheon v. Merz Capsule Company, 37 U. S. App. 586, 598; Morrow v. Iron & Steel Co., 3 Pickle (Tenn.) 262. If that was the purpose of this arrangement, most doubtful language was employed.

There is a sense in which every shareholder is a creditor of the corporation to the extent of his contribution to the capital stock. In that sense every corporation includes its capital stock among its liabilities. But that creditor relation is one which exists only between the corporation and its shareholders. It is a liability which is postponed to every other liability, and no part of the capital stock can be lawfully returned to the stockholders until all debts are paid or provided for. The violation of this well-understood principle is a breach of trust, and a creditor affected thereby may pursue the stockholders and recover as for an unlawful diversion of assets.

The appellants say that it was originally contemplated that the new corporation should pay them for their interests in the foreclosed rail-

road, and for that purpose should issue to them its second mortgage bonds. If that plan had been carried out there would be no doubt as to their attitude. They would have become creditors. Under it their relation would have been one of no doubt, and notice by registration would have put all who dealt with the corporation on guard. That plan was abandoned. They agreed to take and did take the relation of stockholders toward the new company. They surrendered the privilege of voting. That was perhaps a valid agreement between stockholders, though of doubtful public policy. They thereby gave some additional value to the common stock. The latter was the exclusive voting stock, and that was worth something as railway management now goes. The surrender of the right to vote does not make them creditors. They bargained for preferred shares of stock, preferred as to dividends and preferred as to capital. For this advantageous position they surrendered the first intention by which they were to have become secured creditors. If they intended to become creditors and not stockholders, they adopted a most singular method of defining their relation. We will not presume that their purpose was to adopt a device by which they might withdraw their contribution to the capital stock and leave creditors unpaid. If they intended that, they have not made it plain, and if it was plain, the device would be invalid as to creditors.

Although the appellants were not creditors proper, yet they show a case on the face of their certificates entitling them to a preference over common stockholders in relation to both dividends and capital. Ordinarily preferred stock is entitled to no preference over other stock in relation to capital. But where there is an expressed agreement giving such a preference, not prohibited by local law or the charter, we see no reason why it is not a valid contract as between the corporation and such preferred stockholders, and binding upon the common stockholders. 1 Cook on Stock and Stockholders (3d ed.), § 278; Warren v. King, 108 U. S. 389; Chaffee v. Rutland Railroad Company, 55 Ver. 110; *In re* Bangor and Portmadoc Slate and Slab Company, L. R. 20 Eq. 59; Lockhart v. Van Alstyne, 31 Mich. 76; Kent v. The Quicksilver Mining Company, 78 N. Y. 159. Such a preference would not be inconsistent with their relation as stockholders, and would not affect creditors. This relation to the corporation and to its common stockholders, in view of the non-voting provision in this arrangement, makes it eminently proper that these preferred stockholders should be represented by a reasonable number standing for the class with the right to stand for and defend in respect to their own rights. Bronson v. La Crosse and Milwaukee Railroad Company, 2 Wall. 283, 302. * * *

The effect of dismissing the appellants from the case after admitting them as parties was to deny them the preference over common stockholders, and was such a decree as was final, and, therefore, appealable. *Ex parte* Jordan, 94 U. S. 248. For this error the decree will be reversed.

Note. 1. As to nature of preferred stock, see, 1844, Davis v. Proprietors,

etc., 8 Metc. (Mass.) 321; 1860, Bates v. Androscoggin & K. R. Co., 49 Maine 491; 1863, Rutland & B. R. Co. v. Thrall, 35 Vt. 536; 1866, Taft, Trustee, v. Railroad Co., 8 R. I. 310; 1875, Totten v. Tison, 54 Ga. 139; 1875, West Chester & P. R. Co. v. Jackson, 77 Pa. St. 321; 1881, Boardman v. L. S. & M. S. R. Co., 84 N. Y. 157; 1882, Chaffee v. Rutland R. Co., 55 Vt. 110; 1883, Nickals v. R. Co., 15 Fed. Rep. 575; 1884, Gordon v. R. F. & P. R. Co., 78 Va. 501; 1885, Belfast & M. L. R. Co. v. Belfast, 77 Maine 445; 1887, Hazeltine v. B. & M. R., 79 Maine 411, 1 Am. St. Rep. 330; 1890, Miller v. Ratterman, 47 Ohio St. 141; 1890, Campbell v. American Z. Co., 122 N. Y. 455; 1892, Jones v. Concord & M. R. Co., 67 N. H. 234, 68 Am. St. Rep. 650; 1894, Field v. Lamson & Goodnow Mfg. Co., 162 Mass. 388, 27 L. R. A. 136; 1898, People v. St. Louis, A. & T. R. Co., 176 Ill. 512, 12 A. & E. C. C. (N. S.) 227; 1898, Cook v. Association, 104 Ga. 814, 30 S. E. Rep. 911; 1899, Pronick v. Spirits Distributing, 58 N. J. Eq. 97, 42 Atl. Rep. 586; 1899, Savannah Real Estate, L. & B. Co. v. Silverberg, 108 Ga. 281, 33 S. E. Rep. 908; 1899, Heller v. National Marine Bank, 89 Md. 603, 45 L. R. A. 438, 73 Am. St. Rep. 212, note 227.

Sec. 212. Preferred stock—Power to issue.

KENT v. QUICKSILVER MINING COMPANY.[1]

1879. IN THE COURT OF APPEALS OF NEW YORK. 78 New York Reports 159–191.

FOLGER, J. These are suits in equity to perpetually restrain the Quicksilver Mining Company from taking certain action, on the one hand proposed by it with the expressed assent of some only of the stockholders in it, and on the other hand demanded of it by certain other of the stockholders in it which demand, it and still other stockholders resist.

Whatever the frame of the pleadings in the several actions, and whatever the formal prayer for judgment, the purpose of the litigation in each is to reach a final and binding judgment, whether certain "*preferred stock*," heretofore created by that company, is so far valid as to be recognized in the future business of the company as giving to the holders thereof the peculiar right expressed in the certificate thereof. (The judgment below held the issue of preferred stock to be valid.)

What is meant by "*preferred stock*" is well enough known in law and business without definition or circumlocution here. * * *

(The corporation had the usual corporate powers, including "the power to issue certificates of stock, representing the value of its property, in such form and subject to such regulations as it might from time to time by its by-laws prescribe.")

A by-law was duly made, which declared the whole value of its property and the whole amount of its capital stock, and divided the whole of it into shares equal in amount, and directed the issuing of certificates of stock therefor. It is not to be said that this by-law authorized anything but shares equal in value and in right; or that the

[1] Statement much abridged, and only part of opinion given.

taker of one did not own as large an interest in the corporation, its capital, affairs and profits to come, as any other holder of a share. Certificates of stock were issued under this by-law that gave no expression of anything different from that. When that by-law was adopted, it was as much the law of the corporation as if its provisions had been a part of the charter. (Presbyterian Church v. City of New York, 5 Cow. 538.) So it is said in Grant on Corporations, p. 80, in a qualified way. "Thereby, and by the certificate, as between it and every stockholder, the capital stock of the company was fixed in amount, in the number of shares into which it was divisible, and in the peculiar and relative value of each share. The by-law entered into the compact between the corporation and every taker of a share; it was in the nature of a contract between them. The holding and owning of a share gave a right which could not be divested without the assent of the holder and owner; or unless the power so to do had been reserved in some way. (Mech. Bank v. N. Y. and N. H. R. Co., 13 N. Y. 599–627.) Shares of stock are in the nature of *choses in action*, and give the holder a fixed right in the division of the profits or earnings of a company so long as it exists, and of its effects when it is dissolved. That right is as inviolable as is any right in property, and can no more be taken away or lessened, against the will of the owner, than can any other right, unless power is reserved in the first instance, when it enters into the constitution of the right; or is properly derived afterwards from a superior law giver. The certificate of stock is the muniment of the shareholder's title, and evidence of his right. It expresses the contract between the corporation and his co-stockholders and himself; and that contract can not, he being unwilling, be taken away from him or changed as to him without his prior dereliction, or under the conditions above stated. Now it is manifest that any action of a corporation which takes hold of the shares of its capital stock already sold and in the hands of lawful owners, and divides them into two classes—one of which is thereby given prior right to a receipt of a fixed sum from the earnings before the other may have any receipt therefrom, and is given an equal share afterwards with the other in what earnings may remain—destroys the equality of the shares, takes away a right which originally existed in it, and materially varies the effect of the certificate of stock.

It is said that when a corporation can lawfully buy property, or get money on loan, any known assurance may be exacted and given which does not fall within the prohibition, express or implied, of some statute (Curtis v. Leavitt, 15 N. Y. 66–67); and that is sought to be applied here. But the prohibition to such action as this is found, not indeed in a statute commonly so called, but in the constitutional provision which forbids the impairment of vested rights, save for public purposes and on due compensation. The right which a stockholder gets on the purchase of his share and the issue to him of the certificate therefor is such a vested right.

It is contended that the power so to do is an incidental and implied power, necessary to the use of the other powers of the corporation,

and is a legitimate means of raising money and securing the agreed consideration therefor. We have already conceded that it is legitimate to borrow money, and to secure the repayment of it, with a compensation for the use of it. But that is when it is done in such way as to put the burthen upon every share of stock alike, and to enable every share of stock to be relieved therefrom alike; in such way as to preserve the equality of right and privilege and value of the shares, and maintain intact the contract thereto with the stockholder.

Citations are made to us for the converse of this, but they do not come up—sometimes in their facts, sometimes in their declarations—to the necessity of the proposition. Either it is where the capital is not limited, and it is new shares that may be issued with a preference, and where there is express power to borrow on bond and mortgage (2 Redf. on Railways, ch. 33, §§ 4, 237; Harrison v. Mex. R. W., 12 Eng. Rep. 793); or the amount of the capital has not been reached and such stock is issued therefrom (Hazelhurst v. Savannah R., 43 Ga. 53; Tottan v. Tison, 54 Ga. 139); or there was legislative authority (Davis v. Proprietors, 8 Metcf. 321; Rutland R. Co. v. Thrall, 35 Vt. 545); or a restriction to authorized capital and there was unanimous consent of the stockholders (Prouty v. M. S. & N. I. R., 1 Hun 663; 43 Ga. 53, *supra*); or there was power to redeem, which was a transaction in the nature of a debt (Westchester, etc., R. Co. v. Jackson, 77 Pa. St. 321); or the opinion was *obiter* (Bates v. Androscoggin R. Co., 49 Maine 491); or it was the case of a subscription for stock with a condition for interest until the corporation was in operation (Richardson v. Vt. & Mass. R. Co., 44 Vt. 613); or it was an action on a subscription more favorable to defendant than to other subscribers, and it was held that defendant could not set up the lack of equality (Evansville R. Co. v. Evansville, 15 Ind. 395); or a solemn determination of this question was not necessary for the disposal of the case (Williston v. M. S. & N. I. R. Co., 13 Allen 400); or the issue was authorized by the articles of association (*In re* A'D. St. Nav. & Col. Co., 20 L. R. Eq. 339); or there was full knowledge on the part of all concerned (Lockhart v. Van Alstyne, 31 Mich. 81); or the power in the corporate body was conceded, and it was denied that it existed in the directors (McLaughlin v. D. & M. R., 8 Mich. 100).

We will not say, for we are not called upon here to say, that never can a corporation rightfully, against the dissent of a portion of its stockholders, make some of the stock preferred; what we assert is that this case does not present a state of facts in which a power so to do exists.

There is a power in this charter to alter, amend, add to or repeal, at pleasure, by-laws before made. It is argued from this that it was in the power of the corporate body, in due form and manner, to alter the by-law which had fixed the amount of the capital stock and the number and relative value of the shares thereof. The power to make by-laws is to make such as are not inconsistent with the constitution and the law; and the power to alter has the same limit, so that no

alteration could be made which would infringe a right already given and secured by the contract of the corporation. Nor was the power to alter, to the extent of affecting the contracted relative value of a share, reserved when the share was sold to the stockholder, so as to enter into and form a part of the contract. An alteration is a *pro tanto* repeal; but no private corporation can repeal a by-law so as to impair rights which have been given and become vested by virtue of the by-law afterwards repealed. * * *

We are therefore of the opinion that there was no power in the corporate body, nor in a majority of the stockholders, to provide by by-law for the creation of a preferred stock, so as to bind a minority of the stockholders not assenting thereto. * * *

But there remains a serious question, whether, though there was at the outstart a minority of the stockholders who gave no assent to the corporate act, there has not been such tacit acquiescence and delay in action by that minority as to amount to indefensible *laches* and estoppel upon those who constituted it and their assigns. In our judgment there has, and we find here a safe place on which to rest our decisions of these cases.* * *

Affirmed on the ground of estoppel by laches.

Note. Power to issue preferred stock generally: 1857, Everhart v. West Chester, etc., R. Co., 28 Pa. St. 339; 1865, Hutton v. Scarborough Cliff Hotel Co., 4 De G. J. & S. 672, 2 Dr. & S. 514, 521; 1884, Gordon v. Richmond, etc., R. Co., 78 Va. 501; 1885, Belfast, etc., R. Co. v. Belfast, 77 Maine 445; 1890, Campbell v. American Z. Co., 122 N. Y. 455, 11 L. R. A. 596; 1890, Bamjam v. Bard, 134 U. S. 291; 1891, Re Dicido Pier Co., L. R. 2 Ch. Div. 354; 1891, Eichbaum v. City of Chicago Grain Elevators, L. R. 3 Ch. Div. 459; 1895, Higgins v. Lansingh, 154 Ill. 301; 1897, Andrews v. Gas Meter Co., 76 L. T. R., 132, overruling Hutton v. Scarborough C. H. Co., *supra*; 1898, Ernst v. Elmira M. I. Co., 54 N. Y. S. 116, 24 Miscl. (N. Y.) 583.

Majority of members can not, without express legislative authority, and without consent of all the subscribers, after organization or subscription upon an equal basis, convert a part of the shares into preferred. 1865, Hutton v. Scarborough Cliff Hotel Co., 4 De G. J. & S. 672, 2 Drew & S. 514, 521; 1881, Boardman v. L. S. & M. S. R., 84 N. Y. 157; 1890, Campbell v. American Zylonite Co., 122 N. Y. 455; 1898, Ernst v. Elmira M. I. Co., 54 N. Y. Sup. 116, 24 Miscl. 583.

But it has also been held that express legislative authority will make such issue valid, even against dissenting shareholders. 1857, Everhart v. Westchester, etc., R. Co., 28 Pa. St. 339; 1863, Rutland, etc., R. Co. v. Thrall, 35 Vt. 536; 1867, Curry v. Scott, 54 Pa. St. 270; 1875, Westchester, etc., R. Co. v. Jackson, 77 Pa. St. 321; 1875, Totten v. Tison, 54 Ga. 139; 1897, Andrews v. Gas Meter Co., 76 L. T. Rep. 132, overruling Hutton v. Scarborough Cliff Hotel Co., 4 De G. J. & S. 672, and 2 Drew & S. 514, 521.

But upon the other hand, it seems that neither statutory nor charter authority is necessary, if the preferred stock is issued (under a power to increase or complete an authorized issue) by the unanimous consent of the existing shareholders. Havemayer v. Bordeaux Co., 8 National Corp. Rep. 127; 1895, Higgins v. Lansingh, 154 Ill. 301; 2 Beach Corp., § 808; 1 Morawetz, § 464.

Sec. 213. Shares of stock—Nature of.

(1) Personal property.

JOHNS v. JOHNS.[1]

1853. IN THE SUPREME COURT OF OHIO. 1 Ohio St. 350-362.

This is a petition in which the plaintiff, the widow of Benjamin Johns, deceased, claims dower in forty-six shares of the capital stock of "The Mansfield and Sandusky City Railroad Company" and in ten shares of the capital stock of "The Ohio and Pennsylvania Railroad Company," of which shares her deceased husband, the said Benjamin Johns, was the owner at the time of his death.

The defendant, Sherman, as executor as aforesaid, answers, admitting the facts alleged in the petition, but insisting that said shares are personal and not real estate.

THURMAN, J. * * * Turning, then, to the charter of the company, we find in it no provision declaring whether its stock is realty or personalty. We are thus brought to the general question, whether railroad shares in Ohio are, in the absence of express legislative enactment, to be considered as real or personal estate. This question must be determined by a reference to the principles of the common law and the general statutes of the state that have a bearing upon it. And its solution is not without difficulty, for as to the common law the adjudicated cases are directly conflicting, and when we resort to our statutes the chief aid we derive is from analogies and inference.

In Drybutter v. Bartholomew, decided in 1723, 2 P. Wms. 127, the master of the rolls said that: "a fine may be, and usually is, levied of New River shares by the description of so much land covered with water," but the case does not inform us what these shares were, nor how they were created; and whether they were real or personal estate was not discussed. They appear to have had their origin in the statutes of 3 James 1, ch. 18, and 4 James 1, ch. 12, to enable the mayor, commonalty and citizens of London to supply the city with water; but these acts simply authorize the construction of the works and the acquisition of the necessary right of way. They create no stock, nor is any mention made in them of shares or shareholders. Yet it would seem from the case cited, as well as the case of Townshend v. Ash, decided in 1745, 3 Atkyns 336, that shares were created, and hence these cases have been frequently cited as showing that stock in a water-works company is real estate.

By a statute of 10 Anne, the mayor, aldermen and common council of the city of Bath, their successors or assigns, or such persons as they should appoint, were authorized to improve the navigation of the river Avon, and to charge tolls on persons and property transported thereon. By an agreement executed between the corporate authorities

[1] Only part of opinion is given.

of the one part, and the Duke of Beaufort and several other persons on the other part, the duke and his associates undertook to do the work in consideration of being allowed to take the tolls. By the 11th article of the agreement it was provided that "no survivorship shall at any time take place between the said parties and undertakers; but if any or either of them shall happen to die, the share or part of such so dying, shall descend and go to the *heirs* and assigns of the party or parties so dying."

In Buckeridge v. Ingram, decided in 1795, 2 Ves. Jr. 651, the question was directly made whether these shares were personal or real estate, and it was decided that they were real estate and subject to dower. The master of the rolls held that the right to take tolls was an incorporeal hereditament arising out of realty, and was therefore a "tenement."

And he remarked: "I have no difficulty in saying, that wherever a perpetual inheritance is granted, which arises out of lands, or is in any way connected with, or, as it is emphatically expressed by Lord Coke, exerciseable within it, it is that sort of property the law denominates real."

The principle of these cases was followed, and possibly extended, by the supreme court of Connecticut in 1818, in the case of Welles v. Cowles, 2 Conn. 567, in which it was held that shares of an *incorporated* turnpike company are real estate. The right to the tolls, said the court, "is a right issuing out of real property, annexed to and exerciseable within it; and comes within the description of an incorporeal hereditament of a real nature, on the same principle as a share in the New River, in canal navigations and tolls of fairs and markets;" citing Drybutter v. Bartholomew, 2 Peere Williams 127, Habergham v. Vincent, 2 Ves. Jr. 232, and The King v. The Inhabitants of Chipping Norton, 5 East 239.

And in answer to the argument that the individual stockholders had only a claim on the company, and not upon the realty, and that this must be of a personal nature, the court said: "But the stockholders, as members of the company, are owners of the turnpike road; and it is in virtue of this interest that they have their claims for the dividends, or their respective shares of the toll. It is not a mere claim on the corporation."

This decision was recognized as law in 1822, in a suit between the same parties, 4 Conn. 182, though the question was not expressly made.

In 1835 the supreme court of Pennsylvania held that "a toll bridge erected by two individuals across a river between their lands by legislative authority is real estate." The court said that the right was "not only a right arising out of the soil, but so far as the abutments of the bridge are concerned, it is the soil itself." Hurst v. Meason, 4 Watts 346. It is to be observed, however, that it does not appear that the builders were incorporated.

In Price v. Price's Heirs, 6 Dana 107, the court of appeals of Kentucky, in 1838, held that the stock in the Lexington and Ohio Rail-

road Company is real estate. Without citing any adjudicated case, the court came to a conclusion which is thus expressed: "The right conferred on each shareholder is unquestionably an incorporeal hereditament. It is a right of perpetual duration, and though it springs out of the use of personalty, as well as lands and houses, this matters not. It is a franchise which has ever been classed in that class of real estate denominated an incorporeal hereditament."

On the other hand, the supreme court of Massachusetts, in 1798, in Russell *et al.* v. Temple and Others, 3 Dane's Abr. 108, held that shares in incorporated bridge and canal companies are personalty. The case was between the widow and heirs of Thomas Russell, the former contending that the shares were personal property, and that, consequently, she was entitled to a distributive portion of them, and the latter insisting that they were realty, and that, therefore, she had but a dower estate. The question was very fully discussed, and was decided (says Professor Greenleaf in his edition of Cruise) "upon great consideration."

"For the heirs it was urged that these shares were real estate, because, it was said, the estates were real in the corporations, and that if the estates in the corporation were real, the estates of the individual members in them followed their nature and were real, and that the frequent declarations of the legislature declaring such shares personal estate, at least show a doubt that when one has a right to receive rent he has only a right to receive a sum of money, yet it does not follow that his estate is not real estate out of which his rent issues."

For the widow it was argued that the shares were personalty, because the estate (in the bridges, canals, towing-paths, wharves and lands) "can only exist in the corporation, which alone can acquire it, alone be seized or possessed of it, alone pass it away, manage or repair it, and so must hold it entire, and that the corporation is a moral person to all purposes of property. Its tenure is to their successors, or to their successors and assigns. The estates can never vest in or be divided among the individual members to hold as tenants in common, etc., in their private capacities. Only the corporation can possess the estate, and that only by possessing the charter, and only the corporation can be taxed for it on common-law principles, and on these can it alone be taken in execution for the debts of the corporation."

"That the share is personal estate, though the corporation hold real estate, for the individual member has no estate, but only a right to such dividends as the corporation from time to time assigns to him. He is unknown in the grants made to it, and he can not grant any part of the estate; nor can he be taxed for it but by statute law; nor can any private member of a corporation be distrained for a public concern of it; his only remedy for his dividend is case in assumpsit, or an action on the case for a wrongful refusal or neglect to pay or allow him his part of the profits."

The judgment of the court was, as I have stated, that the shares were personal estate. "The principal reason of the decision," says Dane, "appears to be because the court considered that the individual

member, or shareholder, had only a right of action for a sum of money, his part of the net profits or dividends. And so the law has been held to be since this decision was made."

In his edition of Cruise, Greenleaf says: "Shares in the property of a *corporation* are real or personal property, according to the nature, object and manner of the investment. Where the corporate powers are to be exercised solely in land, as where original authority is given by the charter to remove obstructions in a river and render it navigable, to open new channels, etc., to make a canal, erect water-works, and the like, as was the case of the New River water, the navigation of the river Avon and some others, and the property or interest in the land, though it be an incorporeal hereditament, *is vested inalienably in the corporators themselves*, the shares are deemed real estate. Such, in some of the United States, has been considered the nature of shares in toll bridge, canal and turnpike corporations by the common law; though latterly it has been thought that railway shares were more properly to be regarded as personal estate. But where the property originally entrusted is money, to be made profitable to the contributors by applying it to certain purposes, in the course of which it may be invested in lands or in personal property, and changed at pleasure, the capital fund is vested in the corporation, and the shares in the stock are deemed personal property, and as such are in all respects treated. In modern practice, however, shares in corporate stock, of whatever nature, are usually declared by statute to be personal estate." 1 Greenleaf's Cr. Dig. 39, 40.

In support of this statement, Mr. Greenleaf cites the cases we have already noticed, and some others that require consideration. One of the most important of these is Bligh v. Brent, 2 Y. & C. Exch. Rep. 268, 294. It involved the question whether the shares in the Chelsea Water-Works Company were realty or personalty. The act of incorporation left the question open, as it contained no declaration upon the subject. The court reviewed the cases bearing upon it, and came to the conclusion that the shares were personalty. This decision was afterwards, in 1838, spoken of with approbation in Bradley v. Holdsworth, 3 M. & W. 422.

In the latter case the question was whether shares in the "London and Birmingham Railway" might be sold by a verbal contract. On the part of the defendant it was contended that they constituted an interest in land within the meaning of the statute of frauds, and that, therefore, a contract for their sale was void unless reduced to writing. The court held the contract valid. True, the act of incorporation declared that the shares should, to all intents and purposes, be deemed personal estate and transmissible as such, and should not be of the same nature of real property; but it is evident from what was said, that, independent of this provision, the same decision would have been made. Parke. B., said: "No doubt the company are seized of real property, as well as possessed of a great deal of personal property; but the interest of each individual shareholder is a *share of the net produce of both when brought into one fund.*" And

again: "I have no doubt whatever that the shares of the proprietors, as individuals, are personalty; they consist of nothing more than a *right to have a share of the net produce of all the property of the company.*"

Alderson, B., said: "All the cases were under review in Bligh v. Brent, where the question was as to the shares in the Chelsea Water-Works Company. That was a stronger case than the present because there was no clause of this kind in the act of parliament, and yet the shares were held personal property." "I conceive that all the shareholders would take even without such a clause."

Bolland, B., concurred.

So, in Duncuft v. Albrecht, 12 Simons & Stewart 189, it was held that a parol agreement for the sale of railway shares is valid, for they are neither an interest in lands, nor goods, wares or merchandise, within the statute of frauds.

A careful examination of the adjudications upon the subject has brought us to the conclusion that, according to the weight of authority, the shares in question are personal property. In the early English cases the distinction, now well understood, between the property of a corporation and the rights of its members, does not seem to have been taken, and it appears to have been assumed that each shareholder had an *estate* in the corporate property, and that, consequently, if that property was real, his share was also realty. But the cases we have cited abundantly show that the distinction above mentioned is now fully recognized in England, and that the property of a corporation may be mainly, if not wholly, real, and yet the shares of its members be personalty. * * *

In whatever way we view the case, whether upon adjudication, reason, or our statute laws, we arrive at the conclusion that the shares in question are personal property. The bill must therefore be dismissed.

Bill dismissed.

Note. Many early cases held shares in corporations owning real property to be real property. Some of these were followed in this country, as shown by the above case: 1723, Drybutter v. Bartholomew, 2 P. Wms. 127; 1745, Townsend v. Ash, 3 Atk. 336; 1786, King v. Dock Co., 1 T. R. 219; 1818, Welles v. Cowles, 2 Conn. 567 (this case led to a statute declaring shares to be personal property); 1831, Coombs v. Jordan, 3 Bl. Ch. (Md.) 284, 22 Am. Dec. 236; 1838, Price v. Price, 36 Ky. (6 Dana) 107; 1870, Copeland v. Copeland, 70 Ky. (7 Bush) 349 (after which holding the legislature changed the rule there by statute, declaring shares to be personal property).

The great weight of authority, even from early times, holds shares to be personal property: 1781, Weekley v. Weekley, 2 Younge & Col. Exch., p. 281, note; 1798, Russell v. Temple, 3 Dane's Abr. 108; 1812, Cooper v. Swamp Canal Co., 6 N. C. (2 Murph.) 195; 1830, Blake v. Jones, Bailey's Eq. (S. C.) 141, 21 Am. Dec. 530; 1836, Bligh v. Brent, 2 Younge & Col. Exc. 268; 1837, Arnold v. Ruggles, 1 R. I. 165; 1843, North v. Forest, 15 Conn. 400; 1849, Slaymaker v. Bank of Gettysburg, 10 Pa. St. 373; 1854, Watson v. Spratley, 10 Ex. 222, 24 L. J. Ex. 53; 1855, Edwards v. Hall, 25 L. J. Ch. 82, 35 E. L. & Eq. 433; 1856, Walker v. Bartlett, 18 C. B. 845, 25 L. J. C. P. 263; 1865, McKeen v. Northampton Co., 49 Pa. St. 519, 88 Am. Dec. 515; 1869, Southwestern R. Co. v. Thomason, 40 Ga. 408; 1881, Manns v. Brookville National

Bank, 73 Ind. 243; 1884, Feckheimer v. National Exchange Bank, 79 Va. 80; 1886, Colonial Bank v. Whinney, 56 L. J. Ch. 43, 11 App. Cas. 426; 1890, Mattingly v. Roach, 84 Cal. 207, 23 Pac. Rep. 1117; 1897, Jellenik v. Huron C. M. Co., 82 Fed. Rep. 778; 1899, Herring v. Ruskin Co-op. Assn., — Tenn. Ch. App. —, 52 S. W. Rep. 827.

Sec. 214. Same. Statute of frauds.

(2) "Goods, wares or merchandise."

TISDALE v. HARRIS.[1]

1838. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 20 Pick. (Mass.) 9–14.

[Assumpsit by Tisdale against Harris on an oral contract by which defendant agreed to sell plaintiff two hundred shares, with all the earnings thereon, in the capital stock of a manufacturing company. The object was to recover $300, being the amount of dividends declared on the shares after the agreement to sell.]

SHAW, C. J. * * * But by far the most important question in the case arises on the objection that the case is within the statute of frauds. This statute, which is copied precisely from the English statute, is as follows: "No contract for the sale of goods, wares or merchandise for the price of ten pounds ($33.33) or more, shall be allowed to be good, except the purchaser shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agent thereunto lawfully authorized."

This being a contract for the sale of shares in an incorporated company in a neighboring state for the price of more than ten pounds, and no part having been delivered and no purchase-money or earnest paid, the question is, whether it can be allowed to be good without a note or memorandum in writing signed by the party to be charged with it. This depends upon the question whether such shares are goods, wares or merchandise within the true meaning of the statute.

It is somewhat remarkable that this question, arising on the St. 29 Car. 2, in the same terms, which ours has copied, has not been definitely settled in England. In the case of Pickering v. Appleby, Com. Rep. 354, the case was directly and fully argued before the twelve judges, who were equally divided upon it. But in several other cases afterward determined in chancery, the better opinion seemed to be that shares in incorporated companies were within the statute, as goods or merchandise. Mussell v. Cooke, Prec. in Ch. 533; Crull v. Dodson, Sel. Cas. in Ch. 41.

[1] Statement abridged; arguments and part of opinion omitted.

We are inclined to the opinion that the weight of authorities in modern times is, that contracts for the sale of stocks and shares in incorporated companies for more than ten pounds are not valid unless there has been a note or memorandum in writing, or earnest or part payment. 4 Wheaton 89, note; 3 Starkie on Evid., 4th Amer. edit., 608.

Supposing this a new question now for the first time calling for a construction of the statute, the court are of opinion that, as well by its terms as its general policy, stocks are fairly within its operation. The words "goods" and "merchandise" are both of very large signification. *Bona*, as used in the civil law, is almost as extensive as personal property itself, and in many respects it has nearly as large a signification in the common law. The word "merchandise" also, including in general, objects of traffic and commerce, is broad enough to include stocks or shares in incorporated companies. * * *

The main argument relied upon by those who contend that shares are not within the statute is this: That statute provides that such contract shall not be good, etc., among other things, except the purchaser shall accept part of the goods. From this it is argued that by necessary implication the statute applies only to goods, of which part may be delivered. This seems, however, to be rather a narrow and forced construction. The provision is general that no contract for the sale of goods, etc., shall be allowed to be good. The exception is when part are delivered; but if part can not be delivered, then the exception can not exist to take the case out of the general prohibition. The provision extended to a great variety of objects, and the exception may well be construed to apply only to such of those objects to which it is applicable, without affecting others, to which from their nature it can not apply.

There is nothing in the nature of stocks, or shares in companies, which in reason or sound policy should exempt contracts in respect to them from those reasonable restrictions, designed by the statute to prevent frauds in the sale of other commodities. On the contrary, these companies have become so numerous, so large an amount of the property of the community is now invested in them, and as the ordinary indicia of property, arising from delivery and possession, can not take place, there seems to be peculiar reason for extending the provisions of this statute to them. As they may properly be included under the terms goods, as they are within the reason and policy of the act, the court are of opinion that a contract for the sale of shares, in the absence of the other requisites, must be proved by some note or memorandum in writing; and as there was no such memorandum in writing, in the present case, the plaintiff is not entitled to maintain this action. As to the argument that here was a part performance, by a payment of the money on one side, and the delivery of the certificate on the other, these acts took place after this action was brought, and can not therefore be relied upon to show a cause of action when the action was commenced.

Verdict set aside and plaintiff nonsuit.

Note. It is generally held in this country that sales of stock are within the seventeenth section of the statute of frauds. See, as to the application of this and other sections, the following cases: 1810, Colvin v. Williams, 3 Har. & J. (Md.) 38; 1843, North v. Forest, 15 Conn. 400; 1847, Thompson v. Alger, 53 Mass. (12 Metc.) 428; 1862, Hagar v. King, 38 Barb. (N. Y.) 200; 1872, Pray v. Mitchell, 60 Maine 430; 1873, Mayer v. Child, 47 Cal. 142; 1878, Mason v. Decker, 72 N. Y. 595; 1880, Boardman v. Cutter, 128 Mass. 388; 1884, Porter v. Worsmer, etc., 94 N. Y. 431; 1884, Fitzpatrick v. Woodruff, 96 N. Y. 561; 1888, Hinchman v. Lincoln, 124 U. S. 38; 1889, Seddon v. Rosenbaum, 85 Va. 928; 1891, Ryers v. Tuska, 14 N. Y. Sup. 926; 1892, Spear v. Bach, 82 Wis. 192; 1893, Dinkler v. Baer, 92 Ga. 432; 1895, McLure v. Sherman, 70 Fed. Rep. 190; 1895, Flowers v. Steiner, 108 Ala. 440.

But in England the rule is different: See, 1839, Humble v. Mitchell, 11 Ad. & El. 205; 1841, Duncuft v. Albrecht, 12 Sim. Ch. 189; 1844, Hargreaves v. Parsons, 13 Mees. & W. 561.

But the statute of frauds does not apply to agreements to subscribe: See, note, *supra*, p. 459, and, 1871, Green v. Brookins, 23 Mich. 48; 1886, Colfax Hotel Co. v. Lyon, 69 Iowa 683; 1898, Rogers v. Burr, 105 Ga. 432.

The fourth section of the statute of frauds relating to conveyances of interests in lands does not apply to sales of corporate shares, even if the corporation owns and deals in land: 1839, Humble v. Mitchell, 11 Ad. & E. 205; 1836, Bligh v. Brent, 2 Y. & C. Exc. 268.

Sec. 215. Same.

(3) Choses in action.

COLONIAL BANK v. WHINNEY.[1]

1885. In English Court of Appeal. L. R. 30 Ch. Div. 261–290.

[Suit by the bank to enforce an equitable mortgage of shares in a railway company against Whinney, who was a trustee in bankruptcy of the person in whose name the shares stood at the commencement of the bankruptcy. The English bankrupt law provided that "all goods in the possession, order or disposition of the bankrupt" should pass to the trustee in bankruptcy, "provided that things in action, other than debts due the bankrupt, shall not be deemed goods within the meaning" of this law. Under this provision the majority of the court held that the shares were not choses in action within the meaning of the proviso; but Fry, L. J., pronounced the following dissenting opinion, which was affirmed in the house of lords, 11 App. Cas. 426.]

Fry, L. J. One of the questions argued before us on the present appeal has been, whether the shares in question in this case are or are not *choses in action*, within the meaning of those words as used in the 3d subsection of the 44th section of the Bankruptcy Act 1883.

[1] Statement abridged. Only the dissenting opinion of Fry, L. J., is given (a part of it being omitted). The majority opinion was overruled upon this point, and Fry's opinion unanimously affirmed by the house of lords, in 1886. The Colonial Bank v. Whinney, L. R. 11 App. Cas. 426.

The shares in question are shares in a company constituted by act of parliament, which incorporates the Companies Clauses Consolidation Act, and that act declares that shares are personal property, transmissible as such, and furthermore provides for the transfer of the shares by deed in a specified manner.

The first question is whether, according to the ordinary legal meaning of the words "things in action," which I take to be technical words, they include such shares as those in controversy. This leads to the consideration of some very elementary points in English law. According to my view of that law, all personal things are either in possession or in action. The law knows no *tertium quid* between the two. "No chattel," says Lord Coke, in Fulwood's Case, 4 Rep. 65*a*, "either in action or possession, shall go in succession," as if the two alternatives were the only possible ones. "Property in chattels personal," says Blackstone, "may be either in possession—which is where a man hath not only the right to enjoy, but hath the actual enjoyment of the thing—or else it is in action, where a man hath only a bare right without any occupation or enjoyment." Bl. Comm., book 2, ch. 25, p. 389, and so Lord Hardwicke, in the great case of Ryall v. Rolle, 1 Atk. 165, 182, speaks of personal property, whether in possession or action only, as equivalent to all kinds of personal property. The expression "*choses in suspense*" is found in Brooke's Abridgement, in conjunction with *choses in action;* but, so far as I can understand, the two expressions are synonymous.

It has been suggested that the expression "*choses in action*" was originally only applicable to debts, and that by a lax usage it has acquired a secondary and wider significance. I am not able to adopt this view. The article "*Choses in Action* and *Choses in Suspense*," in Brooke's Abridgement, fol. 140, seems to show that as early as 5 Edw. 4 the expression was held to include the king's right to the marriage of his ward; in 9 Hen. 6 the property in deeds in the hands of a third person was considered as a *chose in action*, and in 33 Hen. 8 the classification of *choses in action* into real, personal and mixed, was recognized. Indeed, the whole article appears to me inconsistent with the notion that according to early usage the expression was confined to debts. On the contrary, that early usage appears to me to have been as wide as the modern usage, as explained by Mr. Joshua Williams in the passage which has been cited by Lord Justice Cotton.

What, then, is the character of a share in a company? Is it in its nature a *chose in possession* or a *chose in action?* Such a share is, in my opinion, the right to receive certain benefits from a corporation, and to do certain acts as a member of that corporation; and if those benefits be withheld or those acts be obstructed, the only remedy of the owner of the share is by action. Of the share itself, in my view, there can be no occupation or enjoyment, though of the fruits arising from it there may be occupation, enjoyment and manual possession. Such a share appears to me to be closely akin to a debt, which is one of the most familiar of *choses in action*; no action is required to obtain the right to the money in the case of the debt, or the right to the

dividends or other accruing benefits in the case of the share; but an action is the only means of obtaining the money itself or the other benefits in specie, the right to which is called in one case a debt and in the other case a share. In the case alike of the debt and of the share, the owner of it has, to use the language of Blackstone, "a bare right without any occupation or enjoyment." A debt no doubt differs from a share in one respect, that it confers generally a more limited right than a share, and that when once paid it is at an end; but this distinction appears to me immaterial for the purpose now in hand.

It is true that unassignability by act *inter vivos* has been a character of many *choses in action* in the earlier stages of our law; but the question whether a personal thing is or is not assignable, is not, in my opinion, a criterion of whether it is in possession or in action. The king has always been able to assign *choses in action* that are certain. Bills of exchange have been assignable by our law ever since the law merchant on that point was recognized by our courts hundreds of years ago; many *choses in action* have long been assignable by statute, such as promissory notes and bail and replevin bonds, and by the Judicature Act of 1873 all debts and other legal *choses in action* were made assignable in the manner therein indicated. With great deference to those who think otherwise, I consider that the power of transfer conferred on the holder of these shares by statute does not affect the question.

Furthermore, on the question whether a particular property is a *chose in action* or not, I think it immaterial to inquire whether the right in question was formerly enforceable at law or in equity; a right of suit is equally a *chose in action*, whether the forum be legal or equitable.

Turning now to authority, I find that in the case of Humble v. Mitchell (1839), 11 Ad. & El. 205, the question arose whether shares in a joint stock company were goods, wares or merchandise within the meaning of the seventeenth section of the statute of frauds; and in determining that they were not, Lord Denman observed that shares in a joint stock company like this are mere *choses in action*; and in this judgment Justices Patteson, Williams and Coleridge concurred. Again, in *Ex parte* Agra Bank (1868), Law Rep. 3, Ch. 555, a question arose as to certain shares in the San Pedro Mining Company being in the order and disposition of the bankrupt Worcester. Though the precise constitution of the company is not stated, it appears that the company was an English one, by which certificates of shares were issued, and in which the shares passed by transfer; the case was argued and decided on the footing of these shares being *choses in action* and they are so described in the judgment of Lord Hatherly, then Lord Justice Page Wood. On the other hand, in the case of *Ex parte* Union Bank of Manchester (1871), *Ibid.*, 12 Eq. 354, Vice-Chancellor Bacon held that shares in a company under 7 and 8 Vict., ch. 110, were not *choses in action* within the meaning of the Bankruptcy Act, 1869, partly upon the ground that if it had been intended

to exclude from the operation of the law of reputed ownership everything incapable of manual delivery, a clearer term would have been used, and partly on the ground that the owner's title depended on the register. And again, in Societe Generale de Paris v. Tramways Union Company, 14 Q. B. D. 424, 451, Lord Justice Lindley approved of the decision of the vice-chancellor, and dwelt upon the fact that a transferee of shares has a legal and not merely an equitable right to become a shareholder.

In this conflict of authorities upon the precise point, it is not useless to consider the authorities bearing on personal things of a kind closely analogous to shares in a company. The right of a fund-holder in the public funds, where there is, of course, a legal power to assign, has long ago (1790, 1817) been held to be a *chose in action*. Dundas v. Dutens, 1 Ves. 196; Rex v. Capper, 5 Price 217. In *Ex parte* Ibbetson (1878), 8 Ch. D. 519, the court of appeal held a policy of assurance to be beyond all argument a thing in action within the meaning of the clause in question; and in *In re* Bainbridge, 8 Ch. D. 218, Chief Judge Bacon held that the share of a partner in the partnership property was a *chose in action*. If it be rightly decided, as I think it was, that a share in a partnership is a *chose in action*, it is very difficult to conclude that a share in a joint-stock company is not a *chose in action*. In the case of a partnership, the real and personal property of the partnership is, or may be, vested in all the partners, and each therefore may have a legal interest in *choses in possession*. In the case of a corporation, the whole property of the concern is vested in the corporation, and the individual corporators have no direct interest in the chattels in possession which may belong to the concern. In a partnership of seven persons, each would have a *chose in action;* if that partnership incorporated itself under the Companies Act, 1862, would each of the seven have a *chose in possession?* * * *

Appeal dismissed.

Note. See, 1830, Blake v. Jones, 1 Bailey Eq. (S. C.) 141, 21 Am. Dec. 530; 1837, Arnold v. Ruggles, 1 R. I. 165; 1849, Slaymaker v. Bank of Gettysburg, 10 Pa. St. 373.

Sec. 216. Same.

(4) As subjects of conversion.

PAYNE v. ELLIOT ET. AL.[1]

1880. IN THE SUPREME COURT OF CALIFORNIA. 54 Cal. Rep. 339–344, 35 Am. Rep. 80.

Appeal from judgment for plaintiff in the court below.

McKEE, J. This is an action of trover. The plaintiff seeks to charge defendants with $2,796.32 and costs for an alleged conversion

[1] Arguments and part of opinion omitted.

of one hundred shares of the stock of the "Northern Belle Mill and Mining Company," and also to have them adjudged guilty of fraud. The complaint was demurred to on several grounds, and the demurrer overruled. Defendants afterward answered, and, upon a trial, had in the absence of defendants and their attorneys, the court gave judgment for the plaintiff for the amount sued for, in gold coin, and also adjudged that the defendants were guilty of fraud. The appeal comes to this court upon the judgment roll, and the appellants claim that the lower court erred in overruling defendants' demurrer to the complaint upon the grounds that there is no allegation that the plaintiff owned or that the defendants converted any *certificates* of shares of stock, and that the allegation of fraud is insufficient to sustain the judgment that the defendants were guilty of fraud in the supposed conversion. The principal question is, whether shares of stock, *eo nomine*, are property for which an action, in the nature of an action of trover, can be maintained.

At common law trover was the proper remedy for a conversion of personal property; but it lay only for tangible property, capable of being identified and taken into actual possession. The conversion of the property was the gist of the action; and the action did not lie, unless the defendant had become actually possessed of the property by some means, whether of finding or otherwise. *Shares of stock, and such things, did not belong to that class of property known as chattels; they were considered incorporeal, intangible things which existed in idea, and were incapable of being subjected to actual possession. Nor were they supposed to denote possession, for they had no other evidence of an existence than the certificate which was issued to the person who claimed the right to what the certificate represented. That right consists of the privilege of voting in the concerns of the corporation, and of participating in the profits of the business of the corporation. It subsisted only in law or contract. It was a right to a thing not in possession, but in action. The certificates themselves were not considered property, but were considered evidence of property.* Wherever common-law ideas of personal property prevail, courts hold that trover is not the proper remedy for the conversion of things which were considered at common law as mere personal rights, not reducible into possession, but recoverable by law. So the supreme court of Pennsylvania has held that trover will not lie to recover damages for shares of bank stock; and, says Justice Sharswood, "the principle applies to all other corporation stocks." A share of stock, says the court, "is an incorporeal, intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation—with the right to receive in the meantime such profits as may be made and declared in the shape of dividends. Trover can no more be maintained for a share in the capital stock of a corporation than it can for the interest of a partner in a commercial firm." (Neiller v. Kelly, 69 Pa. 407.)

Upon the idea that shares of stock can not be taken away or wrong-

fully detained from the owner, or that they can not be lost by the owner or found by a stranger, there is no doubt of the soundness of that decision. But the fiction on which the action of trover was founded, namely, that a defendant had found the property of another, which was lost, has become in the progress of law an unmeaning thing, which has been by most courts discarded, so that the action no longer exists as it did at common law, but has been developed into a remedy for the conversion of every species of personal property. It lies for bank notes sealed in a letter (Moody v. Keeney, 7 Ala. 218); for negotiable instruments (Comparet v. Burr, 5 Blackf. 419); for a judgment (Hudspeth v. Wilson, 2 Dev. N. C. 372); for a promissory note which has been paid (Pierce v. Gibson, 9 Vt. 216); for copies of a creditor's account (Fulton v. Cunningham, 16 Vt. 697); for a writ of execution issued on a judgment (Keeler v. Fassett, 21 Vt. 539), and for *certificates* of shares of stock (Anderson v. Nicholas, 28 N. Y. 600; Atkins v. Gamble, 42 Cal. 98; Von Schmidt v. Bourne, 50 Cal. 616).

At the same time that the action has been thus expanded the words "things in action" have undergone such a development from their original meaning that they now represent things to the imagination in the light of tangible objects, and as such they are the subject of contract, sale, gift, mortgage, bailment and pledge; and, under the provisions of our codes, they are personal property, subject to taxation, attachment, execution, levy and sale. (Sections 542, 688, Code Civ. Proc.)

It is, therefore, the "shares of stock" which constitute the property which belongs to the shareholder. Otherwise, the property would be in the certificate; but *the certificate is only evidence of the property; and it is not the only evidence, for a transfer on the books of the corporation, without the issuance of a certificate, vests title in the shareholder; the certificate is, therefore, but additional evidence of title, and if trover is maintainable for the certificate, there is no valid reason why it is not also maintainable for the thing itself which the certificate represents.* For, as the supreme court of Connecticut says, "If a certificate of stock is unlawfully retained when demanded, what is presumed to have been converted? The certificate has no intrinsic value disconnected from the stock it represents. No one would say that the paper alone had been converted—that the conversion of the paper constitutes the entire wrong. The real act done in such cases is precisely the same as that done here—no more, no less; and to say that trover will lie in one case and not in the other, is to make a distinction where in reality there is no difference. * * * The stock in both cases was converted; and we think that in these days, when the tendency of courts is to do away with technicalities not based upon reason, a technical distinction of this character should no longer be sustained." (Ayres v. French, 41 Conn. 151.) In Boylan v. Hagnel, 8 Nev. 352, and in Kuhn v. McAllister, 1 Utah 275, actions of this character for "shares of stock" were sustained. It follows that the court below did not err in overruling the demurrer to the com-

plaint, or in rendering judgment for the plaintiff for the value of the stock and interest thereon from the time of the conversion until the time of the trial. * * *

Judgment modified and affirmed.

Note. As to conversion of stock see, 1821, Kingman v. Pierce, 17 Mass. 247 (conversion of a note); 1830, Plymouth Bank v. Bank of Norfolk, 10 Pick. (Mass.) 454; 1859, Freeman v. Harwood, 49 Maine 195; 1864, Anderson v. Nicholas, 28 N. Y. 600; 1869, Morton v. Preston, 18 Mich. 60; 1873, Bank of America v. McNeil, 73 Ky. (10 Bush) 54; 1874, Ayers v. French, 41 Conn. 142; 1875, 1877, Kuhn v. McAllister, 1 Utah 273, 96 U. S. 87; 1881, People v. Williams, 60 Cal. 1 (shares may be embezzled); 1884, Union, etc., Bank v. Farrington, 13 Lea (Tenn.) 333; 1884, Daggett v. Davis, 53 Mich. 35, 51 Am. Rep. 91; 1885, Budd v. Multnomah, etc., R. Co., 12 Ore. 271, 53 Am. Rep. 355; 1893, Gresham v. Island City, etc., Bank, 2 Texas Civ. App. 52; 1896, Withers v. Bank, 67 Mo. App. 115, on 120; 1896, Ralston v. Bank of California, 112 Cal. 208; 1899, Hine v. Com. Bank of Bay City, 119 Mich. 448, 78 N. W. Rep. 471. See, also, notes 52 Am. Dec. 73; 79 Am Dec. 506; 24 Am. St. Rep. 818.

But Pennsylvania seems to hold that nothing but the certificate is susceptible of conversion. 1828, Sewall v. Lancaster Bank, 17 S. & R. (Pa.) 285; 1871, Neiler v. Kelley, 69 Pa. St. 403; 1888, Telford and F. Turnpike Co. v. Gerhab, 13 Atl. Rep. 90.

Sec. 217. Same.

(5) Negotiability of shares.

EAST BIRMINGHAM LAND CO. v. DENNIS.[1]

1888. IN THE SUPREME COURT OF ALABAMA. 85 Ala. 565–569, 7 Am. St. Rep. 73, 26 Am. & E. C. C. 135.

[Appeal from decree in favor of Dennis, who sued one J. P. Mudd and the land company, to compel the transfer of ten shares of stock in the land company, of which Dennis claimed to be owner, and to compel Mudd to deliver the certificate of which he had possession under claim of ownership. The certificate had been issued to one Dearborn, and was indorsed by him in blank. Dennis bought the certificate from one who purchased it from Dearborn; afterward it was lost or stolen, without the fault of Dennis. Mudd had purchased the certificate for full value from stock brokers in Birmingham.]

SOMERVILLE, J. * * * The only question is, whether Mudd, who paid full value for this stock, without notice of the complainant's claim to it, acquired a title superior to that of complainant.

The established rule is, that no person can ordinarily be deprived of his ownership of property save by his own consent, or his negligence. The only exception to this rule is the case of a *bona fide* purchaser for value of negotiable paper. We have no reference, of course, to the taking of property for public uses by judicial condemnation, which may be done without the owner's consent.

It can not be contended with any degree of plausibility that under

[1] Arguments and part of opinion omitted. Statement abridged.

the facts of this case the complainant was guilty of negligence or the want of ordinary care in the custody of the certificate. He kept it in a box in the vault of a banking house, whence it was abstracted by some unknown person, apparently without any fault on his part.

Nor does any question arise involving the rights of a subsequent *bona fide* purchaser of stock, from one shown to be owner on the corporate books, who has already made a prior unregistered transfer of it to another purchaser. All such transfers made by the true owner, and not registered on the books of the corporation within fifteen days, are declared by statute to be "void as to *bona fide* creditors or purchasers without notice." Code, 1886, § 1671; Fisher v. Jones, 82 Ala. 117. If the defendant Mudd had claimed by a subsequent purchase from Dearborn, the owner of the stock on the corporate books, this question would arise. But he does not so claim, his title being derived through the complainant Dennis himself, by two or more intermediate transferees, the first of whom was a fraudulent holder without title. Whether Mudd's title to the stock, therefore, is superior to that of Dennis, depends on whether a certificate of stock, indorsed in blank by the owner, is to be treated as negotiable paper.

The rule is well settled that a *bona fide* purchaser of a negotiable bill, bond or note, although he buys from a thief, acquires a good title, if he pays value for it without notice of the infirmity of his vendor's title. *The authorities are clear in support of the view that a certificate of corporate shares of stock, in the ordinary form, is not negotiable paper, and that a purchaser of such certificate, although indorsed in blank by the owner, where no question arises under the registration laws, obtains no better title to the stock than his vendor had, in the absence of all negligence on the part of the owner, or his authority, to make the sale.* This question arose, and was decided by the New York Court of Appeals, in Mechanics' Bank v. New York & New Haven R. Co., 13 N. Y. (1856) 599. It was there held that such a certificate does not partake of the character of a negotiable instrument, and that a *bona fide* assignee, with full power to transfer the stock, takes the certificate subject to the equities which existed against his assignor. Such certificates, said Comstock, J., "contain no words of negotiability. They declare simply that the person named is entitled to certain shares of stock. They do not, like negotiable instruments, run to the bearer, or order of the party to whom they are given." They were said to be in some respects like a bill of lading or warehouse receipt, being "the representative of property existing under certain conditions, and the documentary evidence of title thereto." *The most that can be said is, that all such instruments possess a sort of quasi-negotiability, dependent on the custom of merchants and the convenience of trade. They are not, in the matter of transferability, protected strictly as negotiable paper.*

In Shaw v. Spencer, 100 Mass. 382; s. c., 97 Am. Dec., 1 Am. Rep. 115 (1868), it was also decided that a certificate of corporate stock, transferred in blank on its back, was clearly not a negotiable instrument. "No commercial usage," it was said, "could give to

such an instrument the attribute of negotiability. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name must fill out the blanks, * * * so as to derive title to himself directly from the last recorded stockholder, who is the only recognized and legal owner of the shares." The case of Sewall v. Boston Water Power Co., 4 Allen 282; s. c. 81 Am. Dec. 701, decided by the same court a few years before, is referred to as a precedent in support of this conclusion.

The precise point in the present case was also decided in Barstow v. Savage Mining Co., 64 Cal. 388; s. c., 49 Am. Rep. 705, where it was expressly held that a *bona fide* purchaser of stock standing on the company's books in the name of the former owner, regularly indorsed by him, and stolen from the present owner without his fault, gets no title. The decision was based on the fact that such certificates are not negotiable instruments, but simply muniments of title, and evidences of the holder's right to a given share in the property and franchise of the corporation. It was observed, in regard to the matter of negligence, as follows: "But if the purchaser from one who has not the title, and has no authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit."

The same principle was applied to bills of lading, in Gurney v. Behrend, 3 Ellis & Bl. 622, decided by the English Queen's Bench, where an instrument of that kind, indorsed in blank by the consignor, and sent by him to his correspondent, had been misappropriated. The correspondent, without authority, fraudulently transferred the bill for value; and it was held by Lord Campbell, that for the want of the element of negotiability in the paper, the title to the goods was unaffected by the transaction.

The doctrine of Barstow v. Savage Mining Co., *supra*, is well supported by authority, and, in our judgment, announces a correct principle of law, and we fully approve it.—Woolley v. Sargeant, 14 Amer. Dec., note on page 427, and cases there cited; Cook on Stock and Stockholders, §§ 7, 10, 192, 368, 437; 2 Daniel's Neg. Inst. (3d. ed.), § 1708*g*. It harmonizes entirely with the declaration of our statute, that shares of stock in private corporations "are personal property, transferable on the books of the corporation" in accordance with the rules and regulations of the corporation.—Code 1886, § 1669; Campbell v. Woodstock Iron Co., 83 Ala. 451.

There is a class of cases, not to be confounded with the one in hand, where the holder of such a certificate of stock indorsed in blank is clothed with power, as agent or trustee, to deal with such stock to a limited extent, and transfers it by exceeding his powers, or in breach of his trust. In such cases it has often been held that the true owner, having conferred on the holder, by contract, all the external *indicia* of title, and an apparently unlimited power of disposition over the stock, "is estopped to assert his title as against a third person, who, acting in good faith, acquires it for value from the apparent owner."—2 Dan. Neg. Inst. (3d ed.), §1708*g*; McNeil v. Tenth Nat. Bank, 46

N. Y. 325; Mount Holly Turnpike Co. v. Ferree, 17 N. J. Eq. 117; Prall v. Tilt, 28 N. J. Eq. 479; Merchants' Bank v. Livingston, 74 N. Y. 223. These cases rest on the principle that it is more just and reasonable, where one of two innocent parties must suffer loss, that he should be the loser who has put trust and confidence in the deceiver than a stranger who has been negligent in trusting no one. Allen v. Maury & Co., 66 Ala. 10.

It being an established principle of law that certificates of stock are not to be regarded as negotiable paper, it is not permissible to prove a custom or usage among stock brokers to the contrary. No usage is good which conflicts with an established principle of law any more than one which contravenes or nullifies the express stipulations of a contract. Dickinson v. Gay, 83 Am. Dec. 656, and note, 664; E. T., Va. & Ga. R. Co. v. Johnston, 75 Ala. 576; Lehman v. Marshall, 47 Ala. 362.

The decree of the court below is in accordance with these views, and must be affirmed.

Note. While shares of stock are almost universally held to be non-negotiable, yet they approach very nearly to having such qualities when they pass by indorsement and delivery of the certificate. 1850, Harris v. Bank of Mobile, 5 La. Ann. 538; 1856, Mechanic's Bank v. N. Y. & N. H. R., 13 N. Y. 599; 1857, Mandelbaum v. N. A. Min. Co., 4 Mich. 465; 1861, Bridgeport Bank v. N. Y. & N. H. R., 30 Conn. 231; 1868, Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; 1870, Mechanic's Bank v. Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388; 1870, State v. Bank of State, 45 Mo. 528; 1871, McNeil v. Tenth Nat'l Bank, 46 N. Y. 325, 7 Am. Rep. 341; 1871, First National Bank v. Lanier, 11 Wall. (78 U. S.) 369; 1873, Hall v. Rose H. & E. R. Co., 70 Ill. 673; 1874, Bercich v. Marye, 9 Nev. 312; 1875, Sherwood v. Meadow Val. M. Co., 50 Cal. 412; 1877, Weyer v. Second Nat'l Bank, 57 Ind. 198; 1883, Barstow v. Savage Min. Co., 64 Cal. 388, 49 Am. Rep. 705; 1886, Young v. South Tredegar Iron Co., 85 Tenn. 189, 4 Am. St. R. 752; 1887, Supply D. Co. v. Elliott, 10 Colo. 327, 3 Am. St. Rep. 586; 1890, Hammond v. Hastings, 134 U. S. 401; 1892, Clark v. Am. Coal Co., 86 Iowa 436, 17 L. R. A. 557, 53 N. W. Rep. 291; 1893, Brinkerhoff-Farris, etc., Co. v. Home L. Co., 118 Mo. 447; 1896, Craig v. Hesperia L. & W. Co., 113 Cal. 7, 54 Am. St. Rep. 316; 1898, Knox v. Eden Musee Am. Co., 148 N. Y. 441, 51 Am. St. Rep. 700; 1899, Masury v. Ark. Nat'l Bank, 93 Fed. Rep. 603, 35 C. C. A. 476; 1902, Farmers Bank v. Diebold Safe Co., 66 O. S. 367, 58 L. R. A. 620.

Sec. 218. Same.

(6) As subjects of attachment or execution.

HALEY v. REID.[1]

1854. IN THE SUPREME COURT OF GEORGIA. 16 Ga. Rep 437–439.

[Reid sued out an attachment against Haley, which the sheriff levied on the stock of Haley in a plank-road company by making an entry to that effect upon the attachment. The court overruled a mo-

[1] Only part of opinion given.

tion by the defendant to dismiss the attachment, and exceptions were taken.]

BENNING, J. * * * To "levy" means to seize—to take corporeally. It follows that what can not be seized—what can not be taken corporeally—can not be levied on. And as the law is not to be presumed to require impossibilities when it requires an executing officer to levy on both personal and real estate, it is not to be presumed to intend to require him to levy on such personal or real estate as it is impossible to levy on; that is to say, as it is impossible to seize—to take corporeally. What precise idea the sheriff meant to express by the word "*levied*" when he returned that he had "levied" the attachment upon one hundred shares in the corporation I am at some loss to conceive. * * *

Reversed.

Note. At common law shares are not attachable. 1812, Denton v. Livingston, 9 Johns. (N. Y.) 96; 1819, Williamson v. Smoot, 7 Martin (La. O. S.) 31, 12 Am. Dec. 494; 1823, Nashville Bank v. Ragsdale, Peck (Tenn.) 296; 1858, Evans v. Monot, 4 Jones Eq. (N. C.) 227; 1866, Foster v. Potter, 37 Mo. 525; 1873, Merchants' M. I. Co. v. Brower, 38 Texas 230; 1885, Barnard v. Ins. Co., 4 Mackey (D. C.) 63; 1887, Rhea v. Powell, 24 Ill. App. 77; 1889, Duncanson v. Nat'l Bank, 7 Mackey (D. C.) 348.

But statutes generally provide for the taking of shares by execution or attachment. 1821, Howe v. Starkweather, 17 Mass. 240; 1830, Hussey v. Manufac. & M. Bank, 10 Pick. (Mass.) 415; 1838, Castle v. Carr, 16 N. J. Law 394; 1882, Shenandoah Valley R. Co. v. Griffith, 76 Va. 913; 1889, Union Bank v. Byram, 131 Ill. 92; 1894, Thompson v. Wells, 57 Ill. App. 436; 1895, Ditty v. Bank, 112 Ala. 391; 1902, Ball v. Towle Mfg. Co., 67 O. S. 306, 93 Am. St. R. 682, 65 N. E. 1015.

Under some statutes only the legal interest is attachable. 1881, Van Norman v. Jackson, Cir. J., 45 Mich. 204; 1888, Weller v. Pace Tobacco Co., 2 N. Y. Supp. 292; 1893, Gypsum Plaster & S. Co. v. Kent, C. J., 97 Mich. 631.

But under other statutes the equitable interest is also. 1854, Bank of St. Mary's v. St. John, 25 Ala. 566; 1866, Middletown Sav. Bank v. Jarvis, 33 Conn. 372; 1894, Tufts v. Volkening, 122 Mo. 631.

"Stock" can not be the subject of replevin, because of its incorporeal nature. 1899, Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. Rep. 624.

Sec. 219. Same.

(7) Location of shares for attachment.

PLIMPTON v. BIGELOW.[1]

1883. IN THE COURT OF APPEALS OF NEW YORK. 93 New York 592–602.

[Appeal from order of general term of supreme court reversing an order of the special term vacating a levy by attachment upon stock.]

ANDREWS, J. This action is brought by the plaintiffs, residents of Massachusetts, against the defendant, a resident of Pennsylvania, upon

[1] Arguments and parts of opinion omitted.

several promissory notes of the defendant, made and delivered in Massachusetts and payable generally. The plaintiffs procured an order for the service of the summons upon the defendant by publication, and also a warrant of attachment against his property. The sheriff of the city and county of New York, to whom the warrant was directed, undertook to execute it by levying upon 439 shares of the stock of the Hat Sweat Manufacturing Company, a Pennsylvania corporation, incorporated under the laws of that state, owned by the defendant, and for which he held and then had, in the state of Pennsylvania, stock certificates issued and delivered to him at the office of the company in Philadelphia, in February, 1882, at which place the stock and transfer books of the company then were and still are kept. The sheriff, for the purpose of making the levy, left with the secretary of the company in the city of New York a certified copy of the warrant of attachment, together with the notice prescribed by section 649 of the Code of Civil Procedure. The formal proceedings were taken to complete the levy, and the shares were subjected to the attachment, provided they were liable to attachment under section 647 of the code. That section declares that "the rights or shares which the defendant has in the stock of an association or corporation, together with the interest and profits thereon, may be levied upon, and the sheriff's certificate of the sale thereof entitles the purchaser to the same rights and privileges with respect thereto, which the defendant had when they were attached."

The question here is whether this section applies to shares of stock of a foreign corporation. It is to be observed that the section is one of the provisions of a system of proceedings by attachment, and is to be construed in view of the fundamental principle upon which all attachment proceedings rest, that the *res* must be actually or constructively within the jurisdiction of the court issuing the attachment in order to any valid or effectual seizure under the process. In the case of tangible property, capable of actual manucaption, it must have an actual situs within the jurisdiction. But credits, choses in action and other intangible interests are made by statute susceptible of seizure by attachment. The same principle, however, applies in this case as in the other, the *res*, that is the intangible right or interest, to be subject to the attachment, must be within the jurisdiction. But it is manifest from the nature of this species of property that it must be a constructive or statutory presence only, founded upon some characteristic fact which determines its locality. Where the defendant who owns a credit is within the jurisdiction there is no difficulty through proceedings *in personam* in reaching and applying it in discharge of his debt to the plaintiff. But where he is out of the jurisdiction, and the debt or duty owing to him, or the right he possesses exists against some person within the jurisdiction, attachment laws fasten upon that circumstance, and by notice to the debtor or person owing the duty or representing the right, impound the debt, duty or right to answer the obligation which the attachment proceeding is instituted to enforce. In the case supposed, the debt, duty or right for

the purpose of attachment proceedings is deemed to have its situs or locality in the jurisdiction. * * *

We now come more directly to the inquiry upon which the case now under review depends, viz.: Whether the shares of a non-resident defendant in the stock of a foreign corporation can be deemed to be within this state, by reason of the fact that the president or other officers of the corporation are here engaged in carrying on the corporate business. We do not overlook the fact that we are construing a section of the code, the language of which is sufficiently general to include foreign corporations, but they are not expressly named, and for the purpose of determining whether foreign corporations were intended to be included, it is a relevant inquiry whether upon general principles the right which a stockholder in a corporation has, by reason of his ownership of shares, is a debt or duty of the corporation, existing in a foreign jurisdiction wherever the officers of the corporation may be found engaged in the prosecution of the corporate business. If the corporation, by having its officers, and by transacting business in a state other than its domicile of origin, is deemed to be itself present as an entity in such foreign state, to the same extent and in the same sense as it is present in the state which created it, it may be conceded that its shares might be properly attached in such foreign jurisdiction.

But we regard the principle to be too firmly settled by repeated adjudications of the federal and state courts, to admit of further controversy, that a corporation has its domicile and residence alone within the bounds of the sovereignty which created it, and that it is incapable of passing personally beyond that jurisdiction. (Bank of Augusta v. Earle, 13 Pet. 519; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404; Merrick v. Van Santvoord, 34 N. Y. 208; Stevens v. Phœnix Ins. Co., 41 N. Y. 150.) But it is equally true that a foreign corporation is permitted to sue in the courts of this state and that suits *in personam* may be brought against it by service of process on its officers or agents within the jurisdiction. (Code, §§ 432, 1780; Gibbs v. Queen Ins. Co.[1]) But suits by or against foreign corporations are not maintained on the theory that the corporation litigant is here in person, or that the corporate entity attends its officers in their migrations from one state to another, or that it is itself present wherever its property may be, or its business may be transacted. The jurisdiction, as I understand, rests upon the ground that as a corporation must act by agents, it may, through its agents, subject itself to the jurisdiction of a foreign tribunal. * * *

The right which a shareholder in a corporation has by reason of his ownership of shares is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately on its dissolution in the assets remaining after payment of its debts. (Burrall v. Bushwick Railroad Co., 75 N. Y. 211.) It is this right and interest which is made liable to attachment under the section referred to. The right of the shareholder is derived from the corporation under its charter, or the laws

[1] 63 N. Y. 114.

of the state which created it. It is enforceable by judicial proceeding in the local courts, and in case of a dissolution of the corporation the local courts alone can be resorted to to wind up its affairs and distribute its assets. It seems impossible to regard the stock of a corporation as being present for the purpose of judicial proceedings except at one of two places, viz., the place of residence of the owner, or the place of the residence of the corporation. * * *

The foreign corporation is not here because its agents are here, nor because it has property here; nor is the stock here because the corporation has property, or is conducting its business in this state. The individual members of a corporation are not the owners of the property of the corporation, or of any part of it. The abstract entity—the corporation—is the owner and only owner of the property. We do not doubt that shares for the purpose of attachment proceedings may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation by intendment of law always remains, to wit, in the state or country of its creation. In all other places it is an alien. It may send its agents abroad or transact business abroad as any other inhabitant may do, without passing personally into the foreign jurisdiction or changing its legal residence. But such agents are not the corporation, and do not represent the corporation in respect to rights as between the corporation and its shareholders incident to the ownership of shares.

It is not necessary to this case to define the limits of legislative power in subjecting intangible property to attachment by notice served upon such person or corporation as may be designated by the legislature. Manifestly the *res* can not be within the jurisdiction, as a mere consequence of a legislative declaration, when the actual locality is undeniably elsewhere. But in respect to intangible interests, as we have said, there can be no actual seizure of the thing, and it can be bound only by notice to some one who represents the thing. In case of a debt, notice to the debtor residing within the jurisdiction is the ordinary proceeding to attach the debt, and if the debtor is a corporation, and the corporation is a domestic one, there is no difficulty. But in some of the states foreign corporations having an agent, or a place of business within the state, may be charged under what is called the trustee process, or as garnishee. (Barr v. King, 96 Pa. St. 485; Nat'l Bank v. Huntington, 129 Mass. 444.) In these proceedings the trustee or garnishee is joined with the principal defendant as a party to the action, and the debt owing by the trustee or garnishee is ascertained and the liability of the trustee and garnishee is adjudged in the action. There may be no difficulty upon principle in compelling a corporation which has an agent and officer in another state and is transacting business there to respond in garnishment proceedings for the debt, although the creditor—the principal defendant—is a non-resident, and if bound to respond, it is certainly just that the judgment which compels the corporation to pay the debt to the plaintiff should protect it in making such payment against a subse-

quent claim by its creditor. We do not enter into this question here, but whatever view may be taken as to the right to attach a debt owing by a foreign corporation to a non-resident, by service of notice on an agent of the corporation within the jurisdiction, we think, in respect to corporate stock, which is not a debt of the corporation in any proper sense, it would be contrary to principle to hold that it can be reached by such a notice. We are, therefore, of the opinion that the fundamental condition of attachment proceedings, that the *res* must be within the jurisdiction of the court in order to an effectual seizure, is not answered in respect to shares in a foreign corporation by the presence here of its officers, or by the fact that the corporation has property and is transacting business here, and that section 647 must be construed as applying to domestic corporations only. (See Moore v. Gennett, 2 Tenn. Ch. 375; Christmas v. Biddle, 13 Pa. St. 223; Childs v. Digby, 24 Pa. St. 26; Drake on Attachment, §§ 244, 471, 478.) * * *

Order of general term reversed and that of special term affirmed.

Note. See, also, 1875, Moore v. Gennett, 2 Tenn. Ch. 375; 1886, Winslow v. Fletcher, 53 Conn. 390, 55 Am. Rep. 122; 1895, Reid Ice Co. v. Stephens, 62 Ill. App. 334; 1895, Ireland v. Globe M. & R. Co., 19 R. I. 180, 61 Am. St. Rep. 756, 29 L. R. A. 429; 1898, New Jersey Sheep & W. Co. v. Traders' Dep. Bank, 20 Ky. L. Rep. 565, 46 S. W. Rep. 677; 1898, Pinney v. Nevills, 86 Fed. Rep. 97. Situs of shares for administration is at the domicile of the corporation and not at that of the decedent: 1901, Murphy v. Crouse, 135 Cal. 14, 87 Am. St. R. 90, 66 Pac. 671.

Sec. 220.

(8) Seizure in equity.

ERWIN v. OLDHAM.

1834. In the Supreme Court of Tennessee. 6 Yerger (14 Tenn.) 185–189.

Green, J. This is a bill filed by the complainant to subject stock in the Nashville Bridge Company to the payment of his debt due from defendant.

It is not pretended that there is any fraud or trust in this case to furnish a ground of equity jurisdiction, and the simple question is whether this court has power to cause stocks, credits and rights of action held by a debtor, without fraud, to be sold or converted into money, or transferred to the creditor in payment of his debt. We think it has not, and without entering into any reasoning on the subject or review of authorities, we refer, as conclusively settling the point, to the case of Donavan v. Finn, 1 Hop. 59.

Our act of assembly of 1833, ch. 11, makes ample provision upon this subject, but this bill, being filed long before the passage of that act, can not be governed by it.

Decree affirmed.

Note. Compare, 1854, Bank of St. Mary's v. St. John, 25 Ala. 566; 1866, Middletown Sav. Bank v. Jarvis, 33 Conn. 372; 1902, Ball v. Towle Mfg. Co., 67 O. S. 306, 93 Am. St. R. 682, 65 N. E. 1015.

CHAPTER 9.

THE CORPORATE NAME.[1]

Sec. 221. Necessity of a name.

"There ought to be a name by which it ought to be incorporated."—10 Coke's Rep., p. 29, c. 1600.

"The name of the corporation *is as a name of baptism.*"—21 Ed. IV, p. 56 (1482); 10 Coke's Rep., p. 28.

"It is a clear and plain rule in our law, that the name of a corporation *is as a name of baptism* to a natural man, and if there is any difference, I conceive that *the law requires more strict certainty in the name of a corporation than in the name of any particular person;* for a name is more necessary to a corporation than to another; for when an infant is born, he is presently a perfect creature before any name is given him, and the giving the name is not a matter of necessity, but of policy for distinction, etc., but in the case of a corporation *the name is the substance and essence of it*, and it is not a body before a name be imposed upon it."—Argument of Egerton, Solicitor-General, 30 and 31 Eliz., Ley's Rep. 163 pl. 228 (1589); 6 Viner's Abr., p. *261.

"The names of corporations are given of necessity, for the name is as the *very being of the* constitution, and though it is the will of the king that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts, and it is no body to plead and be impleaded, to take and give till it hath got a name, but natural persons can take before they come into being, and when they are in being, before they have got a name."—Gilb. Hist. C. B. 181, 182, cap. 17; 6 Viner *262, c. 1620.

[1]See Ang. & Ames, §§ 99–103; Beach, §§ 373–5, 864; Boone, §§ 29–32, 47, 75, 286; Clark, pp. 71–4; Cook, § 699, *et seq.*; Elliott, §§ 47–8; Morawetz, §§ 353–7, 770, 771, 810-12; Taylor, §§ 12, 14, 137, 158–9; I Thompson, §§ 284–300; VII Thompson, §§ 8183-8202.

Sec. 222. Acquisition of a name.

SMITH v. TALLASSEE BRANCH OF CENTRAL PLANK-ROAD CO.[1]

1857. IN THE SUPREME COURT OF ALABAMA. 30 Ala. Rep. 650-668.

[Action by the "Tallassee Branch of the Central Plank-Road Company" against Smith upon a subscription to the stock of the Central Plank-Road Company. Plaintiff showed the organization of the latter company under its charter; also the proceedings for the establishment of the Tallassee branch, including the meeting of the stockholders for the organization thereof, the adoption of by-laws and a corporate name—"The Tallassee Branch of the Central Plank-Road Company"—the election of directors, etc. Smith asked the court to charge that the charter did not give the plaintiff any corporate name, nor any authority to select one. This was refused, and defendant, Smith, excepted. The court below found for the road company and Smith appeals.]

WALKER, J. * * * If the plaintiff have any corporate existence, it is derived from the fourth section of the act of 30th of January, 1850, *providing for* the incorporation of the Central Plank-Road Company—Pamphlet Acts 1849–1850, p. 268. This act authorizes the incorporation of a company for the construction of a plank-road from Wetumpka to Gunter's Landing or some other point on the Tennessee river. So much of the fourth section as it is necessary to copy in this opinion, is in the following words: "Any individual or association may establish branch plank-roads running into and connecting with said central plank-road, which branches may be governed by the respective stockholders thereof; and said stockholders for building branches to said central plank-road may become, and hereby are incorporated *under the provisions of this act.*"

It is contended that the bestowment of a name by the charter of a corporation is indispensable to its creation, and that the plaintiff has no corporate existence, because no name is provided in the statute. Names are necessary to the existence of corporations. It is "the very being of the constitution;" "the knot of their combination, without which they could not do their corporate acts, for it is no body to plead and be impleaded, to take and give, until it hath gotten a name."—2 Bacon's Abr. Corporation (C). *But the authorities clearly show, that although the name is usually given by the charter, it is not indispensable that it should be so given. It is said, in Wilcock on Corporations 34, that every corporation has at least one name by which it may be identified; this may be either derived from usage, or conferred upon it by the statute or charter of creation.* In an anonymous case in 1st Salkeld 191, we find the following: "My Lord Coke says that a cor-

[1] Statement much abridged. Arguments omitted; and only that part of the opinion relating to the one point given.

poration must have a name; but that must be understood to be either expressed in the patent or implied in the nature of the thing, as if the king should incorporate the inhabitants of Dale with power to choose a mayor annually, yet it is a good corporation by the name of mayor and commonalty. So the city of Norwich is incorporated to be a mayor and sheriffs by the charter of Henry IV, and are called mayor, sheriffs and commonalty."

Where individuals are authorized to associate themselves together, and, organizing as a corporation under a general law, give themselves a name, the existence of the corporation has been maintained.—Falconer v. Campbell, 2 McLean 195–198; see, also, Minot v. Curtis, 7 Mass. 447.

The charter provides for the establishment of branches to the Central plank-road, and so designates them in the 13th as well as the 4th section above copied. The charter also clearly contemplates the establishment of more branches than one, and thus arises the propriety of distinguishing the different branches by a variation in the names. A most appropriate mode of accomplishing the object is by reference to some noted point toward which the branch leads. Tallassee or its vicinity is one of the points had in view in the organization of this company. It is shown by the record of the proceedings of the corporation, copied into the bill of exceptions, that it has used from the commencement the name of the Tallassee Branch of the Central Plank-Road Company. This is the name which would naturally be given to it by implication from the charter, and the route of the road. Without determining the effect of implication or usage, in a case where one existed without the other, we decide that the plaintiff has, by implication and usage, the name of the Tallassee Branch of the Central Plank-Road Company, and that the complaint, as amended, is in the proper name. * * *

Affirmed.

Note. A corporate name may be acquired by user. 1877, Gifford v. Rockett, 121 Mass. 431; 1877, Alexander v. Berney, 28 N. J. Eq. 90. See, *infra*, p. 823, but under the statutes should be distinctive and not vague or uncertain. 1882, State v. McGrath, 75 Mo. 424; 1893, *In re* Nether Prov. Assn., 12 Pa. Co. Ct. 666; 1894, *In re* Nether Prov. Assn., 2 Pa. Dist. Rep. 702. Statutes frequently provide that a corporation shall not select a name already in use by another corporation, or so similar thereto as to lead to uncertainty or confusion. New York, Gen'l Corp. L. 1890, ch. 563, § 6; Michigan, Howell's Stat., § 4161*a*, C. L., § 7037. See, New Jersey Statute, 1896, ch. 185, § 8. Such provision is declaratory of the common law. Newby v. R. Co., *infra*, p. 819.

Many other statutory provisions exist, *e. g.*: "When the name assumed is that of a person or firm, there must be joined thereto some word designating the business to be carried on, followed by the word "company or corporation" —Alabama, § 1286 of Code—under penalty of partnership liability of members for failure to comply with this provision. Missouri has a similar provision, R. S. 1889, § 2496. Ohio provides that the name shall begin with "The" and end with "company," unless the organization is not for profit. R. S., § 3236. Wisconsin provides that the "name shall not contain the names of individuals in the manner in which they are ordinarily used in partnership or business names." Statutes 1889, § 1772. In Kentucky, every corporation doing business in the state is required to have its name painted in large let-

ters in a conspicuous place at its principal place of business, followed by *incorporated*, painted in like manner. So the name, with *incorporated*, shall be printed upon all advertising matter. Am. Corp. Legal Man., 1899, p. 159; Stat. 1894, § 576.

Sec. 223. Rights in the corporate name.

NEWBY v. THE OREGON CENTRAL RAILWAY CO. ET AL.[1]

1869. IN THE U. S. CIRCUIT COURT. Deady's Rep. 609–620, Fed. Cas. 10144.

[Suit to enjoin the defendants from using and issuing bonds in the name of the Oregon Central Railway Company. Prior to 1867 there had existed a railroad company, duly incorporated and organized under the Oregon law, by the name of the Oregon Central Railway Company. This had proceeded to business, and had issued certain bonds of $1,000 each, two of which Newby owned. In 1867, owing to difficulties among the members, certain of the corporators of the old company seceded therefrom, and under the general corporation laws of Oregon proceeded to organize a new corporation with the same name, and to issue and put upon the market bonds of a character similar to those issued by the old company and under the same name. The defendants demurred on the ground that the legal right to the name—The Oregon Central Railway Company—had not been established at law, and the facts alleged were not sufficient to constitute a cause of suit.]

DEADY, J. * * * By the law of Oregon any three or more persons may incorporate themselves for the purpose of engaging in any lawful enterprise or occupation. The primary step in the formation of this legal entity is the execution and filing of articles of incorporation, which articles, among other things, must specify—"The name assumed by the corporation and by which it shall be known." (Or. Code, 658–9.)

By the execution and filing of these articles the corporate name assumed thereby and specified therein becomes exclusively appropriated. If afterwards any persons attempt to incorporate for any purpose by the same name, this would be an encroachment upon the rights of the first corporation and therefore illegal. To prevent the continuance of such a wrong upon the rights of another, equity will interfere at the suit of the injured party by injunction. The case is analogous to if not stronger than that of a piracy upon an established trade-mark. (Bell v. Locke, 8 Paige 75; Taylor v. Carpenter, 11 Paige 292; Partridge v. Menck, 2 Barb. Ch. 102; Wil. Eq., 402–3.) The corporate name of a corporation is a trade-mark from the necessity of the thing, and upon every consideration of private justice and

[1] Statement abridged. Only part of opinion given.

public policy deserves the same consideration and protection from a court of equity.

Under the law the corporate name is a necessary element of the corporation's existence; without it a corporation can not exist. Any act which produces confusion or uncertainty concerning this name is well calculated to injuriously affect the identity and business of a corporation. And as a matter of fact, in some degree at least, the natural and necessary consequence of the wrongful appropriation of a corporate name is to injure the business and rights of the corporation by destroying or confusing its identity. The motives of the persons attempting the wrongful appropriation are not material. They neither aggravate or extenuate the injury caused by such appropriation. The act is an illegal one, and must, if necessary, be presumed to have been done with an intent to cause the results which naturally flow from it. Nor will a court of equity refuse to enjoin the wrongful appropriation of a corporate name until the right of the first corporation to the name has been established by the verdict of a jury in an action at law. Such right does not rest in parol but is shown by the record, if at all, and is determined by the court in any form of proceeding. Neither in such case has the party injured an adequate and complete remedy at law. As in the case of patents for inventions and copyrights, the remedy at law can only give redress for the past injury, and that often inadequately. But to protect the injured corporation from the mischief arising from continued violation of its rights and perpetual litigation concerning them, resort must be had to the equitable remedy by injunction. (Story's Eq., § 930.)

Nor do I deem it material in this case to the jurisdiction in equity, that the defendant should be insolvent—unable to respond to the complaint in damages. The jurisdiction in this class of cases—trademarks, patents and copyrights—depends upon the fact that the matter is intrinsically of equitable cognizance—that the legal rights of the party can only be protected in equity, and not upon the uncertain and irrelevant test of the insolvency of the defendant. * * *

Demurrer sustained on another ground suggested in argument, *i. e.*, that the old company should be a party to the suit.

Note. See note at end of next case.

Sec. 224. Same.

ARMINGTON v. PALMER ET AL.[1]

1898. IN THE SUPREME COURT OF RHODE ISLAND. 21 R. I. 109, 79 Am. St. Rep. 786, 42 Atl. Rep. 308, 43 L. R. A. 95, 9 Am. & Eng. C. C. N. S. 802.

[Bills by Armington and Sims, individually and as stockholders in the Armington and Sims Engine Company, to enjoin Palmer and others from using the name "Armington and Sims Company, successors

[1] Statement abridged. Arguments and part of opinion omitted.

to Armington and Sims Engine Company." The engine company was incorporated in 1883, and had acquired the assets, including patents and good-will, of a former partnership and corporation by the name of Armington and Sims Company. It had, however, in 1896, become embarrassed, and by agreement of all interested, its property was sold at auction to pay its debts, Palmer and others being purchasers. They immediately organized a corporation under the general corporation law, with the name Armington and Sims Company, and afterward a meeting of the engine company was called to ratify the use of the name chosen. At this meeting, against the written protest of Sims, Armington not being present, a resolution granting the right to use the name was passed. The defendants demurred on the ground that an injunction against the use of a corporate name authorized by the state could not be maintained by a private party, but only by the state; also, that no facts set out entitled complainants to relief.]

STINESS, J. * * * Upon the first ground of demurrer, the question is whether a private party can maintain a bill against a corporation for the wrongful assumption of its name. The respondents rely upon Rice v. Bank, 126 Mass. 300; Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. Rep. 875; American Order of Scottish Clans v. Merrill, 151 Mass. 558, 24 N. E. Rep. 918, and Paulino v. Association, 18 R. I. 165, 26 Atl. Rep. 36. The first of these cases was an information *quo warranto*, to exclude the respondents from exercising the franchise of being a corporation. The court held that such a bill must be filed by the state, and not by private parties. With this doctrine we need not disagree. The second case was a petition for leave to file an information *quo warranto*, and to restrain the respondent from doing business under the name of the Boston Rubber Company, claiming that this was distinct from the franchise to be a corporation. The statutes of Massachusetts of 1870 provided that the name assumed in the agreement of association should not be changed but by act of the legislature, and also that the agreement was to be submitted to a commissioner of corporations for his approval. The court held that, as it was within his discretion to refuse to approve it, the court could not exercise that discretion, and the certificate was conclusive. The court said that the statute was not intended to prevent the fraudulent use of trade-names, but to prevent the identity of corporate names. The statute, like our own, required that the name should not be one in use by any existing corporation of the state. The statutes of Massachusetts (Pub. St., ch. 186, § 17) provide for an application to the court in cases of private injury; but as the petitioner had acquiesced in the use of the name for ten years without injury, the court held that it did not make out a case for injunction under the statute. The third case is to the same effect, that the approval by the insurance commissioner of the name adopted by a beneficial association is conclusive in a private suit of the right of the association to such corporate name. Both of these latter cases so clearly rest upon the conclusiveness of the judgment of the commissioner that they are hardly in point in respect to our statute, which

has no such provision. Judge Holmes, in American Order of Scottish Clans v. Merrill, foresaw a case like this one in saying: "When there are no statute provisions as to the choice of names, and parties organize a corporation under general laws, it may be that they choose a name at their peril, and that, if they take one so like that of an existing corporation as to be misleading and thereby to injure its business, they may be enjoined, if there is no language in the statute to the contrary." The possibility here suggested is fully sustained by many cases, among which are the following, some of which were cited by Judge Holmes: Putnam v. Sweet, 1 Chand. 286; Newby v. Railway Co., Deady 609; Holmes, Booth & Haydens v. Holmes, Booth and Atwood Mfg. Co., 37 Conn. 278; Farmers' Loan and Trust Co. v. Farmers' Loan and Trust Co. of Kansas (Sup.), 1 N. Y. Supp. 44; Higgins Co. v. Higgins' Soap Co., 144 N. Y. 462, 39 N. E. Rep. 490; Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. Rep. 94; R. W. Rogers Co. v. William Rogers' Mfg. Co., 17 C. C. A. 576, and note; Plant Seed Co. v. Michel Plant and Seed Co., 23 Mo. App. 579, affirmed 37 Mo. App. 313.

The principles upon which these cases rest are, that although a corporation may be legally created, it can no more use its corporate name in violation of the rights of others than an individual can use his name, legally acquired, so as to mislead the public and to injure another. The principle adopted is similar to that of a trade-name or trade-mark, and is applied accordingly. Consequently a court of equity has jurisdiction in such a case without the intervention of the state. The case of Paulino v. Association is quite different from the case now before us. In that case the complainants, a voluntary association, had appointed a committee to procure a charter, which was procured, and under which the corporators had organized. The bill sought to annul the charter because of alleged misconduct on the part of the corporators. The court held that this could not be done. Clearly, the remedy of the complainants was of a different sort. After referring to some of the cases cited above, the court used the same language herein quoted from the opinion of Judge Holmes in American Order of Scottish Clans v. Merrill, thus intimating the very right which is claimed in this case. But the respondents argue, as was argued in the Massachusetts cases, that to restrain the use of the name is practically to annul the corporation, because it can not act without a name. We do not think that this result follows. According to the allegations of the bill, the name assumed by the respondents is so like that of the older corporation as to be misleading and injurious. We see no reason why the corporation, if it is restrained from using its present name, may not, under Gen. Laws R. I., ch. 176, § 7, choose another name. * * *

Stated generally, the defense is that, having the right to make the engine, the respondents have the right to use the name, which, for this reason, can not injure the complainants; that no fraud was intended in the choice of the name, and the authority given by the vote above referred to for the use of the name by the respondents. The

use of a trade-name is in some respects different from that of a trade-mark. The latter usually relates chiefly to the thing sold, while, in addition to this, the former involves the source from which it comes, the individuality of the maker, both for protection in trade and for avoiding confusion in business affairs, as well as for securing to him the advantage of any good reputation which he may have gained. The law of trade-mark is designed chiefly for the protection of the public from imposition; that of trade-name for the protection of the party entitled to it. A case, therefore, in regard to trade-name is of somewhat broader scope than one relating to a trade-mark. It would be of little use to go over the numerous cases upon these objects, as they all agree in principle, however variant may have been its application. For this case it is enough to say that although one may make and sell an unprotected article, he can not simulate the name or product of another so as to trench upon the latter's rights or to mislead the public. * * *

Applying this principle to this case, it is demonstrative. The name adopted by the respondent is so close a resemblance to that of the Armington & Sims Engine Company that there can be little doubt that it would be misleading and confusing in business matters, and the respondent advertises itself as the successor of said company. That company is still in existence. So far as appears, it still has assets, because its accounts, bills and notes receivable were excepted from the sale of its property. As such corporation, it has the right to its name, free from simulative interference. * * *

But the respondents claim that the Armington & Sims Engine Company is not in business, and so no injury can follow. As we have said, the company is still in existence, and may be put on a footing for active business by a further contribution of capital, a thing which is often done. It has the right to its name, and, if its right be violated, it is not necessary to show actual damage, nor will the absence of fraudulent intent be a defense. Davis v. Kendall, 2 R. I. 566. This disposes of the defense on the ground of innocent intent.

The third branch of the defense, the claim of authority, can not prevail. The respondents did not acquire the right to use the name by purchase. They bought only the plant, machinery, stock and such visible property. The purchase of these does not carry the franchise or name of the corporation. * * *

The vote of the corporation is of no effect. * * * It was done after the sale of the property and the organization of a new company, and without consideration. It was therefore a purely voluntary act. * * *

Demurrer overruled.

Note. 1. The right to a corporate name is a franchise of the corporation, if lawfully acquired: 1889, Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436, 27 Am. & E. C. C. 380; 1890, American Order Scottish Clans v. Merrill, 151 Mass. 558, 8 L. R. A. 320; 1892, Illinois Watch Case Co. v. Pearson, 140 Ill. 423, 41 Am. & E. C. C. 11; 1893, Paulino *et al.* v. Portuguese B. Assn., 18 R. I. 165, 41 Am. & E. C. C. 8; but see, 1891, Hazelton Boiler Co. v. Hazelton Tripod Co., 137 Ill. 231, 28 N. E. Rep. 248, holding that rights in

a corporate name are not a *franchise* within the meaning of statutes relating to jurisdiction of courts; 1893, Hygeia Water Ice Co. v. N. Y. Hygeia Water Ice Co., 140 N. Y. 94; 1899, Aiello v. Montecalo, 21 R. I. 496, 44 Atl. Rep. 931.

2. A corporation, unincorporated association, or an individual who has acquired a prior right to a name used as a *trade-name* or *trade-mark* may enjoin its subsequent appropriation and use by another corporation, association or person when it does substantial damage to the plaintiff or misleads the public: 1869, Newby v. Oregon Cent. R. Co., Deady 609, Fed. Cas. 10144, *supra*, p. 819; 1870, Holmes, Booth & Haydens v. Holmes B. & A., 37 Conn. 278, 9 Am. Rep. 324; 1877, Singer Machine Co. v. Wilson, 3 App. Cas. 376; 1878, Merchants' Banking Co., etc., v. Mer. J. S. Co., 9 Ch. Div. 560, 47 L. J. Ch. 828; 1881, Hendricks v. Montagu, 44 L. T. 879, 50 L. J. Ch. 456, 17 Ch. Dec. 630; 1884, Goodyear Rubber Co. v. Goodyear Rubber Mfg. Co., 21 Fed. Rep. 276, reversed 128 U. S. 598; 1885, Drummond Tobacco Co. v. Rundle, 114 Ill. 412, 10 Am. & E. C. C. 9; 1887, Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. Rep. 94; 1890, Rendle v. J. Edgcumbe R. Co., 63 L. T. 94; 1890, Gato v. El. Modello Cigar Mfg. Co., 25 Fla. 886, 6 L. R. A. 823; 1890, Madame Tussaud & Sons v. Louis Tussaud, L. R. 44 Ch. Div. 678, 32 Am. & E. C. C. 11; 1892, Hazelton Boiler Co. v. Hazelton T. Co., 142 Ill. 494, 37 Am. & E. C. C. 7; 1892, Vonderbank v. Schmidt, 44 La. Ann. 264, 15 L. R. A. 462; 1892, Fish Bros. Wagon Co. v. Fish, 82 Wis. 546, 16 L. R. A. 453; 1892, Le Page Co. v. Russia Cement Co., 51 Fed. Rep. 941, 17 L. R. A. 354; 1895, Higgins v. Higgins Soap Co., 144 N. Y. 462, 27 L. R. A. 42; 1895, Grand Lodge A. O. U. W. v. Graham, 96 Iowa 592, 31 L. R. A. 133; 1895, Rogers Co. v. Rogers Mfg. Co., 17 C. C. Ap. 579, 70 Fed. Rep. 1017; 1895, Elgin Butter Co. v. Elgin Creamery Co., 155 Ill. 127; 1896, Snyder Mfg. Co. v. Snyder, 54 Ohio St. 86, 31 L. R. A. 657; 1896, Investor Pub. Co. v. Dobinson, 72 Fed. Rep. 603; 1897, Supreme Lodge K. of P. v. Imp. Or. K. of P., 113 Mich. 133, 38 L. R. A. 658; 1898, Bingham School v. Gray, 122 N. C. 699, 41 L. R. A. 243; 1898, Bristol Bank & T. Co. v. Jonesboro B. & T. Co., 101 Tenn. 545; 1898, Reed v. Wilmington S. Co., 1 Marvel (Del.) 193, 40 Atl. Rep. 955; 1898, Walter A. Baker & Co. v. Baker, 87 Fed. Rep. 209; 1899, St. Patrick's Alliance, etc., v. Byrne, 59 N. J. Eq. 26, 44 Atl. Rep. 716; 1899, Red Polled Cattle Club v. Red Polled Cattle Club, 108 Iowa 105, 78 N. W. Rep. 803; 1899, Lamb Knit Goods Co. v. Lamb G., etc., Co., 120 Mich. 159, 44 L. R. A. 841, 78 N. W. Rep. 1072. But compare, 1890, Amer. Order, etc., v. Merrill, 151 Mass. 558, 8 L. R. A. 320; 1891, Internatl. T. Co. v. Int. L. & T. Co., 153 Mass. 271, 10 L. R. A. 758.

3. A sale of the property and *good-will* of the business carries with it the right to use the *trade-name*, though the name be the name of an individual or corporation: 1892, Le Page Co. v. Russia Cement Co., 51 Fed. Rep. 941, 17 L. R. A. 354; 1892, Vonderbank v. Schmitt, 44 La. Ann. 264, 15 L. R. A. 462; 1892, Fish Bros. v. Fish, 82 Wis. 546, 16 L. R. A. 453; 1894, Pillsbury v. Pillsbury-Washburn F. M. Co., 12 C. C. App. 432, 64 Fed. Rep. 841; 1895, Higgins v. Higgins Soap Co., 144 N. Y. 462, 27 L. R. A. 42; 1896, Snyder Mfg. Co. v. Snyder, 54 Ohio St. 86, 31 L. R. A. 657; 1898, Bingham School v. Gray, 122 N. C. 699, 41 L. R. A. 243; 1898, Walter A. Baker v. Baker, 87 Fed. Rep. 209.

4. It has, however, been held that a foreign corporation can not prevent the use of a corporate name afterward selected by a domestic corporation: 1892, Hazelton Boiler Co. v. Hazelton, T. B. Co., 142 Ill. 494; 1897, People v. Assurance Co., 111 Mich. 405. But see *contra*, 1897, Re Bradley Fertilizer Co., 19 Pa. Co. Ct. 271; 1899, Red Polled Cattle Club v. Red Polled Cattle Club, 108 Iowa 105, 78 N. W. Rep. 803.

5. But no exclusive trade-name rights can be acquired in geographical names, though selected by a corporation as its name: 1889, Nebraska L. & T. Co. v. Nine, 27 Neb. 507, 27 Am. & Eng. C. C. 374; 1893, Columbia Mill Co. v. Alcorn, 150 U. S. 460; 1899, Illinois Watch Case Co. v. Elgin N. W. Co., 94 Fed. Rep. 667. But compare 1899, Waltham Watch Co. v. U. S. Watch Co., 173 Mass. 85, 53 N. E. Rep. 141.

6. The secretary of state or the proper registering officer has discretionary power to refuse to register a company that chooses a name closely resembling one already in use by another corporation; and this discretion is not to be

controlled by the courts: 1887, State v. McGrath, 92 Mo. 355, 17 Am. & Eng. C. C. 191; 1889, *In re* U. S. Mer. Rep. Co., 115 N. Y. 176; 1892, *Re* Waverly Ladies, 30 W. N. C. 257; 1892, Illinois Watch C. Co. v. Pearson, 140 Ill. 423, 41 Am. & Eng. C. C. 11; 1896, Altoona Gas Co. v. Gas Co., 17 Pa. Co. Ct. 662. But if the corporation applying has a clear prior right to the name chosen, the secretary of state may be compelled to register it. 1882, State v. McGrath, 75 Mo. 424; 1900, People v. Payn, 161 N. Y. 229, 55 N. E. Rep. 849.

Sec. 225. Effect of misnomer.

THE MEDWAY COTTON MANUFACTORY v. ADAMS.[1]

1813. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 10 Mass. Rep. *360–*364.

SEWALL, J. In this action of assumpsit the defendants are charged upon a note made by them with an averment that it was made to the plaintiffs, by the name of *Richardson, Metcalf & Co.* To this declaration there is a demurrer, and the ground taken by the defendants is, that the promise expressed in the note declared on is not recoverable by the plaintiffs. * * *

[It was argued that the variance was not obviated by the averment that the promise was in fact made to the plaintiffs in their corporate capacity, and that the demurrer was no confession of a substantially deficient averment.]

But the declaration is not liable to the objections which have been urged against it, if the case there stated is provable in any course of evidence competent for the plaintiffs to produce in a trial upon the general issue. For then the variance of name is not fatal to their demand; and if it is competent for the plaintiffs to prove the allegations of their writ, then these are confessed by the demurrer.

A variance or mistake of the name in cases of existing persons is not fatal to their contracts when there is a sufficient description of the parties whereby they may be known. A variance of the name subscribed from the name of the defendant does not prejudice, if it be found that the defendant executed the deed, although the name should be totally different.[2]

A grantee or person entitled by a conveyance takes solely by the deed, and is therefore to be named or described with more exactness than is required in naming the party entitled by an obligation or contract constituting a *chose in action*. But even in grants and conveyances it is sufficient if the name be expressed *in re and sensu*, although not *in verbis*. And in all cases a *misnomer* may be aided by a verdict or an averment.[3]

These principles are noticed and relied on in the case of the Mayor and Burgesses of Lynn Regis,[4] the case of *misnomer* of corporations reported by Lord Coke, and which was cited in the argument for the defendants. In that case the defendant, who was sued upon a bond

[1] Statement abridged, and only part of opinion given, arguments omitted.
[2] Salk. 462; Com. Dig. Fait. B. 1 E. 3; Grant. A. 2; Co. Lit. 3; 2 Rol. 42.
[3] Dyer, 279.
[4] 10 Co. Rep. 120.

given to the corporation, pleaded *non est factum*, and relied upon a variance in the bond from the true and right name of the corporation. But the plaintiffs had judgment, notwithstanding the *misnomer*.

In a more modern case[1] the *misnomer* of a corporation was considered with a view to the argument which has been urged in the case at bar, that a corporation is a creature of the law, having no essence but what is derived from its name. In an action for tolls which accrued to the plaintiffs in their corporate capacity, and as a duty to the corporation, the corporate name of the plaintiffs was mistaken; and the declaration was in a name variant from the name given them in their charter. But the decision was, that the *misnomer* was not to be taken advantage of at the trial as a ground of nonsuit; and was only pleadable in abatement, as in the case of an existing person.

It may be objected that the variances in the cases cited of *misnomer* of corporations are not so considerable or material as the variance is in the case at bar, where the name of the promisees, as it is expressed in the note, is totally different from the name of the plaintiffs in their corporate capacity. The inquiry, however, is in this case, as it was in the cases of *misnomer* which have been cited, of the description of the promisees, or parties in the note or contract declared on. Does the name in the note sufficiently indicate the plaintiffs? Were they known by it as the promisees? Now this depends, in part at least, upon any inquiry of facts which may or may not be proved, and which may be provable by evidence extraneous to the note, or, for aught that appears, the note itself may maintain the plaintiff's averment, that it was made to them by the name therein expressed.. In an action of assumpsit there is no *profert* of the writing declared on, and this is not like a demurrer for variance as in a case of oyer of a deed. In such a case, a different construction might be required if there were no averments to identify the plaintiffs in the action with the description given of them in their deed.

Upon this demurrer we have only to determine whether the declaration is in itself absurd and repugnant and incapable of proof. We think it is not, upon the authorities respecting *misnomers* of corporations, or upon the reason of the thing. The declaration is adjudged good, and the plaintiffs are to have judgment to recover their demand.[2]

Note. **Effect of misnomer.**

1. *In case of contracts*, grants and devises misnomer does not invalidate if the identity of the corporation can be established. 1809, Inhabitants of Middletown v. McCormick, 3 N. J. L. (2 Penn. *500) 92; 1816, New York African Soc. v. Varick, 13 Johns. 38; 1820, Berks & D. T. R. v. Myers, 6 Serg. & R. 12, 9 Am. Dec. 402; 1840, Milford & C. Turnp. v. Brush, 10 Ohio 111, 36 Am. Dec. 78; 1854, Kentucky Sem. v. Wallace, 15 B. Mon. (Ky.) 35; 1862, Mount Palatine Acad. v. Kleinschintz, 28 Ill. 133; 1867, Commissioners v. Louisville Orphans' Home, 3 Bush (Ky.) 365; 1871, Athearn v. Ind. Dist. of Millersburg, 33 Iowa 105; 1873, St. Luke's, etc., v. Association, 52 N. Y. 191; 1873, Walrath v. Campbell, 28 Mich. 111; 1875, Lefevre v. Lefevre, 59 N. Y. 434; 1884, Clement v. City of Lathrop, 18 Fed. Rep. 885; 1889, Chilton v. Brooks, 71 Md. 445; 1895, Woodrough & Hanchett v. Witte, 89 Wis. 537; 1899, Precious Blood Soc. v. Elsythe, 102 Tenn. 40, 50 S. W. Rep. 759.

[1] 1 Bos. & Pul., 40; 1 Chitty, 252; 3 Ans., 935.

[2] See 2 Bos. & Pul., 339, Elliot *et al.* v. Davis.

But in England it is, by statute, more serious—leading to individual liability of the corporate officer making the contract. 1858, Penrose v. Martyr, El. Bl. & El. 96 E. C. L. 499; 1889, Atkin v. Wardle, 61 L. T. 23.

2. *In process.*

(*a*) Issuing summons against a corporation by the wrong name is not a valid beginning of the suit against the corporation. 1835, Bank of Virginia v. Craig, 6 Leigh (Va.) 399; 1878, Pennsylvania Co. v. Sloan 1 Ill. App. 364; 1892, South. Pac. Co. v. Block, 84 Texas 21.

(*b*) But if process is issued against the corporation in the wrong name, the mistake can be corrected by amendment. 1809, Bullard v. Nantucket Bank, 5 Mass. 99; 1832, Burnham v. Strafford Co. Sav. Bank, 5 N. H. 573; 1857, Lane v. Seaboard & R. Co., 56 N. C. 25; 1860, Edinboro Acad. v. Robinson, 37 Pa. St. 210, 78 Am. Dec. 421; 1860, Keech v. B. & W. R. Co., 17 Md. 32; 1876, Roberts v. Nat'l Ice Co., 6 Daly (N. Y.) 426; 1885, Thompson v. Allen, 86 Mo. 85.

(*c*) So, if a corporation has process issued for it in a wrong name, it is ground for plea in abatement. 1842, Beene v. Cahawba & M. R. Co., 3 Ala. 660. See *infra*, under *pleadings*.

3. *In pleadings.*

(*a*) In actions against a corporation, transposition of words or other like, or slight, variations are not material: 1809, Bullard v. Nantucket Bank, 5 Mass. 99; 1814, Sherman v. Conn. B. Co., 11 Mass. 338; 1831, Burnham v. Stafford Sav. Bank, 5 N. H. 446; 1864, Board of Ed. v. Greenebaum, 39 Ill. 610. But see *supra*, under *process* (*a*).

(*b*) And the corporation defendant may, by appearance, waive what would otherwise be material variations: 1842, Stone v. Cong. Soc., 14 Vt. 86; 1875, Wilton Town Co. v. Humphrey, 15 Kan. 372; 1880, Mobile & M. R. Co. v. Yeates, 67 Ala. 164; 1886, Young v. South T. I. Co., 85 Tenn. 189; 1887, Bate Refrig. Co. v. Gillett, 31 Fed. Rep. 809.

(*c*) In actions by the corporation, care is required that no part of the name be omitted: 1867, Bartlett v. Brickett, 96 Mass. (14 Allen) 62; 1873, Drumheller v. First U. C., etc., 45 Ind. 275.

(*d*) But slight variations, not misleading as to the identity of the corporation plaintiff, are not material: 1832, Burnham v. Sav. Bank, 5 N. H. 573; 1838, Mechanics & T. Bank v. Prescott, 12 La. 444; 1869, Thatcher v. W. R. N. B., 19 Mich. 196; 1880, State v. Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583.

(*e*) Defendant can take advantage of mistake in name of corporation plaintiff only by plea in abatement: 1841, Gray v. Monongahela Nav. Co., 2 Watts & S. Co. (Pa.) 156, 37 Am. D. 500; 1845, Trustees of M. E. Church v. Tryon, 1 Denio (N. Y.) 451; 1851, Hanover Sav. F. Soc. v. Suter, 1 Md. 502; 1869, Northumb. Co. Bank v. Eyer, 60 Pa. St. 436.

(*f*) As to effect of judgment rendered in wrong name, see, 1855, Lafayette Ins. Co. v. French, 18 How. (59 U. S.) 404; 1878, Lehman D. & Co. v. Warner, 61 Ala. 455; 1879, Wilson v. Baker, 52 Iowa 423; 1880, Brown v. T. H. & I., etc., Co., 72 Mo. 567.

Sec. 226. Change of corporate name.

CINCINNATI COOPERAGE COMPANY v. BATE.[1]

1894. In the Court of Appeals of Kentucky. 96 Ky. Rep. 356–361, 49 Am. St. Rep. 300.

[The cooperage company sued Bate upon a draft accepted by the Gebhart & Bate Brewing Company. The facts showed that originally

[1] Statement greatly abridged, and only part of opinion given. (Cook Corp., § 243, thinks this decision is erroneous.)

the New Albany Brewing Company was organized under the Indiana laws. Afterwards Gebhart, Bate and another acquired all the stock of this company, became its directors, and without complying with the Indiana statute, changed the name to the Gebhart & Bate Brewing Company, and continued to do business in that name. The plaintiff contended that the parties thereby became liable individually or as partners and the superior court so held. On appeal to the Louisville law and equity court it was ruled otherwise, and this is the error assigned.]

HAZELRIGG, J. * * * The name of a corporation is "the very being of its constitution, the knot of its combination, without which it could not perform its corporate functions." (Smith's Mercantile Law, 3d edition, 141.)

"When a corporation is created a name must be given to it, and by that name alone must it sue and be sued and do all legal acts." (1 Blackstone's Comm. 474.)

"The law knows a corporation only by its corporate name." (Walker's American Law, 9th edition, 232.)

"A corporation has no right or power of itself to change or alter the name originally selected by it without recourse to such formal proceedings as are prescribed by law." (Beach on Private Corporations, section 275.) The effect of such change of name is an abandonment not only of the corporate name, but of the corporation itself. The identity of the creature authorized by the statute to do business is destroyed. It is in no sense like the case where an individual changes his name. The very being of its constitution is destroyed by an abandonment of its name and an attempted substitution of a new name without authority of law. In the case of Fuller v. Rowe, 57 N. Y. 26, it was said: "Parties assuming to act in a corporate capacity without a legal organization as a corporate body are liable as partners to those with whom they contract." In Robinson v. Harris, 5 Ky. Law Rep. 928, it was held that the corporate existence of associations provided for in chapter 56, General Statutes, depends upon and begins only after the terms of the law are substantially complied with, and until the notice required by section 5 has been published, the association has no right to begin business as a corporation, and because such notice had not been published, the members were held liable as individuals. We concur in the conclusions reached by the superior court in this case, that "The Gebhart & Bate Brewing Company had no right to do business as a corporation until the members had complied with the law. Until they did so, no corporation existed. The stockholders were merely doing business as partners, and as such are individually liable for the debts."

Judgment reversed and cause remanded for proceedings conformable to this opinion.

Note. **Change of name.**

(*a*) Corporation can change its name only by consent of the state: 1847, Regina v. Registrar, 10 Q. B. (Ad. & E.), 59 E. C. L. 839; 1884, Goodyear Rubber Co. v. Goodyear, 21 Fed. Rep. 276; 1890, Sykes v. People, 132 Ill. 32.

(*b*) And the name can be changed only by consent of the shareholders: 1873, Morris v. St. Paul, etc., R. Co., 19 Minn. 528; 1879, Anthony v. International Bank, 93 Ill. 225; 1883, Wells v. Oregon R. & Nav. Co., 15 Fed. Rep. 561; 1899, *In re* Societe Francaise, etc., 123 Cal. 525.

(*c*) Such a change made by the legislature is an amendment, under constitutional provisions forbidding special acts: 1876, Chicago D. & M. v. Keisel, 43 Iowa 39; 1899, *In re* La Societe Francaise, 123 Cal. 525. But see, 1843, Doe v. Norton, 11 Mees. & W. 928; 1882, Hazelett v. Butler Univ., 84 Ind. 230.

(*d*) Such change, if legal, does not affect the rights, duties or liabilities of the corporation: 1843, The President, etc., of Ft. Wayne v. Jackson, 7 Blackf. (Ind.) 36; 1852, Trinity Church v. Hall, 22 Conn. 125; 1857, Hyatt v. McMahon, 25 Barb. (N. Y.) 457; 1858, Rosenthal v. Madison, etc., R. Co., 10 Ind. 358; 1869, Olney v. Harvey, 50 Ill. 453; 1875, Dean v. La Motte Lead Co., 59 Mo. 523; 1878, Heckel v. Sanford, 40 N. J. L. 180; 1879, Macon & A. R. Co. v. Goldsmith, 62 Ga. 463; 1895, McCloskey v. Doherty, 97 Ky. 300.

(*e*) Statutes usually provide a method for changing the corporate name: *e. g.*, the laws of Michigan provide that any corporation "organized under the laws of this state may amend its articles of association by a vote of not less than two-thirds in interest of all its stockholders, but before it shall commence any business under its amended articles the said corporation shall cause such amendment or amendments, subscribed by at least two-thirds in interest of all its stockholders, and certified by its president, to be filed or recorded, as the case may be, in the same manner as is provided for in the original articles of incorporation, and when so recorded, such amendment or amendments shall become a part of the articles of incorporation of such company." Comp. L., § 8583.

When a corporation having the right to change its name has done all the statute requires, the secretary of state may be compelled by mandamus to register the change: 1897, State v. Pritchett, S. I. & Lesueur, 141 Mo. 29; 1900, People v. Payn, 161 N. Y. 229.

CHAPTER 10.

THE MODE OF CORPORATE EXISTENCE AND ACTION.

ARTICLE I. MODE OF EXISTENCE.

Sec. 227. Perpetual succession.

THE STATE, EX REL. WALKER, ATTY.-GEN'L, v. PAYNE.[1]

1895. IN THE SUPREME COURT OF MISSOURI. 129 Mo. Rep. 468–482.

[*Quo warranto* by the attorney-general against Payne and his associates, charging them with usurping the franchise of being a corporation, after the term of corporate existence was alleged to have expired. The defense was that the term had not expired.]

MACFARLANE, J. * * * The only question presented by the pleadings which we deem it necessary to discuss is whether, under the act incorporating the Kansas City Gaslight and Coke Company, its corporate rights and powers ceased at the expiration of thirty years after the act became a law. The question is one of vast importance both to the corporation and the citizens of Kansas City. The corporation has expended and now has invested a large amount of money in plants, mains and other property, which will necessarily be much depreciated in value should the property go into the hands of the stockholder or trustees for the settlement of the corporate business. The citizens, and city itself, have also great interest in securing adequate light at reasonable rates. These considerations, however, can not affect the legal principles involved.

At the time the act in question was passed the general law of the state concerning corporations declared: "Every corporation, as such, has power to have succession by its corporate name for the period

[1] Statement, arguments and part of opinion omitted. Sufficient facts are stated in the opinion for an understanding of the case.

limited in its charter, and when no period is limited, for twenty years." The first section of the act incorporating the said gaslight and coke company granted to it "perpetual succession." The second section grants to the corporation the "exclusive right and power of manufacturing gas and coke from any substance whatever for and within the city of Kansas, Jackson county," for the term of thirty years.

It is insisted by respondents that the grant of "perpetual succession," without other limiting words, gave to the corporation the right to perpetual existence, and that the limitation of thirty years, contained in section 2, was not intended to limit the duration of corporate existence, but of the exclusive rights specified. * * *

The word perpetual, as used in the act, expressly qualifies the succession and not the duration of the corporate existence. In the connection used, does it imply that the legislature intended to grant the corporation unlimited existence? The word itself does not necessarily so imply. It has more than one meaning, as "everlasting," "continued," "uninterrupted." All lexicographers give these or equivalent words as proper definitions of the word "perpetual."

The word "succession," in its common legal use, denotes the devolution of title to property under the laws of descent and distribution. It is defined as "the coming in of another to take the property of one who dies without disposing of it by will." Title to corporate property and franchises is held continuously and uninterruptedly by and in the name of the corporation, and not in the names of the various stockholders. There is no devolution of title in case of the death of a member or stockholder. The succession is not interrupted, but continues in the corporation. The succession is continuous during the life of the corporation, whether it be for years or for an unlimited time.

Blackstone says that the very end of a corporation is "to have perpetual succession," "for there can not be a succession forever without an incorporation." 1 Cooley's Blk. Com., 475. Chancellor Kent says: "A corporation is a franchise possessed by one or more individuals, who subsist as a body politic under a special denomination, * * * with the capacity of perpetual succession and of acting in several respects, however numerous the association may be as a single individual." 2 Kent's Com., 268.

The duration of a corporation, though unlimited by its charter, and though it is given the capacity to have perpetual succession, can not be regarded as everlasting within the general and common meaning of that word. It may be dissolved and cease to exist for want of members, by voluntary surrender of franchises, forfeiture by misuser, etc. Ang. & Ames Corp. [11 ed.], § 8.

It will be found, by reference to all the authorities, that a grant of capacity to take in "perpetual succession" refers rather to the continued legal identity and succession than to continuous or perpetual succession. 1 Blk. Com., *supra;* 2 Kent's Com., *supra;* 1 Dill. Munc. Corp., § 18; Dartmouth College Case, 4 Wheat. 636; Field Corp., §§ 1 and 71.

"The immortality of a corporation means only its capacity to take in perpetual succession as long as the corporation exists. So far is it from being literally true that a corporation is immortal, many corporations of recent creation are limited in their duration to a certain number of years." Ang. & Ames Corp., § 8.

Aggregate corporations are "immortal, because, in the judgment of law, they never die, yet in point of fact, like natural persons, they are subject to death and dissolution in various ways. * * * Its immortality, therefore, means only its capacity to take and to act in perpectual succession so long as the corporation exists." Potter Corp., § 2.

"When it is said that corporations have perpetual succession, it is meant that they have continuity only during any limited period of time which may be fixed by the law of their creation. * * * In the proper and more restricted sense the immortality of a corporation means only its capacity to take in perpetual succession so long as it exists. Spelling Priv. Corp., § 4.

Chancellor Kent says: "It is sometimes said that a corporation is an immortal as well as an invisible and intangible being. But the immortality of a corporation means only its capacity to take in perpetual succession so long as the corporation exists." 2 Kent, *supra*.

Thus, it appears that the words "perpetual succession" as used in charters generally mean nothing more than that the corporation should have continuous and uninterrupted succession so long as it should continue to exist as a corporation, and are not intended to define its duration. If no limit is fixed to its existence then it would have an indefinite or unlimited duration. Morawetz on Corp., § 411.

The general law in force at the time this special act was passed declared that every corporation should have the capacity of succession by its corporate name for the period limited in its charter, and when no period was limited, for twenty years. R. S. 1855, § 1, p. 369.

It is claimed by respondents that this provision of the general law is inconsistent with this special act of incorporation and was expressly repealed by the ninth section. But if, as we have seen to be the case, the words "perpetual succession" were intended to imply nothing more than a continuous succession during the existence of the corporation, then there is no inconsistency. The general law must be read into and made a part of the special act. The general law must be taken as declaring the intent of the legislature in respect to the duration of the corporation. As is said: "Statutes granting such special privileges are, in one sense, to be read together and construed in conformity with general statutes laying down universal rules applicable to the class of corporations to which the one claiming under the special act belongs." Endlich Interpretation of Statutes, § 56.

Reading the general law and the first section of the special act together the duration of the corporate existence of the gaslight company is clearly fixed at twenty years. It does not seem that a doubt of the

legislative intent can be raised, but if one should exist it must be resolved against the corporation. * * *

Judgment of ouster.

Note. The foregoing case is contrary to 1881, State *ex rel.* etc., v. Stormont, 24 Kan. 686, which is distinguished, and also to 1880, Fairchild v. Masonic Hall Assn., 71 Mo. 526, which it overrules. It also seems to conflict with 1889, State v. Ladies of the Sacred Heart, 99 Mo. 533, which is not mentioned in the case. The later case of 1897, State, etc., v. Lesueur, 141 Mo. 29, where the language used was "the trusteeship shall be perpetual," with a provision for each trustee to appoint his successor, holds that "a continuous or perpetual term" of existence is clearly implied. The case of 1878, Scanlan v. Crawshaw, 5 Mo. App. 337, is in accord with the principal case.

In case the duration is not expressly limited in some way the corporation is supposed to have the right of an endless existence, if it is not guilty of misuser or non-user, so that the state can complain of a forfeiture: 1841, Vanderbilt v. Eagle I. W., 25 Wend. (N. Y.) 665; 1850, Farmers' L. & T. Co. v. Clowes, 3 N. Y. 470; 1879, East Tenn. Mfg. Co. v. Gaskell, 70 Tenn. (2 Lea) 742; 1889, State v. Ladies of the Sacred Heart, 99 Mo. 533; 1892, Cronin v. Potters' Co-op. Co., 29 W. L. B. (Ohio) 52; 1897, State v. Lesueur, 141 Mo. 29.

Charter, statutory or constitutional provisions usually fix the period of existence. Many of these fix the limit in such a way that the articles of association can not provide for a longer duration: 1876, Atlantic & G. R. Co. v. Allen, 15 Fla. 637; 1884, People v. Cheeseman, 7 Colo. 376; 1890, Marysville Inv. Co. v. Munson, 44 Kan. 491.

Some statutes, however, fix a limit only in case the articles of association do not name a limit. See the Missouri cases cited above, and 1887, Steadman v. Merchants' & P. Bank, 69 Tex. 50.

ARTICLE II. MODE OF ACTION; SHAREHOLDERS AND DIRECTORS.

Sec. 228. Shareholders' meeting.[1]

DUKE v. MARKHAM.[2]

1890. IN THE SUPREME COURT OF NORTH CAROLINA. 105 N. C. Rep. 131–138, 18 Am. St. Rep. 889.

[Action by Duke to recover from Markham certain property he had taken possession of as the property of a corporation by virtue of executions in his hands. Plaintiff claimed under a mortgage by the corporation which the trial judge instructed the jury was valid. The error assigned was this instruction and allowing the mortgage to be put in evidence. The secretary of the corporation testified as to the execution of the mortgage as follows: "Before this mortgage was executed he went around and saw the stockholders separately in

[1] See Ang. & Ames, §§ 487–514; Beach, §§ 272–298; Boone, §§ 62–6; Clark, pp. 462–493; Cook, § 589, *et seq.*; Elliott, §§ 463–493; Morawetz, §§ 474–533, 641–7; Taylor, §§ 184, 573–6; I Thompson, §§ 686–697; II Thompson, §§ 1900–1910; III Thompson, §§ 3905–37; V Thompson, §§ 6176–6486; VII Thompson, §§ 8451–90.

[2] Statement abridged, only part of opinion given.

regard to executing it; he did not see all the stockholders or directors, he saw a majority of them; they had no meeting, but each one he saw authorized him to execute the mortgage; the plaintiff requested the president and two stockholders to sign the mortgage; this was done; Mr. Duke signed the note for $3,000, and witness got the money from the Raleigh National Bank; the money was used in the business of the corporation; he said nothing more to the stockholders or directors; the directors were stockholders; the note has never been paid; it sometimes happened that we could not get a meeting of the board of directors; they did not attend the meetings regularly; the mortgage was delivered to W. Duke immediately."]

CLARK, J. * * * We think his honor erred in admitting the mortgage in evidence upon such probate, and likewise in instructing the jury, upon the proof offered by plaintiff, that it was valid as to creditors whom defendant represented by virtue of the executions in his hands.

In Pierce v. New Orleans Building Co., 9 La. 397, it is held that the act of a majority of the stockholders, expressed elsewhere than at a meeting of stockholders, as where the assent of each one is given separately and at different times, is not binding on the corporation. The same is true of a meeting of which notice is not given. Stow v. Wyse, 18 Am. Dec. 99[1] and notes; Cook Stockholders, § 594; 1 Potter on Corporations, § 336 and notes.

In Leggett v. N. J. M. & B. Co., 1 Saxton Ch. 541, it is held that a corporation is only bound by an agent's acts when within the scope of his authority, and that a president and cashier, as such, can not execute a mortgage of corporate property without special authority from the board of directors or the stockholders, and that the proceeds of a mortgage have been applied to the use of the corporation in paying its debts, or otherwise, is not sufficient to render the mortgage binding if its execution was not properly authorized.

"The members of a corporation can not, separately and individually, give their consent in such manner as to bind it as a collective body, for in such case it is not the *body* that acts, and this is no less the doctrine of the common than of the Roman civil law. Being *lawfully assembled*," says Ayliffe, "they represent but one person, and may consequently make contracts, and by their collective assent, oblige themselves thereunto. And though all the members of a corporation covenanted on behalf of it under their private seals," this, it was held, would only bind them *personally*, and not the corporation. Angell & Ames Corp., §232, which is supported by the numerous cases there cited. Again, in the same work, section 504: "The separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with corporate powers." Indeed, the authorities upon this subject are numerous, uncontradicted and supported by reason. * * *

Error.

[1] *Infra* p. 835.

Note. To same effect see, 1820, Livingston v. Lynch, 4 Johns. Ch. (N.Y.) 573, 597; 1836, Pierce v. N. O. Building Co., etc., 9 La. 397, 29 Am. Dec. 448; 1841, Shortz v. Unangst, 3 Watts & S. (Pa.) 45; 1847, Smith v. Hurd, 12 Metc. (Mass.) 371, on 385; 1850, Commonwealth v. Cullen, 13 Pa. St. 133, *supra*, p. 417; 1851, Langolf v. Seiberlitch, 2 Pars. Eq. Cas. 64; 1854, *Ex parte* Johnson, 31 E. L. & Eq. 430; 1861, Torrey v. Baker, 83 Mass. 120; 1874, Hopkins v. Roseclare Lead Co., 72 Ill. 373; 1876, Finley Shoe, etc., Co. v. Kurtz, 34 Mich. 89; 1877, Clarke v. Omaha & S. R. Co., 5 Neb. 314; 1886, England v. Dearborn, 141 Mass. 590; 1890, Humphreys v. McKissock, 140 U. S. 304, 312; 1890, Allemong v. Simmons, 124 Ind. 199; 1898, Sellers v. Greer, 172 Ill. 549, *supra*, p. 65; 1898, Troy Min. Co. v. White, 10 S. Dak. 475; 1898, Singer v. Salt Lake, etc., Co., 17 Utah 143; 1898, Morrison v. Wilder Gas. Co., 91 Maine 492; 1899, Nicholstone City Co. v. Smalley, 21 Tex. Civ. App. 210, 51 S. W. Rep. 527; 1899, De La Vergne Co. v. Ger. Sav. Inst., 175 U. S. 40, on 53.

But compare 1870, Granger v. Grubb, 7 Phil. 350; 1886, Graham v. B., etc., R., 118 U. S. 161; 1892, Coe v. East., etc., R., 52 Fed. Rep. 531; 1895, *In re* George N. & Co., L. R. 1 Ch. 674.

Sec. 229. Shareholders' meetings—Notice.

STOWE ET AL. v. WYSE.[1]

1828. IN THE SUPREME COURT OF ERRORS OF CONNECTICUT. 7 Conn. Rep. 214–220, 18 Am. Dec. 99.

This was an action of trespass *quare clausum fregit*, tried on the general issue at Middletown, February term, 1828, before Daggett, J.

It was admitted that the defendant entered on the premises in May, 1825, the time specified in the declaration, and continued in the possession and occupation thereof until the commencement of this suit, claiming right as the tenant of the Middletown Bank, and the only question was whether the plaintiffs had title to the land or whether it was in the Middletown Bank. The title of the bank was derived from a mortgage deed of the Middletown Manufacturing Company, dated the 29th of March, 1817, to the bank. The title of the plaintiffs was derived from a mortgage deed, executed by Arthur W. Magill, some years afterwards. Magill's title was acquired by the regular levy of an execution in his favor against the Middletown Manufacturing Company subsequent to the execution of the deed to the bank. The Middletown Manufacturing Company were the undisputed owners of the land prior to and until their deed of the 29th of March, 1817, above mentioned. That deed was given to the Middletown Bank by Arthur W. Magill as agent for the Middletown Manufacturing Company. It begins thus: "I, Arthur W. Magill, of the town of Middletown, agent for the Middletown Manufacturing Company of said town, being empowered, by a vote of said company, in pursuance of said power," etc. [It contained the usual covenants of seizin and warranty by Magill on behalf of the company. The resolution directing the conveyance was passed at a meeting at which the holders of only 29 out of 1,000 shares were represented, and of which the others had no notice. Verdict for plaintiff. Motion for new trial.]

[1] Statement abridged, and only part of opinion given.

DAGGETT, J. The plaintiffs, who claim under A. W. Magill's deed to them, allege that no title passed by the deed to the Middletown Bank; for that Magill had no authority to bind the Middletown Manufacturing Company and transfer the title. The deed is attempted to be supported, or rather Magill's power is to make it, on two grounds. The first is the vote of the Middletown Manufacturing Company, passed on the 29th day of March, 1817, the day of the execution of the deed, by which he was authorized to make a mortgage to the bank of the premises. On the other hand, it is insisted that the meeting was illegal, and the acts done void. It is very clear that a meeting of the stockholders, constituted as this was, could do no acts binding on the company. Though a meeting, regularly warned, would be competent to do any act within their chartered powers by a bare majority, yet if not thus warned their act must be void. If no particular mode of notifying the stockholders be provided, either in the charter or in any by-law, yet personal notice might be given; and this, in such case, would be indispensable. The counsel for the defendant do not press this point, and I think it quite untenable. * * *

Another position, however, is taken by counsel for defendant which is fatal to the plaintiff's title. * * *

Now Magill has declared under his hand and seal that he was empowered by a vote of the company to execute this deed. Can he ever say that he was not thus empowered? If, on the next day after the deed to the bank was executed, he had procured a valid deed from the company, and had brought ejectment against the bank, could he have sustained it against the declarations in his deed? I think he must have been estopped. If so, then all persons claiming under and through him are estopped. 1 Stark. Ev., 305; Hoyt v. Dimon, 5 Day 483; 1 Phill. Ev., 10.

These principles are in entire accordance with the case of Fairtitle d. Mytton *et al.* v. Gilbert *et al.*, 2 Term Rep. 169, 171; Palmer v. Elkins, 2 Stra. 817; Com. Dig., tit. Estoppel, A, 1, 2, 3 and B.

There must, therefore, be a new trial.

Note. See note at end of next case.

Sec. 230. Same.

STEVENS v. EDEN MEETING-HOUSE SOCIETY.

1839. IN THE SUPREME COURT OF VERMONT. 12 Vt. Rep. 688-9.

This was an action of assumpsit on an award. Plea, non-assumpsit.

On the trial the plaintiff produced the defendants' book of records, which showed a society regularly organized under the statute constituting them a corporation. The by-laws provided that, among other officers, a clerk or secretary should be chosen, and one had been regularly elected. The by-laws provided that all meetings were to

be warned by the clerk, by posting up a written notice thereof. This appears to have been done and the records regularly kept up to December, 1836. The plaintiff then offered to prove, by parol testimony, that said society continued its meetings, that the persons who joined him in the submission were, at that time, and at the publishing of the award, the prudential committee of said society, and that after the award was made and published, said society voted to approve and confirm the same. This was objected to by the defendants and was rejected by the court, to which the plaintiff excepted. Verdict and judgment having passed for the defendants, the cause passed to the supreme court.

The opinion of the court was delivered by

COLLAMER, J. A corporation, and every member thereof, is bound by a vote of the majority present at a meeting warned agreeably to the laws of the corporation, and not otherwise. If no provision is made for such warning every member must have personal notice. Here the clerk was authorized to warn a meeting by posting up a written notice. No other mode of calling a meeting could be shown, and most clearly this could not be proved by parol until the loss of the notification was first proved, but this was not attempted. Here was an attempt to add to the records by parol, whole warnings, meetings and votes. This is clearly inadmissible, and the fact that no record of meetings after 1836 appeared on the books does not authorize this. The want of such record only shows that no such meeting was held. If it be asked, what is to be done by third persons, if a corporation will not record its appointments and votes, the answer is, refuse to recognize or act on any such assumed authority or unrecorded votes, or hold them personally liable who misrepresent their authority.

Judgment affirmed.

Note. **Notice of corporate meetings.**

1. Notice of corporate meetings is necessary to their validity and the validity of the business done at a meeting as against a stockholder who had no notice, was not present, and who objects promptly: 1844, Wiggin v. First Freewill B. Ch., 8 Metc. (49 Mass.) 301; 1850, Commw. v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450, *supra*, p. 417; 1852, Stebbins v. Merritt, 10 Cush. (Mass.) 27; 1871, Westcott v. Minnesota M. Co., 23 Mich. 145; 1876, Shelby R. Co. v. L. C. & L. R. Co., 12 Bush (75 Ky.) 62; 1892, Coe v. East & W. R. Co., 52 Fed. Rep. 531; 1893, Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 21 L. R. A. 174, *infra*, p. 839; 1898, Wall v. London & N. A. Corp., 79 L. T. (N. S.) 249, 67 L. J. Ch. 596; 1899, Heller v. National M. Bank, 89 Md. 602, 45 L. R. A. 438.

2. In the absence of charter, by-law or statutory provision, personal notice is required: 1830, Savings Bank v. Davis, 8 Conn. 191; 1834, Bethany v. Sperry, 10 Conn. 200; 1841, Evans v. Osgood, 18 Maine 213; 1844, Wiggin v. Freewill B. C., 8 Metc. (Mass.) 301; 1860, People v. Batchelor, 22 N. Y. 128; 1860, People's Ins. Co. v. Westcott, 14 Gray (Mass.) 440; 1870, Harding v. Vandewater, 40 Cal. 77.

3. But statutory, charter or by-law provisions should be followed: 1871, Westcott v. Minn. M. Co., 23 Mich. 145; 1876, Stockholders, etc., v. Louisville, etc., R. Co., 12 Bush (Ky.) 62; 1877, Tuttle v. Mich. Air Line, 35 Mich. 247; 1884, Reilly v. Oglebay, 25 W. Va. 36; 1897, Matthews v. Columbia Nat'l Bank, 79 Fed. Rep. 558.

4. However, it is frequently held that statutory, charter and by-law provisions relating to quorum, notice and business to be done are wholly for the benefit of the shareholders only, and if they do not complain of the irregularity others can not: 1881, Beecher v. Marquette & P. R. M. Co., 45 Mich. 103; 1882, Thomas v. Citizens', etc., R. Co., 104 Ill. 462; 1889, Manhattan Hardware Co. v. Phalen, 128 Pa. St. 110; 1890, Wood v. Corry Water-Works Co., 44 Fed. Rep. 146; 1892, Nelson v. Hubbard, 96 Ala. 238, 17 L. R. A. 375; 1896, Atlantic Trust Co. v. The Vigilancia, 73 Fed. Rep. 452; 1898, *In re* A. A. Griffing Iron Co., 63 N. J. L. 168, 41 Atl. Rep. 931. But compare, 1885, State v. McGrath, 86 Mo. 239.

5. If the time of holding meetings is fixed definitely by statute, charter, by-law or custom, no further notice is necessary, unless extraordinary or special business is to be done: 1839, Warner v. Mower, 11 Vt. 385, 393; 1858, Atlantic M. F. Ins. Co. v. Sanders, 36 N. H. 252, 269; 1878, State v. Bonnell, 35 O. S. 10, 15; 1893, Morrill v. Little Falls Mfg. Co., 53 Minn. 371, *infra*, p. 839; 1899, Heller v. National Marine Bank, 89 Md. 603, 45 L. R. A. 438.

6. Notice should be definite and specific: (*a*) *As to time*—day and hour: 1858, Atlantic M. F. Ins. Co. v. Sanders, 36 N. H. 252; 1860, People v. Batchelor, 22 N. Y. 128; 1875, San Buenaventura, etc., Co. v. Vassault, 50 Cal. 534; 1876, Shelby R. Co. v. L., C. & L. R. Co., 12 Bush (Ky.) 62.

(*b*) *As to place:* 1848, Miller v. English, 21 N. J. L. 317; 1856, Jones v. Milton & R. T. R. Co., 7 Ind. 547; 1875, San Buenaventura, etc., Co. v. Vassault, 50 Cal. 534.

(*c*) *As to business to be done*, unless the meeting is a stated one at which it is understood any corporate business may be done: 1841, Evans v. Osgood, 18 Maine (6 Shep.) 213; 1853, Sampson v. Bowdoinham, etc., Co., 36 Maine 78; 1860, People Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440; 1866, *Re* Bridport Old Brewery Co., L. R. 2 Ch. Div. 191; 1877, Tuttle v. Michigan Air Line, 35 Mich. 247; 1881, Beecher v. Marquette & P. R. M. Co., 45 Mich. 106; 1885, American Tube Works v. Boston Mach. Co., 139 Mass. 5; 1890, Stutz v. Handley, 41 Fed. Rep. 531; 1892, Evans v. Boston Heating Co., 157 Mass. 37.

7. But if the meeting is one prescribed by the charter, by-law or statute, at which it is usual to transact the general corporate business, the notice need not specify the business to be done: 1839, Warner v. Mower, 11 Vt. 385; 1853, Samson v. Bowdoinham, etc., Co., 36 Maine 78; 1858, Atlantic De Laine Co. v. Mason, 5 R. I. 463; 1891, Chicago, etc., R. v. Union Pac. R., 47 Fed. Rep. 15; 1892, Jones v. Concord & M. R., 67 N. H. 234, 38 Atl. Rep. 120; 1893, Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 21 L. R. A. 174, *infra*, p. 839.

8. But if unusual or extraordinary business is to be done at a general meeting, statutes frequently require the notice to specify that such business is to be done: 1892, Jones v. Concord & M. R. Co., 67 N. H. 234; 1898, Mutual Fire Ins. Co. v. Farquhar, 86 Md. 668.

9. If the meeting is called to do specific business designated in the notice, no other business can be transacted at such meeting against the protest of members, or bind those absent: 1839, Warner v. Mower, 11 Vt. 385; 1841, Evans v. Osgood, 18 Maine (6 Shep.) 213; 1860, Peoples' Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440; 1898, Wall v. London & N. A. Corp., 79 L. T. (N. S.) 249, 67 L. J. Ch. 596. But see, 1892, Evans v. Heating Co., 157 Mass. 37.

10. However, if all the members are present and consent, other or different business may be transacted. 1809, Rex v. Theodorick, 8 East 543; 1852, Stebbins v. Merritt, 10 Cush. (Mass.) 27; 1891, Handley v. Stutz, 139 U. S. 417; 1892, Nelson v. Hubbard, 96 Ala. 238; 1892, Campbell v. Argenta, etc., Co., 51 Fed. Rep. 1; 1895, Bridgeport Electric Co. v. Meader, 72 Fed. Rep. 115; 1898, *In re* A. A. Griffing Iron Co., 63 N. J. L. 168, 41 Atl. Rep. 931.

11. No further notice is necessary of an adjourned meeting, or the business to be done thereat, than the record of the resolution adjourning a duly called meeting to a definite time and place. 1897, Western Imp. Co. v. Des Moines M. N. Bank, 103 Iowa 455, 72 N. W. Rep. 657; 1897, State v. Cronan, 23 Nev. 437, 49 Pac. Rep. 41. But if the time to which the meeting is adjourned is not

definitely fixed further notice must be given. 1888, Thompson v. Williams, 76 Cal. 153.

12. Notice must be given by the officer having authority, such as the board of directors or the general manager, but not the president or secretary without special authority. 1834, Betheny v. Sperry, 10 Conn. 200; 1841, Evans v. Osgood, 18 Maine 213; 1852, Stebbins v. Merritt, 10 Cush. (Mass.) 27; 1872, Johnston v. Jones, 23 N. J. Eq. 216; 1875, State v. Pettineli, 10 Nev. 141; 1882, Toronto, etc., Co. v. Blake, 2 Ont. 175; 1888, Cassell v. Lexington, etc., Co., 10 Ky. L. Rep. 486, 9 S. W. Rep. 502, 701; 1896, Dusenbury v. Looker, 110 Mich. 58, 67 N. W. Rep. 986.

13. Notice, to be valid, must be served a reasonable time before the meeting called by it. 1837, *Re* Long Island R., 19 Wend. 37; 1878, Covert v. Rogers, 38 Mich. 363; 1888, Cassell v. Lexington, etc., Co., 10 Ky. L. Rep. 486, 9 S. W. Rep. 502; 1893, Brown v. Republican, etc., Mines, 55 Fed. Rep. 7.

Sec. 231. Quorum.

MORRILL v. LITTLE FALLS MANUFACTURING CO.[1]

1893. In the Supreme Court of Minnesota. 53 Minn. Rep. 371–380, 55 N. W. Rep. 547.

[Action to determine title to land, claimed to belong to the plaintiff, but in which the company claimed some interest. The corporation had originally owned the lands, but in 1864 it had become hopelessly insolvent, abandoned its business, and its organization became practically defunct. No effort to revive it was made by any of the shareholders until 1881, a period of seventeen years. In the meantime plaintiff had attempted to acquire title to its lands through tax titles. In 1881, at plaintiff's suggestion, one Thayer, a shareholder, for himself and as proxy for certain other shareholders, went to the place, and at the time fixed by the by-laws for holding the annual meeting of the company, and being the only person present, cast the votes of himself and those for whom he held proxies for a board of directors, to each of whom he transferred one share of stock. The same thing was done by another shareholder at the proper time and place in 1882. During these years Thayer was elected and acted as president of the company, and in 1882 he and the secretary under proper directions conveyed the land in question to persons from whom the plaintiff traces title. The decision below was for the plaintiff, and the defendant company appealed.]

Mitchell, J. * * * As affecting the validity of the deeds executed in 1882, in behalf of the corporation, by Thayer as president, the appellants assail the finding of the court as to the election of directors in August, 1881. The grounds of objection are: *First*, that no notice was given of the meeting, and, *second*, that it required a majority of the shares of stock to constitute a quorum to hold a meeting, or, in any event, that one person could not hold a meeting, that at least two persons are necessary to constitute a corporate meeting.

[1] Statement abridged. Only part of opinion given.

As to the first point all that is necessary to say is that the by-laws fixed the time and place of holding the meeting, and neither the charter nor the by-laws required any notice to be given. Under such circumstances, the rule is that the by-laws themselves are sufficient notice to all the stockholders, and no further notice is necessary. 1 Mor. Priv. Corp., § 479.

The second objection is equally untenable. Where the charter and by-laws of a corporation are silent on the subject, the common-law rule is that such of the shareholders as actually assemble at a properly convened meeting, although a minority of the whole number and representing only a minority of the stock, constitute a quorum for the transaction of business, and may express the corporate will, and the body will be bound by their acts. Cook Stock & S., §§ 607, 623; 2 Kent Comm., 293; Mor. Priv. Corp., § 476; Craig v. First Presbyterian Church, 88 Pa. St. 42; Rex v. Varlo, Cowp. 248; Columbia Bottom Levee Co. v. Meier, 39 Mo. 53; *Ex parte* Willcocks, 7 Cow. 402; Field v. Field, 9 Wend. 395.

The contention of the appellants that this rule applies only to such organizations as towns, churches and the like, and not to stock corporations, finds no support either in reason or authority. The correct distinction is between a corporate act to be done by a select body of a definite number, as, for example, a board of directors or trustees, and one to be performed by the constituent members of the corporation. In the latter case a majority of those who appear may act. This distinction is clearly made in several of the cases above cited, and also in the leading case of Rex v. Bellringer, 4 Term R. 810. As was said by Lord Mansfield in Rex v. Varlo, *supra*: "It is in the nature of all corporations to do corporate acts; and, when the power of doing them is not specially delegated to a particular number, the general mode is for the members to meet on the charter days, and the major part who are present to do the act. But when there is a select body it is a different thing, for then it is a special appointment." And, this being so, it is immaterial whether the number present is only one or more than one. It was held in Sharpe v. Dawes, 46 Law J. Q. B. 104, followed reluctantly in another case, that one person can not constitute a quorum; that at least two persons are necessary to hold a corporate meeting; but this decision is based upon a narrow lexicographical definition of the word "meeting," as the coming together of two or more persons—a reason that does not commend itself to our judgment.

Therefore, in our opinion, the court was justified in holding that the election of directors in 1881 was regular; and it follows that the deeds executed in 1882 by Thayer, the president elected by them, were the deeds of the corporation. * * *

Reversed upon another point.

Note. **Quorum.**

1. If all of an indefinite number of shareholders are duly notified to meet, those who assemble constitute a quorum, unless there are statutory, charter, or by-law provisions otherwise: 1775, Rex v. Varlo, Cowp. 248; 1827, *Ex parte*

Willcocks, 7 Cow. (N. Y.) 402, 17 Am. D. 525; 1832, Field v. Field, 9 Wend. 394; 1856, People v. Walker, 2 Abb. Pr. 425, 23 Barb. (N. Y.) 304; 1866, Columbia Bottom L. Co. v. Meier, 39 Mo. 53; 1866, Madison Ave. B. Ch. v. Baptist Ch., etc., 5 Robt. (N. Y.) 649; 1867, Brown v. Pacific Mail S. S. Co., 5 Blatch. 525; 1878, Craig v. First Pres. Ch., 88 Pa. St. 42, 32 Am. Rep. 417; 1885, State v. Chute, 34 Minn. 135. See note in 7 Eng. Rul. Cases, pp. 350–3.

2. A majority of a body composed of a definite number of members must be present to constitute a quorum: 1693, Hascard v. Somany, Freem. K. B. 504; 7 Eng. Rul. Cas. 333; 1792, Rex v. Bellringer, 4 T. R. 810; 1823, Rex v. Devonshire, 1 Barn. & C. 609 (8 Eng. C. L.)

3. Statute, charter or by-laws frequently require a certain number of members, or a certain number of shares, to be represented to constitute a quorum; if so, this number must continue to be present during the meeting: 1827, *Ex parte* Rogers, 7 Cow. (N. Y.) 526, 530, note; 1898, Rutherford B. S. & C. Elec. Co. v. Franklin, 57 N. J. Eq. 42, 41 Atl. Rep. 488, s. c. 43 Atl. Rep. 1098.

4. The shares *outstanding*, and not the authorized but unissued or unsubscribed shares, are the ones counted where the quorum is to consist of a "majority of shares": 1846, Green v. Seymour, 3 Sandf. Ch. 285; 1897, *In re* Election of Directors, etc., 19 Miscl. (N. Y.) 409; 1898, Castner v. Twitchell-Champlin Co., 91 Maine 524, 40 Atl. Rep. 558. But see, 1887, Ellsworth Woolen Mfg. Co. v. Faunce, 79 Maine 440.

5. In the absence of evidence to the contrary, a quorum will be presumed to have been present at a corporate meeting: 1817, Commw. v. Woelper, 3 Serg. & R. 29, 8 Am. Dec. 628; 1847, Sargent v. Webster, 13 Metc. (Mass.) 497; 1864, Citizens' M. F. Ins. Co. v. Sortwell, 8 Allen (Mass.) 217.

6. The English courts hold contrary to the case above upon the right of one man with proxies to hold a meeting: 1876, Sharpe v. Dawes, 47 L. J. Q. B. 104. Compare also, 1874, Hopkins v. Roseclare L. Co., 72 Ill. 373; 1886, England v. Dearborn, 141 Mass. 590.

Sec. 232. Place of meeting.

MILLER v. EWER.[1]

1847. In the Supreme Judicial Court of Maine. 27 Maine Rep. 509–525, 46 Am. Dec. 619.

[Writ of entry to recover land. Demandants derive title from the Bluehill Granite Company, through a mortgage purporting to be executed by the president and secretary of that company. To prove authority of these officers, the charter granted by the state of Maine, and the corporate records were introduced in evidence. The records showed "that a meeting of the corporators was called for the organization of the corporation under the charter in the city of New York, and that the charter was there accepted and directors, president and secretary chosen. The directors by meeting held in New York City organized and authorized the president and secretary to execute the mortgage. There was no proof of any meeting for the organization of the company or any election of officers being held in Maine or that it had ever transacted business there, except by a person acting as its agent there.]

Shepley, J. * * * The demandants must recover upon the strength of their own title, not because the tenant does not exhibit a

[1] Statement abridged. Arguments and part of opinion omitted.

legal title; and their right to recover will depend upon a decision of the question whether the corporation has authorized any board of directors or other persons to make that conveyance of its estate.

There is a variety of corporations. It will only be necessary, on this occasion, to speak of one class of them, corporations aggregate, composed of natural persons. It is often stated in books that such a corporation is created by its charter. This is not precisely correct. The charter only confers the power of life, or the right to come into existence, and provides the instruments by which it may become an artificial being, or acting entity. Such a corporation has been well defined to be an artificial being, invisible, intangible and existing only in contemplation of law. The instruments provided to bring the artificial being into life and active operation are the persons named in charter, and those who, by virtue of its provisions, may become associated with them. Those persons or corporators, as natural persons, have no such power. The charter confers upon them a new faculty for this purpose; a faculty which they can have only by virtue of the law which confers it. That law is inoperative beyond the bounds of the legislative power by which it is enacted. As the corporate faculty can not accompany the natural persons beyond the bounds of the sovereignty, which confers it, they can not possess or exercise it there. Can have no more power there to make the artificial being act, than other persons not named or associated as corporators. Any attempt to exercise such a faculty there is merely an usurpation of authority by persons destitute of it, and acting without any legal capacity to act in that manner. *It follows that all votes and proceedings of persons professing to act in the capacity of corporators, when assembled without the bounds of the sovereignty granting the charter, are wholly void.*

This is a familiar principle when applied in analogous cases to persons upon whom the law has conferred some power or faculty which, as natural persons, they do not possess.

The power conferred by law upon executors and administrators can not accompany their persons beyond the bounds of the sovereignty which has conferred it. Story has collected numerous cases in note under section 512, in his treatise upon the Conflict of Laws, proving the doctrine to be established both in England and in this country.

The same doctrine prevails respecting the powers of guardians. Williams v. Storrs, 6 Johns. Chan. 357.

The same doctrine generally prevails in this country, while it does not in England, respecting the powers of assignees under bankrupt and insolvent laws. The doctrine is stated and discussed and the cases are collected by Story in his treatise on the Conflict of Laws, ch. 9, §§ 405 to 417.

If the artificial being called the Bluehill Granite Company may be considered as having existence and active life in this state, by proof of its acts within her limits, it will be still true that it can not have existence without her limits, and of course can not make choice of

any officers or agents there. It may maintain a suit without those limits, but that does not imply its existence or presence there. It may also contract without those limits. Being within them it may, acting *per se*, by vote transmitted elsewhere, propose a contract or accept one previously offered. And it may, by an agent or agents duly constituted, act and contract beyond those limits. But it can neither exist nor act *per se* without them, except by the assistance of its officers or agents duly elected or appointed within them.

The constitution and powers of such corporations were perhaps more thoroughly discussed and fully considered than ever before, by any judicial tribunal, in the case of the Bank of Augusta v. Earle, 13 Peters 519. C. J. Taney, delivering the opinion of the court, says: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law; and where that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation and can not migrate to another sovereignty."

The cases of McCall v. The Byram Manufacturing Co., 6 Conn. Rep. 428, and of Copp v. Lamb, 3 Fairf. 314, are relied upon as deciding that corporations whose charters were granted by one state could hold meetings, pass votes and exercise powers in another state.

The question presented in the former case was whether the secretary of a corporation was legally appointed by the directors of a meeting held by them in the city of New York. The charter had been granted by the state of Connecticut. The decision was in the affirmative.

The directors of a corporation are not a corporate body, are, when acting as a board, but a board of officers or agents, and they may exercise their powers as agents beyond the bounds where the corporation exists. It did, indeed, appear in that case that all the meetings of the stockholders and of the directors were holden in the city of New York, but the capacity of the stockholders to act there does not appear to have been examined or discussed.

In the case of Copp v. Lamb the court did not enter upon an examination of the question whether the proprietors of common and undivided lands had, by virtue of an act passed by the commonwealth of Massachusetts, power to organize and act as a corporation in another state. * * *

That clause in the charter of the Bluehill Granite Company which authorizes two persons named to call the first meeting of the company at such time and place as they may think proper can not receive such a construction as would authorize them to call the meeting at a place without the limits of this state. Legislative bodies do not usually in their acts of legislation use language to limit their operation, but use general language, and the limitation is implied and inferred from the extent of the legislative power. The language used in that charter does not require any other construction or authorize the

conclusion that it was the intention to authorize that meeting to be held without the limits of the sovereignty. * * *

Whether the statute provisions of this state and the intention of the legislative power, or the general rules of law respecting corporations, be examined, the conclusion must be the same, that this corporation could hold no meeting for the election of its officers or for the regulation of its affairs without the limits of this state. That all such meetings and proceedings were without right or authority and wholly void.

If there were no directors *de jure*, were there any *de facto* having authority to convey the estate of the corporation? * * *

When a corporation has held certain persons out to the public as its directors or officers, those dealing with them as such and ignorant of their want of legal power will be entitled to consider their acts as binding upon the corporation. And when there has been an informal or irregular exercise of an existing power of election, the officers so elected, until removed, are regarded as officers *de facto*, and their acts are obligatory upon the corporation.

But when the corporators have no power at all to proceed to an election, and when the officers must be considered as assuming to be such without any election, their acts can not be binding upon the corporation unless the corporation has held them out in the manner before stated to be its officers. * * *

(The facts showed that demandants traced their title directly through deeds from parties having knowledge of and participating in the organization proceedings.)

Demandants nonsuit.

See note at end of Graham v. Railroad Co., *infra*, p. 847.

Sec. 233. Same.

THE MISSOURI LEAD M. & S. CO. v. REINHARD.[1]

1893. IN THE SUPREME COURT OF MISSOURI. 114 Mo. Rep. 218-232, 35 Am. St. Rep. 746.

[Suit to quiet title to lands. The plaintiff, the lead company, was organized in England. In 1880 it purchased certain mining lands in Missouri, formerly owned by a company organized in Missouri; this company, having become financially embarrassed, its members, consisting of only three persons, one residing in St. Louis and the other two in London, England, held a meeting in London, England, and there organized the plaintiff company. While there they held a meeting of the Missouri company, selected themselves as directors, elected a president and empowered him to convey the mining lands to the

[1] Statement abridged, arguments and much of the opinion omitted. See note at end of next case.

plaintiff. This was done. One M. had, in 1877, begun suit against the Missouri company and obtained judgment against it in 1885, and under an execution issued upon this judgment, the mining lands in question was sold to Reinhard, who claims title to them. The lower court directed the plaintiff to pay the judgment and the title to the land to be quieted.]

BLACK, C. J. * * * The defendants insist that the deed from the Missouri company to the English company is void because executed and delivered in England.

As our statute provides that the articles of association shall state the city or town and the county in which the corporation is to be located, *it is but fair and reasonable that acts of the body corporate itself, such as annual elections of directors, votes to increase or diminish the stock, and other meetings of the stockholders, should take place at the home office. But where, as here, there is no prohibitory statute, and all of the shareholders give their consent, the acts of the stockholders at a meeting held in a foreign jurisdiction are valid.* 1 Morawetz on Private Corporations (2 ed.), § 484; Taylor on Corporations (2 ed.), § 382. *Directors are the agents of the corporation, and it is now quite well settled that they may hold meetings and transact business in a foreign state if they desire to do so unless the contrary is expressly provided by the charter, by-laws or the general laws of the state under which the corporation was organized.* Morawetz on Private Corporations, (2 ed.), § 533; Taylor on Corporations (2 ed.), § 381; Railroad v. McPherson, 35 Mo. 13; Handley v. Stutz, 139 U. S. 422. These three persons who transacted the business in London held all of the stock and were the duly-appointed directors. The law of this state did not prohibit them from holding meetings there, and it follows that the action of these directors in making the contract for the sale of the property, and in directing the president to execute the deed, and his act in delivering it, were and are just as valid as if they had been performed here at the office of the corporation.

The further contention that the English company had and has no power to take and hold real property in this state is equally untenable. Though it was said in Bank v. Earle, 13 Pet. 584, that a corporation "must dwell in the place of its creation, and can not migrate to another sovereignty," still it was there held that it did not follow that it could not do business in other jurisdictions. *Though corporations are mere artificial beings and creatures of the law where organized, still it is settled beyond a shadow of doubt that they may hold property and transact business in a foreign state or country when not prohibited from doing so by the laws of such country.* But wherever a corporation "goes for business it carries its charter, as that is the law of its existence, and the charter is the same abroad as at home." Railroad v. Gebhard, 109 U. S. 527. * * *

Affirmed.

Note. Compare, 1900, Union Natl. Bank v. State Natl. Bank, 155 Mo. 95 78 Am. St. Rep. 560.

Sec. 234. Same.

GRAHAM v. BOSTON, HARTFORD AND ERIE R. CO.[1]

1886. IN THE SUPREME COURT OF THE UNITED STATES. 118 U. S. Rep. 161–180.

[Bill in equity in circuit court of the United States, by a stockholder on behalf of himself and the other shareholders and the creditors, to set aside a mortgage given by the railroad company upon all its property.]

BLATCHFORD, J. * * * It appears by the bill that the mortgagor corporation was chartered by its name by the legislature of Connecticut at its May session, 1863; that thereafter acts were passed by the legislatures of Massachusetts and Rhode Island making it a corporation of those states; that in August, 1863, the Southern Midland Railroad Company having previously acquired all the franchises and property of the Boston and New York Central Railroad Company, a corporation chartered under the laws of Massachusetts, Connecticut and New York, conveyed all its franchises and property to the Boston, Hartford and Erie Company; and that in November, 1863, the latter company, under authority contained in acts of the legislatures of all four of the states, acquired the franchises and property of the Hartford, Providence and Fishkill Railroad Company, a corporation created under the laws of New York, Rhode Island and Connecticut. * * *

The first ground alleged in the bill for declaring the mortgage invalid is, that it was authorized and made at a meeting of the shareholders of the company held in the city of New York; that it was not a corporation of New York, but was a corporation of Connecticut, Massachusetts and Rhode Island; and that, therefore, the meeting was illegal and the mortgage void. The circuit court held that the corporation was a New York corporation; that the meeting was lawfully held; and that its proceedings were valid and binding on the company. * * *

That a meeting in one of several states of the stockholders of a corporation chartered by all those states is valid in respect to the property of the corporation in all of them without the necessity of a repetition of the meeting in any other of those states is, we think, a sound proposition, whether it be or be not true that proceedings of persons professing to act as corporators, when assembled without the bounds of the sovereignty granting the charter, are void. Miller v. Ewer, 27 Maine 509. There is no principle which requires that the corporators of this consolidated corporation should meet in more than one of the states in which it has a domicile in order to the validity of a corporate act. * * *

The Boston, Hartford and Erie Company, though made up of dis-

[1] Statement of facts greatly abridged. Only part of the opinion relating to the single point is given, and this is rearranged and transposed.

tinct corporations, chartered by the legislatures of different states, had a capital stock which was a unit, and only one set of shareholders, who had an interest by virtue of their ownership of shares of such stock in all of its property everywhere. In its organization and action and the practical management of its property it was one corporation, having one board of directors, though in its relations to any state it was a separate corporation, governed by the laws of that state as to its property therein. It, therefore, had a domicile in each state, and the corporators or shareholders could, in the absence of any statutory provision to the contrary, hold meetings and transact corporate business in any one state, so as to bind the corporation in respect to its property everywhere. Bridge Co. v. Mayer, 31 Ohio St. 317; Pierce on Railroads, 20. * * *

Affirmed.

Note. 1. A great number of decisions hold that business done at an organization meeting, or other meeting of shareholders held out of the state creating the corporation, is void, and of no effect: 1854, Freeman v. Machias Water, etc., Co., 38 Maine 343; 1858, Hill v. Beach, 12 N. J. Eq. 31; 1862, Hilles v. Parrish, 14 N. J. Eq. 380; 1863, Aspinwall v. Ohio, etc., R. Co., 20 Ind. 492, 83 Am. D. 329; 1874, Bellows v. Todd, 39 Iowa 209, 217; 1874, Ormsby v. Vermont Copper M. Co., 56 N. Y. 623; 1876, Mitchell v. Vermont C. M. Co., 67 N. Y. 280; 1883, Franco Texan Land Co. v. Laigle, 59 Texas 339 (so held although the charter expressly authorized the business to be done in France); 1885, Smith v. Silver Valley, 64 Md. 85, 54 Am. Rep. 760; 1890, Mack v. De Bardeleben, 90 Ala. 396; 1890, Welch v. Old Dominion, etc., R., 10 N. Y. Supp. 174; 1891, Hodgson v. Duluth, etc., R., 46 Minn. 454; 1894, Jones v. Pearl M. Co., 20 Colo. 417; 1895, Taylor v. Branham, 35 Fla. 297; 1895, Craig Silver Co. v. Smith, 163 Mass. 262, on 265; 1896, Duke v. Taylor, 37 Fla. 64, 53 Am. St. Rep. 232, 31 L. R. A. 484 (this intimates that if the statute authorized, such meeting would be valid); 1897, Bastian v. Modern Woodmen of Am., 166 Ill. 595 (this seems to intimate that statutory authority might make such meeting valid). 1899, Harding v. Glucose Co., 182 Ill. 557, 74 Am. St. Rep. 189.

2. Several cases, however, hold that such extraterritorial acts are not void, but, at least, are sufficient to estop the corporation or participating shareholders, and third parties can not complain, non-participating shareholders being the only parties who may object. 1864, Ohio & M. R. Co. v. McPherson, 35 Mo. 13, on 26; 1867, Camp v. Byrne, 41 Mo. 525; 1875, Heath v. Silverthorn L. M. Co., 39 Wis. 146; 1880, Humphreys v. Mooney, 5 Colo. 282; 1891, Handley v. Stutz, 139 U. S. 417; 1892, Wright v. Lee, 2 S. Dak. 596.

3. There seems to be no doubt but that consolidated companies formed by the union of several corporations, organized in different states, can hold a valid meeting in either state, as held in Graham v. R. Co., *supra*. 1877, Covington, etc., Bridge Co. v. Mayer, 31 Ohio St. 317; 1888, Ohio, etc., R. v. People, 123 Ill. 467.

4. As indicated in Miller v. Ewer, the directors, being only corporate agents, may hold valid meetings outside the state creating the corporation. 1827, McCall v. Mfg. Co., 6 Conn. 428; 1864, Arms v. Conant, 36 Vt. 744; 1864, Ohio & M. R. Co. v. McPherson, 35 Mo. 13; 1872, Wood, etc., M. Co. v. King, 45 Ga. 34; 1874, Bellows v. Todd, 39 Iowa 209; 1880, Humphreys v. Mooney, 5 Colo. 282; 1881, Parsons v. Lent, 34 N. J. Eq. 67; 1888, Saltmarsh v. Spaulding, 147 Mass. 224; 1892, Wright v. Lee, 2 S. Dak. 596; 1893, Brockway v. Gadsden M. L. Co., 102 Ala. 620. But, see, 1874, Ormsby v. Vermont C. M. Co., 56 N. Y. 623, *contra*.

Statutes sometimes require the directors to meet within the state creating the corporation. 1897, State National Bank v. Union Nat'l Bank, 168 Ill. 519.

Sec. 235. Directors' meeting, necessity, notice and quorum.

BANK OF LITTLE ROCK v. M'CARTHY.[1]

1892. IN THE SUPREME COURT OF ARKANSAS. 55 Ark. Rep. 473-482, 29 Am. St. R. 60, 37 Am. & E. C. C. 671.

[Suit instituted by a dissenting stockholder to have a receiver appointed for a lumber company. In August, 1869, this company owed the bank and McCarthy about $25,000 each, and others about $6,500. In order to meet pressing claims the president sought a further loan from McCarthy, who offered to advance $10,000, provided the company would give a mortgage securing that sum and his existing claim of $25,000. This necessitated a meeting of directors, a call for which was prepared and served upon all but one, Field. Inquiry was made at Field's office, but without ascertaining where he was. The president then went with a notice of the meeting to Field's residence, and finding no one there, inserted it between the door and casing and left it. Field's family was away, the residence was unoccupied at the time, except by a man who slept there, and the notice was not received by Field. The meeting was held, and all of the directors (there being five), except Field, were present. At this meeting it was determined by a vote of three to one that the mortgage should be made to McCarthy. The shareholders were the same as the directors, and the dissenting director as a shareholder instituted the suit the same day the mortgage was executed. A receiver was appointed and it then became apparent the company was insolvent. The bank put in a cross-bill asking that the mortgage to McCarthy be canceled, and McCarthy asked a foreclosure and secured a decree to that effect. The bank appealed.]

HEMINGWAY, J. * * * The statute provides that the stock, property, affairs and business of business corporations shall be managed by not less than three directors (Mansf. Dig., § 964); and, further, that a majority of the directors, convened according to the by-laws, shall constitute a quorum for the transaction of business (section 969).

In the case of Simon v. Sevier Association, 54 Ark. 58, the validity of a general assignment authorized by a majority of the directors at a meeting of which the absent directors had no notice was considered, and we held that the statute authorized a majority to act only at a meeting legally convened, and that it was essential to a legal meeting that it be called in accordance with the by-laws or rules of the corporation or upon due and legal notice given to each of the members. There was no contention that notice could not have been served on each member, and no expression of the law where that was a fact.

Subsequent investigation has not altered our views as then expressed, but we are convinced that they are in a line with the authority of text-writers and adjudged cases. If the rule were otherwise, the rights

[1] Statement abridged. Arguments and part of opinion omitted.

and interests of minority holders would be liable to great abuse. Even majorities might suffer, for, by absence of some of their number, the minority might become the majority, hold a meeting without notice to the absentees and change the entire course or policy of the business, or do acts destructive to its prosperity or future existence. Such abuse of corporate power is not unknown to the history of corporations, and its evidence is found in the records of the courts. Rules intended to check or prevent it should be rigidly observed, except where reason requires that they be relaxed. The wisdom of the rule and the dangers incident to any other are very clearly stated by Judge Brewer in the case of the Paola & Fall River R. Co. v. Comrs. of Anderson Co., 16 Kan. 309, where he shows that if any other rule prevailed it would be possible, with a board composed of twelve members, for four directors to convene a meeting of seven by giving notice to three and witholding it from five others, and to bind the corporation to acts condemned by eight. That case called for no expression as to the law in cases of emergency where notice to any director was impracticable, and contains no discussion of such cases, but there is an intimation that the rule might admit exceptions in such cases.

That such cases may arise as will justify and require exceptions to be made, is a conclusion to which reflection inevitably leads. In fact, it is conceded by the learned counsel for the appellant "that a director can not put a stop to corporate business by simply leaving its jurisdiction"; and that, "if after a reasonable search the parties are unable to find him, the remaining directors may attend to the necessary affairs." This indicates that the exception arises upon a concurrence of three conditions, first, the impracticability of notice; second, the existence of an emergency for action; and third, a reasonable necessity for the action taken.

Without committing the court to a full approval of this form of stating the exception, we may say that it seems to be substantially correct. *Where notice is practicable, it must be given; it can be dispensed with when impracticable, only to meet an emergency; and the act done must appear reasonably necessary to the welfare of the corporation. If the act is merely proper, but not necessary, or if it appear that it may become necessary, but the necessity is not present, the rule should not yield, for in such cases notice may become practicable, and the presence of the absent director be secured before the necessity arises or the emergency is present.* Such we consider the rule deducible from the case of Chase v. Tuttle, 55 Conn. 455, relied upon by the appellee. For it had been held in earlier decisions of that court that a meeting attended by a majority of the directors, of which the minority had no notice, was not lawful, and it does not appear that there was any intention to overrule those decisions. Stow v. Wyse, 7 Conn. 214; s. c., 18 Am. Dec. 99.[1] The learned judge who delivered the opinion in that case says that "the exigency demanded immediate action to save the property and to save expense,"

[1] *Supra*, p. 835.

and the action of the meeting was upheld upon the ground that power must be accorded the company to protect itself. * * *

Was the notice left at his usual place of residence, at a time when he and his family were absent to remain until after the time fixed for the meeting, notice to him? Counsel insist that it constituted notice, and to sustain their position cite us to section 5206, Mansfield Digest; but that section has reference to notices mentioned in the code, and as notices to directors of business corporations are not included in such mention, we think the section inapplicable. *The law provides for no constructive notice in such cases, and in the absence of such provision notice must be personal. Such seems to be the rule established by the authorities.* 1 Beach Corp., § 281; Stow v. Wyse, 7 Conn. 214; s. c., 18 Am. Dec. 99, and note, 102–3; Covert v. Rogers, 38 Mich. 363; 1 Waterman on Corp., § 63, p. 205; 1 Morawetz Corp., § 531; Stevens v. Eden Meeting-house Society, 12 Vt. 688; Harding v. Vandewater, 40 Cal. 77.

Reversed.

Note. 1. *Accord*: 1828, Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99, *supra*, p. 835; 1839, Stevens v. Eden Meeting-house, etc., 12 Vt. 688, *supra*, p. 836; 1841, Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; 1842, Elliot v. Abbott, 12 N. H. 549, 37 Am. Dec. 227; 1859, Ross v. Crockett, 14 La. Ann. 811; 1876, Paola, etc., F. R. Co. v. Commissioners Anderson Co., 16 Kan. 302; 1877, Herrington v. District Tp. of Liston, 47 Iowa 11; 1878, Covert v. Rogers, 38 Mich. 363; 1878, Choteau Ins. Co. v. Holmes, 68 Mo. 601, 30 Am. Rep. 807; 1879, Baldwin v. Canfield, 26 Minn. 43; 1880, Pike Co. v. Rowland, 94 Pa. St. 238; 1882, Buttrick v. Railroad Co., 62 N. H. 413, 418; 1887, Chase v. Tuttle, 55 Conn. 455, 3 Am. St. Rep. 64, and note; 1888, Thompson v. Williams, 76 Cal. 153, 9 Am. St. Rep. 187, and note; 1892, Smith v. Dorn, 96 Cal. 73, 40 Am. & E. C. C. 196; 1895, Smith v. Cornelius, 41 W. Va. 59, on 68; 1895, First Nat'l Bank v. Asheville, etc., Co., 116 N. C. 827; 1895, Hamlin v. Union Brass Co., 68 N. H. 292, 44 Atl. Rep. 385; 1897, Limer v. Traders' Co., 44 W. Va. 175, 28 S. E. Rep. 730; 1898, Singer v. Salt Lake City Mfg. Co., 17 Utah 143, 53 Pac. Rep. 1024; 1899, Monroe Mercantile Co. v. Arnold, 108 Ga. 449, 34 S. E. Rep. 176; 1899, Broughton v. Jones, 120 Mich. 462, 79 N. W. Rep. 691. See next case, *contra*.

(2) In the absence of evidence to the contrary, notice is presumed to have been properly given and a quorum present: 1847, Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; 1883, Leavitt v. Oxford & G. S. M. Co., 3 Utah 265, 4 Am. & E. C. C. 234; 1887, Chase v. Tuttle, 55 Conn. 455, 3 Am. St. Rep. 64, and note; 1890, Rollins v. Shaver Wagon Co., 80 Iowa 380, 20 Am. St. Rep. 427; 1894, Benbow v. Cook, 115 N. C. 324, 44 Am. St. Rep. 454; 1895, Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98; 1899, Balfour-Guthrie Co. v. Woodworth, 124 Cal. 169, 56 Pac. Rep. 891.

(3) In the absence of statutory, charter or by-law provisions no qualifications, except such as the corporation may impose, are necessary in order to be a director. An officer may be, 1847, Sargent v. Webster, 13 Met. 497, 46 Am. Dec. 743; a non-resident may be, 1887, State v. Smith, 15 Ore. 98; an alien, resident or non-resident may be, 1890, Commonwealth v. Hemingway, 131 Pa. St. 614; and it has been held where the statute requires a director to be a shareholder, he may receive shares solely for the purpose of qualifying him 1891, *In re* Argus, etc., Co., 1 N. Dak. 434, 26 Am. St. Rep. 639.

(4) Delegation of powers by directors:

(*a*) In general discretionary powers can not be delegated by those to whom they have once been delegated, and the powers of directors derived from share-

holders are delegated powers: 1832, Percy v. Millaudon, 3 La. 568; 1837, Bank Commrs. v. Bank of Buffalo, 6 Paige Ch. (N. Y.) 497; 1850, Gillis v. Bailey, 21 N. H. 149; 1855, York, etc., R. Co. v. Ritchie 40 Me. 425; 1866, *In re* Leeds Banking Co., L. R. 1 Ch. App. 561; 1876, Farmers' Mut. Fire Ins. Co. v. Chase, 56 N. H. 341; 1877, Tracy v. Guthrie, etc., Soc., 47 Iowa 27; 1878, Silver Hook Road v. Greene, 12 R. I. 164; 1892, Weidenfeld v. Sugar, etc., R. Co., 48 Fed. Rep. 615; 1895, Temple v. Dodge, 89 Tex. 68.

(*b*) But if the board of directors is a statutory body, it is frequently held that its powers are original, and not delegated as the power of an agent is, and so may be delegated by it to others: 1814, North Hampton Bank v. Pepoon, 11 Mass. 288; 1883, Leavitt v. Oxford, etc., G. S. M. Co., 3 Utah 265; 1891, Sheridan, etc., Co. v. Chatham, etc., Bank, 127 N. Y. 517; 1893, Black River, etc., Co. v. Holway, 85 Wis. 344; 1896, Burden v. Burden, 8 App. Div. (N.Y.) 160; 1896, Union, etc., R. Co. v. Chicago, R. I. & P. R. Co., 163 U. S. 564.

(*c*) Purely ministerial, non-discretionary power may be delegated: 1823, Fleckner v. Bank of U. S., 8 Wheat. (U. S.) 338, 355; 1840, Burrill v. Nahant Bank, 2 Metc. (Mass.) 163; 1848, Stevens v. Hill, 29 Maine 133; 1856, Manchester, etc., R. Co. v. Fisk, 33 N. H. 297; 1864, Arms v. Conant, 36 Vt. 744; 1881, Burleigh v. Ford, 61 N. H. 360; 1893, Skinner v. W. M. & R. M. Co., 140 N. Y. 217.

(*d*) Directors can not vote by proxy: 1891, Craig Medicine Co. v. Merchants' Bank, 59 Hun 561. Neither can shareholders unless specially authorized by charter or statute or by law provision: 1812, State v. Tudor, 5 Day (Conn.) 329, 5 Am. Dec. 162; 1829, Philips v. Wickham, 1 Paige (N. Y.) 590; 1834, Taylor v. Griswold, 14 N. J. L. 222, 27 Am. Dec. 33; *infra*, p. 1591; 1883, Commonwealth v. Bringhurst, 103 Pa. St. 134, 49 Am. Rep. 119; 1890, Commonwealth v. Detwiller, 131 Pa. St. 614, 7 L. R. A. 357.

Sec. 236. Same.

EDGERLY v. EMERSON.[1]

1851. In the Superior Court of Judicature of New Hampshire; 23 N. H. Rep. 555–573, 55 Am. D. 207.

[The Rochester bank had obtained a judgment against Jones, Richards and Legro. Execution was levied by Edgerly, as deputy sheriff, upon the goods of Jones, and these were delivered to Emerson for safe keeping. Legro as surety for Jones paid the judgment, and the execution was discharged in writing on its back by the cashier of the bank. Edgerly, relying upon a later assignment of the bank to Legro, demanded the goods of Emerson, who failed to deliver them. Edgerly then sued him, alleging the goods were lost by Emerson's negligence, and proposed to show that the discharge was written upon the execution through mistake, and contrary to the agreement of the parties, and that the same was intended, and supposed at the time it was executed, to be an assignment of said execution to Legro; and to prove this he offered the testimony of John McDuffie, Jr., who signed said discharge, to which the defendant objected, but which the court admitted.

The plaintiff proposed to show by parol that it was agreed between

[1] Statement abridged; arguments and part of opinion omitted.

the bank and Legro that Legro should pay to the bank the amount of the execution, and the bank, by its cashier, McDuffie, should assign to him the execution, and all its rights, as against Jones, at the same time that the discharge was written upon the execution; but no vote was passed upon the subject.

The defendant objected that the proceedings of the directors could be proved by the records alone; but the court decided that if the directors agreed in any matter of business, it was not necessary that any formal question should be put, or vote passed; and that if their agreement was not recorded, it might be shown by parol.

It appeared that the meeting of the directors, last referred to, was a special meeting, and that only four of the seven directors were present or notified. The defendant objected to the meeting as illegal, but the court ruled that if a quorum were present, the proceedings were valid.]

BELL, J. * * * It was also objected that the meeting of the directors, on whose action the plaintiff relies, was illegal and their proceedings invalid, because it was a special meeting at which only four of the seven directors were present or notified. In the case of The Despatch Line of Packets v. The Bellamy Manufacturing Company, 12 N. H. Rep. 205, certain questions were determined in relation to the powers of the directors of corporations, by which we feel bound to abide. The case was considered with great care and ability. In that case it was held:

I. That if the authority of the directors, to manage and exercise a general superintendence and control over the affairs of the corporation, had been conferred by the charter itself, it would have been in the nature of an original corporate power, in a definite number, and a majority of the whole number being duly assembled at a regular meeting might act by major vote of those present.

II. That where the by-laws of a private corporation confer upon the directors power to act in behalf of the corporation without special limitation as to the manner, a majority may act within the scope of the authority given to the board and bind the corporation, either where there is a consultation of all together and a concurrence of a majority or where there is a regular meeting at which all might be present, and a majority actually meet and act by major vote.

III. That the act of a majority of such board, in the case last supposed, does not bind the corporation, unless

1. There was an assent of all the directors at a meeting, or, *perhaps*, separately obtained.

2. Or there was a meeting and consultation of the whole board and a vote of a majority.

3. Or a meeting held at some regular period, at which a majority were present and acted by a major vote.

4. Or a meeting regularly notified, at which a majority assembled and acted by major vote.

IV. When the act purports to be the act of the board, it may be presumed it was the act of a majority until the contrary is shown. * *

But this applies only to a regular meeting, which is a stated meeting, at which all have, of course, the needful notice and opportunity to be present, or a special meeting, at which all have been duly notified to be present. The question which arises in this case is different. The meeting in question was not a stated meeting nor a meeting at which all had been duly notified to be present. Four only of the seven directors were present, and no others had been notified. The general principles applicable to the exercise of joint powers are well settled. When individuals or corporations give an authority jointly to two or more persons, in order to bind the principal all the agents must act. Jewett v. Alton, 7 N. H. Rep. 253; Andover v. Grafton, 7 N. H. Rep. 304. But where a number of persons are by law entrusted with power not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority and their act will be the act of the whole. Grindley v. Barker, 1 B. & P. 236; King v. Beeston, 3 D. & E. 592; Green v. Millar, 6 Johns. 39; Farwell's Petition, 2 N. H. Rep. 124; Damon v. Granbly, 2 Pick. 345.

There are, however, many cases where an authority is granted to a board or to several persons, or a majority of them, or a certain limited number, either more or less than a majority, who are thereby constituted a quorum. Thus, in the usual form of bank charters there is a provision that "no less than four directors shall constitute a board for the transaction of business, of whom the president shall be one, except in case of sickness or necessary absence, in which case the directors present may choose a chairman for the time being, in his stead." The effect of this clause we deem the same as a provision that the directors, or any four of them, shall be competent to transact any business of the bank. Four constitute a quorum, and when assembled possess all the powers of the entire board. * * *

We are, therefore, of the opinion that where a quorum of the directors of a bank meet and unite in any determination the corporation are bound, whether the other directors are or are not notified.

Such, we understand, to be the construction, practically given to this part of their charters by all our banking institutions, and we think their convenience requires that it should be sustained. * * *

Verdict set aside on other grounds.

Note. Accord. 1876, State v. Smith, 48 Vt. 266; 1885, Bank v. Flour Co., 41 Ohio St. 552, on 558-9. Compare, 1898, Troy Mining Co. v. White, 10 S. D. 475, 42 L. R. A. 549. See, however, *contra*, cases in note, *supra*, p. 850.

ARTICLE III. MODE OF ACTION GENERALLY.

Sec. 237. Presumptions.

PRESIDENT, DIRECTORS, ETC., OF BANK OF THE UNITED STATES v. DANDRIDGE ET AL.[1]

1827. IN THE SUPREME COURT OF THE UNITED STATES. 12 Wheat. (25 U. S.) Rep. 64–116.

[Writ of error from the circuit court.

The original action was debt upon a bond, purporting to be signed by Dandridge as principal, and six sureties, to insure the faithful performance by Dandridge of the duties of cashier of the bank. The plea was *non est factum*, the ground of which was that the bond had never been approved according to the rules and regulations of the bank. These required the cashier "before entering upon the duties of his office to give bond, with two or more sureties, to the satisfaction of the directors" in a sum named. Evidence to show the execution and approval of the bond was offered, but upon objection was rejected by the court. This is the error assigned.]

STORY, J. * * * It is material to state that the rejection of the evidence did not proceed upon the ground that it was of a secondary nature, leaving behind, in the possession of the plaintiffs, evidence of a higher and more satisfactory nature. On the contrary, the whole structure of the case shows that there was, in the understanding of both the parties, no record ever made of the approval or acceptance of the bond in question, and the principal controversy was whether it could be established by any evidence short of such record proof.

The propositions maintained by the circuit court were, in substance, these: First, that the cashier could not legally enter upon the duties of his office, nor make his sureties responsible for his non-performance of those duties, before his official bond was accepted as *satisfactory* by the board of directors, according to the terms of the charter. Secondly, that such acceptance could be established only by proof drawn from the records of the board of directors; and if no record had been kept of such assent and acceptance, the bond was ineffectual, and no secondary evidence could be admitted to establish the fact.

The last proposition will be first considered. The correctness of it in a great measure depends upon the soundness of the distinction taken between the acts of private persons and the acts of corporations. It is admitted, in the opinion of the circuit court, that the evidence offered would, in common cases, between private persons, have been *prima facie* evidence, to be submitted to the jury as proof that the bond was fully executed and accepted. But it is supposed that a different rule prevails in cases of corporations; that their acts

[1] Statement abridged; much of Story's opinion, and most of the dissenting opinion of Marshall, Ch. J., are omitted.

must be established by positive record of proofs; and that no presumptions can be made in their favor of corporate assent or adoption, from other circumstances, though in respect to individuals the same circumstances would be decisive. The doctrine, then, is maintained from the nature of corporations, as distinguished from natural persons; and from the supposed incapacity of the former to do any act, not evidenced by writing, and if done to prove it, except by writing.

Little light can be thrown on this subject, by considerations drawn from corporations existing by the common law, or dependent upon prescription. To corporations, however erected, there are said to be certain incidents attached, without any express words or authority for this purpose; such as the power to plead and be impleaded, to purchase and alien, to make a common seal, and to pass by-laws. Com. Dig. Franchise, F. 10, 13. In ancient times, it was held, that corporations aggregate could do nothing but by deed under their common seal. But this principle must always have been understood with many qualifications; and seems inapplicable to acts and votes passed by such corporations at corporate meetings. It was probably, in its origin, applied to aggregate corporations at the common law, and limited to such solemn proceedings as were usually evidenced under seal, and to be done by those persons who had the custody of the common seal, and had authority to bind the corporation thereby, as their permanent official agents. Be this as it may, the rule has been broken in upon in a vast variety of cases, in modern times, and can not now, as a general proposition, be supported. Mr. Justice Bayley, in Harper v. Charlesworth, 4 B. & C. 575, said, "A corporation can only grant by deed; yet there are many things which a corporation has power to do, otherwise than by deed. It may appoint a bailiff, and do other acts of a like nature." And it is now firmly established, both in England and America, that a corporation may be bound by a promise, express or implied, resulting from the acts of its authorized agent, although such authority be only by virtue of a corporate vote, unaccompanied with the corporate seal. * * *

By the general rules of evidence, presumptions are continually made, in cases of private persons, of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence, and upholding transactions intimately connected with the public peace, and the security of private property, indulges its own presumptions. * * *

The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted, and slight acts on their part, which can be reasonably accounted for, only upon the supposition of such acceptance, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which

presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as cashier of a bank, and is recognized by the directors or by the corporation as an existing officer, a regular appointment will be presumed, and his acts, as cashier, will bind the corporation, although no written proof is or can be adduced of his appointment. In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions from acts done of what must have preceded them, as matters of right, or matters of duty.

It may be not without use to advert to a few cases where corporate acts have been the subject of presumptions. In the first place, we may advert to the known fact, that a charter may be presumed to have been given to persons who have long acted as a corporation, and assumed the exercise of the powers of a corporate body, whether of an ordinary or extraordinary nature. This is the case in respect to all corporations existing by prescription. Yet the very case supposes that no written proof can be adduced of a charter, or of a vote of the corporators to accept the charter. Yet, both a charter and acceptance are vital to the existence of the corporation. They are, however, presumed, not merely from the lapse of time, but from the continued exercise of corporate powers, which presuppose their existence. So, in relation to the question of acceptance of a particular charter, by an existing corporation, or by corporators already in the exercise of corporate functions, the acts of the corporate officers are admissible evidence from which the fact of acceptance may be inferred. It is not indispensable to show a written instrument or vote of acceptance on the corporation books. It may be inferred from other facts which demonstrate that it must have been accepted. * * *

In respect to grants and deeds beneficial to a corporation, there seems to be no particular reason why their assent to and acceptance of the same may not be inferred from their acts, as well as in the case of individuals. Suppose a deed poll granting lands to a corporation, can it be necessary to show that there was an acceptance by the corporation by an assent under seal, if it be a corporation at the common law, or by a written vote, if the corporation may signify its assent in that manner? Why may not its occupation and improvement, and the demise of the land by its agents, be justly admitted by implication to establish the fact in favor and for the benefit of the corporation? Why should the omission to record the assent, if actually given, deprive the corporation of the property which it gained in virtue of such actual assent? The validity of such a grant depends upon the acceptance, not upon the mode by which it is proved. It is no implied condition that the corporation shall perpetuate the evidence of its assent in a particular way. At least, if it be so, we think it is incumbent on those who maintain the affirmative to point out the authorities which sustain it. None such have been cited at the bar. * * *

But the present question does not depend upon the point whether the acts of a corporation may be proved otherwise than by some written document. The reasoning upon it, however, was very ably gone into at the bar, and as it furnishes very strong illustrations upon the point now in judgment, it could not be passed over with propriety.

In the present case, the acts of the corporation itself, done at a corporate meeting, are not in controversy. * * *

[After examining the charter and showing that the corporation was created out of the subscribers to the stock, and that the management was vested in a board of twenty-five directors, chosen by the shareholders annually, proceeds:]

It is most manifest, that the corporation is altogether a distinct body from the directors, possessing all the general powers and attributes of an aggregate corporation, and entitled to direct and superintend the management of its own property, and the government of the institution, and to enact by-laws for this purpose. So far as the act delegates authority to the directors, the latter possess it, and may exercise it, not as constituting the corporation itself, but as its express statute agents, to act in the ordinary business of the institution. The directors are created a board, and not a corporate body. If the authority delegated to them can only be exercised by them, when assembled as a board, with a proper *quorum*, and not by the separate assent of a majority of the whole body (on which it is unnecessary here to express any opinion), still it is clear that their meetings and acts are but the meetings and acts of a board of agents, acting *ex officio*, and not the meetings and acts of the corporation itself. The whole structure of the charter, and the whole proceedings under it, as well as the by-laws and regulations which have come under our review, demonstrate that this has been the uniform construction of the corporation itself, and of the directors. Indeed, this is believed to be so universally acted upon, in all the cases respecting banks, which have been judicially decided, that it is not thought necessary to do more than express our opinion that such is the true interpretation of this charter. * * *

Assuming, then, that the directors of the parent bank were, as a board, to approve of the bond, so far as it respects the sureties, in what manner is that approval to be evidenced? Without question, the directors keep a record of their proceedings as a board, and it appears by the rules and regulations of the parent bank, read at the bar, that the cashier is bound "to attend all meetings of the board and to keep a fair and regular record of its proceedings." If he does not keep such a record, are all such proceedings void, or is the bank at liberty to establish them by secondary evidence? In the present case (we repeat it) the whole argument has proceeded upon the ground, as conceded, that no such record exists of the approval of the present bond. * * *

We ask, upon what ground it can be maintained that the approval of the bond by the directors must be in writing? It is not required by the terms of the charter, or the by-laws. In each of them, the language points to the fact of approval, and not to the evidence by

which it is to be established, if controverted. It is nowhere said the approval shall be in writing or of record. The argument at the bar upon the necessity of its being in writing must, therefore, depend for its support upon the ground that it is a just inference of law from the nature and objects of the statute, from the analogy of the board of directors to a corporate body, from principles of public convenience and necessity, or from the language of authorities, which ought not to be departed from. Upon the best consideration we can give the subject, we do not think that the argument can be maintained under any of these aspects.

If the directors had been a board constituted by an unincorporated company, or by a single person for the like purposes and with the like powers, it would scarcely occur to any person that the acts of the board must, of necessity, be reduced to writing before they could bind their principal. The agents of private persons are not usually in the habit of keeping regular minutes of all their joint proceedings, and hitherto there has been no adjudication which requires such a verification of their joint acts. Yet innumerable cases must have arisen in which such a principle might have been applied with success if it had been ever supposed to possess a legal existence. The acts of private and public trustees, of joint agents for commercial purposes, of commissioners for private objects and of public boards, must have presented many occasions for passing upon such a doctrine. The silence of the books under such circumstances would form no inconsiderable answer to the argument, connected as it must be with the knowledge of the loose and inartificial manner in which much of the business of agencies is generally conducted. There may be, and undoubtedly there is, some convenience in the preservation of minutes of proceedings by agents, but their subsequent acts are often just as irresistible proof of the existence of prior dependent acts and votes as if minutes were produced. If a board of directors were created to erect a bridge, or make a canal or turnpike, and they proceeded to do the service, and under their superintendence there were persons employed who executed the work, and the board proceeded to pay them therefor out of funds in their hands, the facts of public notoriety would be as irresistible evidence of the due execution of their authority and of due contracts made and proceedings had by the board as if the proceedings were recorded in the most formal and regular manner. Can there be a doubt that in the cases put many contracts are so varied and rescinded, many acts done and assented to by the board which never are reduced to formal votes and declarations and written proofs? We think we may safely say that the sense of the profession and the course of private business have never, hitherto, in respect to private agencies and boards, recognized the existence of any rule which required their acts and proceedings to be justified by written votes.

What foundation is there for a different rule in relation to agencies for corporations? The acts of a single duly-authorized agent of a corporation, within the scope of his authority, bind the corporation,

although he keeps no minutes of such acts. They may be, and they are, daily, proved *aliunde*. In what respects do the acts of a board of agents differ from those of a single agent in their operation as evidence? A board may accept a contract, or approve a surety, by vote, or by a tacit and implied assent. The vote or assent may be more difficult of proof, by parol evidence, than if it were reduced to writing. But surely this is not a sufficient reason for declaring that the vote or assent is inoperative. If a board of directors agree to build a banking-house, and it is accordingly built, and paid for by their cashier, with their assent, is the whole proceeding to be deemed void, because, in the progress of the undertaking, from accident or negligence, the votes and the payments have not been verified by regular minutes? But it is said that in the present case the cashier is required to keep a fair and regular record of the proceedings of the directors. But if this be admitted, it does not establish the purpose for which it is used. It is a by-law of the corporation, directory to its officers, enacted for its own security and benefit, and not for the purpose of restricting the acts of the directors. If the cashier should neglect to keep such records, or should omit any single vote, the by-law has not declared that the vote shall be void and the proceedings nugatory. Suppose no such by-law had been passed, would not the votes of the board have bound the corporation? If they had discounted notes, taken mortgages, advanced money, and bought stock, by faith of *viva voce* unrecorded votes, and evidence of the existence of these acts and votes necessarily resulted from the other proceedings of the bank, could it be the intention of the legislature that they should be utterly void? or of the stockholders that any by-law should operate a legal extinguishment of their title to the property? It seems to us difficult to imagine that such could be the legislative or corporate intention. If, in ordinary cases, such an intention could not be inferred, in order to produce a very strict and inconvenient construction of the charter, there is still less reason to apply it to the cases of approval of official bonds. These are taken exclusively for the security and benefit of the bank itself, and not of mere strangers. The approval is matter of discretion in the directors, and that discretion once being exercised, it is of very little consequence to the bank whether a written minute of the vote be made or not. All that the bank is interested in is that there shall be an approval; and it matters not whether the fact is established by a direct record, or by acts of the directors, which recognize its prior existence. * * *

To all the authorities cited at the bar on this point, the counsel for the defendants has made one answer, which he deems applicable to all of them. It is this, that where no particular form for the expression of the corporate will is prescribed by law, there it may be inferred from corporate acts; but that where such a form is prescribed it must be followed. This distinction, he supposes, will reconcile all the cases. The distinction, if admitted, will not aid the argument. It may be, and, indeed, is conceded, that no corporate act can be valid if done differently from the manner prescribed by law as essen-

tial to its validity. If in the present case the statute had prescribed that nothing but a written vote on record should be deemed an approval of the bond, or that the cashier should not be deemed for any purpose in office until such approval, the consequence contended for would have followed. His acts would have been utterly void, and any unrecorded vote of approval nugatory. But the very point in controversy is whether such written record be necessary by the charter or by-laws, not as a matter of convenience or discreet exercise of authority, but as a *sine qua non* to the validity of the act. The cases which have been commented on by the court do not deny the distinction, but proceed upon the ground that, unless positively required by law, a written vote is not to be deemed indispensable. The court is then called upon, not to administer a doctrine of strict and settled and technical law, but to introduce a new rule into the law of evidence, and to exclude presumptive evidence, not only of the acts of corporations, but of their unincorporated agents. If such a rule be fit to be adopted it must be upon the foundation of some clear and unequivocal analogy of law, and public policy and convenience. We are not prepared to admit that it has any such foundation. On the contrary, we are persuaded that the introduction of the rule itself would be attended with serious public mischiefs, and shake many titles and rights which have been consummated in entire good faith, and the confidence that no such written record was necessary to their validity. We can not, therefore, assent to the doctrine decided in the circuit court on this point. * * *

Reversed.

MARSHALL, CH. J., dissenting. * * * The plaintiff is a corporation aggregate; a being created by law; itself impersonal, though composed of many individuals. These individuals change at will, and even while members of the corporation can, in virtue of such membership, perform no corporate act, but are responsible in their natural capacities, both while members of the corporation and after they cease to be so, for everything they do, whether in the name of the corporation or otherwise. The corporation being one entire impersonal entity, distinct from the individuals who compose it, must be endowed with a mode of action peculiar to itself, which will always distinguish its transactions from those of its members. This faculty must be exercised according to its own nature. Can such a being speak or act otherwise than in writing? Being destitute of the natural organs of man, being distinct from all its members, can it communicate its resolutions or declare its will without the aid of some adequate substitute for those organs? If the answer to this question must be in the negative what is that substitute? I can imagine no other than writing. The will to be announced is the aggregate will; the voice which utters it must be the aggregate voice. Human organs belong only to individuals; the words they utter are the word of individuals. These individuals must speak collectively, to speak corporately, and must use a collective voice; they have no such voice, and must communicate this collective will in some other mode. That

other mode, as it seems to me, must be by writing. A corporation will generally act by its agents; but those agents have no self-existing power. It must be created by law, or communicated by the body itself. This can be done only by writing.

If, then, corporations were novelties, and we were required now to devise the means by which they should transact their affairs, or communicate their will, we should, I think, from a consideration of their nature, of their capacities and disabilities, be compelled to say, that where other means were not provided by statute, such will must be expressed in writing. But they are not novelties. They are institutions of very ancient date; and the books abound with cases in which their character, and their means of action, have been thoroughly investigated. In Brooke's Abridgment (title Corporation) we find many cases, cited chiefly from the Year Books, from which the general principle is to be extracted, that a corporation aggregate can neither give nor receive, nor do anything of importance, without deed. Lord Coke, in his commentary on Littleton (66*b*), says, "but no corporation aggregate of many persons capable" "can do homage." "And the reason is, because homage must be done in person, and a corporation aggregate of many can not appear in person; for, albeit, the bodies natural, whereupon the body politic consists, may be seen, yet the body politic or corporate itself can not be seen, nor do any act, but by attorney." So, too, a corporation is incapable of attorning, otherwise than by deed (6 Co., 386), or of surrendering a lease for years (10 Co., 676), or of presenting a clerk to a living (Bro. Corp., 83), or of appointing a person to seize forfeited goods (1 Vent., 47), or agreeing to a disseizin to their use (Bro. Corp., 34). These incapacities are founded on the impersonal character of a corporation aggregate, and the principle must be equally applicable to every act of a personal nature. * * *

It is stated in the old books (Bro. Corp., 49) that a corporation may have a ploughman, butler, cook, etc., without retaining them by deed; and in the same book (p. 50) Wood says, "small things need not be in writing, as to light a candle, make a fire and turn cattle off the land." Fairfax said, "A corporation can not have a servant but by deed; small things are admissible on account of custom, and the trouble of a deed in such cases, not by strict law." Some subsequent cases show that officers may be appointed without deed, but not that they may be appointed without writing. Every instrument under seal was designated as a deed, and all writings not under seal were considered as acts by parol. Consequently, when the old books say a thing may be done without deed or by parol, nothing more is intended than that it may be done without a sealed instrument. It may still require to be in writing. In 2 Bac. Abr., 13, it is said, "aggregate corporations, consisting of a constant succession of various persons, can regularly do no act without writing; therefore, gifts by and to them must be by deed." In page 340 it is said, "if a corporation aggregate disseize to the use of another, they are disseizors in their natural capacity," "as a corporation they can regularly do no act without writing." * * *

See note at the end of the next case; 1903, Nashua Sav. Bk. v. Anglo-Am. L. Co., 189 U. S. 221.

Sec. 238. Execution of contracts.

ZOLLER v. IDE.

1871. IN THE SUPREME COURT OF NEBRASKA. 1 Neb. Rep. 439.

This was a bill in chancery, filed to recover the legal title to lands. Zoller sought to make his title through a corporation called "The Sulphur Springs Land Company," by a deed which ran, "I, Thomas H. Benton, Jr., President of the Sulphur Springs Land Company, do hereby convey," etc., and was signed by Benton in the same way.

The court, by Lockwood, J., held that this conveyance did not pass the title of the company, and, therefore, Zoller did not show title in himself.

Note. See, as to use of seal, *infra*, pp. 1136–1153.

1. Corporate meetings, both those of shareholders and directors, being deliberative assemblies are conducted in such ways as may be convenient and agreeable to the members, though, perhaps, in the absence of any specific charter or by-law regulations, or custom to the contrary, they are supposed to follow ordinary parliamentary usage: 1829, Phillips v. Wickham, 1 Paige Ch. (N. Y.) 590; 1834, People v. Peck, 11 Wend. (N. Y.) 604; 1849, Hughes v. Parker, 20 N. H. 58; 1851, Downing v. Potts, 23 N. J. L. 66; 1852, People v. Campbell, 2 Cal. 135; 1875, State v. Pettineli, 10 Nev. 141; 1879, *In re* Horbury, etc., Co., L. R. 11 Ch. Div. 109; 1889, Landers v. Frank St. M. E. Church, 114 N. Y. 626; 1890, Henderson v. Bank of Australasia, 62 L. T. Rep. 869.

2. It is not necessary to the validity of corporate action that the proceedings be recorded: 1848, Waters v. Gilbert, 56 Mass. (2 Cush.) 27; 1859, Langsdale v. Bonton, 12 Ind. 467; 1891, Handley v. Stutz, 139 U. S. 417; 1892, New Boston Fire Ins. Co. v. Saunders, 67 N. H. 249; 1896, Boggs v. Lakeport, etc., Assoc., 111 Cal. 354; 1897, Zalesky v. Iowa, etc., Co., 102 Iowa 512, 70 N. W. Rep. 187.

3. If corporate records are kept, they are the best evidence of the corporate action, and other evidence is not admissible until it is shown the records can not be obtained: 1817, Hallowell, etc., Bank v. Hamlin, 14 Mass. 178; 1820, Owings v. Speed, 5 Wheat. (U. S.) 420; 1830, Thayer v. Middlesex Co., 27 Mass. (10 Pick.) 326; 1852, Gould v. Norfolk, etc., Co., 63 Mass. (9 Cush.) 338; 1888, Dial v. Valley, etc., Assoc., 29 S. C. 560; 1891, Mullanphy Sav. Bank v. Schoot, 135 Ill. 655; 1891, Bowick v. Miller, 21 Ore. 25; 1895, Mandel v. Swan, etc., Co., 154 Ill. 177. But compare, 1845, Van Hook v. Somerville, etc., Co., 5 N. J. Eq. 137, 169; 1897, Johnson v. Okerstrom, 70 Minn. 303, on 308.

4. All corporate contracts and conveyances should be made in the legal name of the corporation, and be executed by it in its own name, and not in the name of the person representing it. It is usual, though not necessary, for the instrument itself somewhere to recite that the person who actually represents the corporation has been duly authorized to execute the instrument for and in the name of the corporation.

Illustrations. (*a*) Deed: The following would be proper: Know all men by these presents, that the A. B. Co., a corporation duly organized and existing under and by authority of the laws of ——, in consideration of —— dollars to it paid, etc., does hereby grant, etc., unto the X. Y. Co., a corporation duly organized and existing under and by authority of the laws of ——, its successors and assigns forever, the following, etc., etc.

And the said A. B. Co., for itself and its successors, does hereby covenant, etc., etc.

In witness whereof, the said A. B. Co. has hereunto caused its corporate name to be signed, and its corporate seal to be affixed, and the same to be at-

tested by the signatures of C. D., its president, and E. F., its secretary, being thereunto duly authorized, on this—— day of ———.

[CORPORATE SEAL.] A. B. Co.,
Signed, sealed and acknowledged in our presence: By C. D., its president, and E. F., its secretary.
Witness:
——— ———.
——— ———.

In Norris v. Dains, 52 O. S. 215 (1894), an instrument worded and executed as follows was held not to be the act of the company: *Know all men by these presents*, That I, G. F. Baker, treasurer of the S. I. & C. M. Co., by virtue of the power in me vested by virtue of the vote of directors of said company (a copy of which is hereto annexed), and in consideration of —— dollars, etc., to me paid by, etc., do hereby sell, etc., to G. W. Norris, etc. *In witness whereof*, I, the said G. F. Baker, treasurer as aforesaid, in behalf of said company, have hereunto set my hand and the seal of said company this eighth day of, etc.

G. F. BAKER, Treas. of S. I. & C. M. Co.
In presence of { J. F. Augustus, J. Nickerson. } { Seal. S. I. & C. M. Co., Organized 1864. }

(Copy of vote of directors, authorizing lease to be made to Norris, and authorizing the treasurer to execute the same.)

Commw. of Mass., Suffolk Co., ss., Nov., 1864.

"Then personally appeared G. F. Baker, who executed the foregoing instrument, and acknowledged the same to be his free act and deed and the free act and deed of said company before me.

J. NICKERSON, *Justice of the Peace.*

Some of the older cases, however, hold that a conveyance by an authorized officer, sealed with the corporate seal, is valid as the act of the corporation. See 1830, Savings Bank v. Davis, 8 Conn. 191 (old cases collected in counsel's brief); 1832, Leggett v. N. J. Mfg. Co., 1 Saxton Ch. (N. J.) 541, 23 Am. Dec. 728, note, 746.

But the more recent cases, as well as many of the early cases, approve the rule above stated. I am indebted to J. H. Brewster, professor of conveyancing in the law department of U. of M. for most of the following: 1614, Combes' Case, 9 Co. Rep. 75, 76*b*; 1824, Hatch v. Barr, 1 Ohio 390; 1827, Coburn v. Ellenwood, 4 N. H. 99; 1847, Isham v. Bennington Iron Co., 19 Vt. 230; 1848, Brinley v. Mann, 2 Cush. (Mass.) 337; 1863, Miller v. Rutland R. Co., 36 Vt. 452; 1872, Merrill v. Montgomery, 25 Mich. 73; 1873, Northwestern Distilling Co. v. Brant, 69 Ill. 658, 18 Am. Rep 631; 1876, Hays v. Galion G. L. & C. Co., 29 Ohio St. 330, on 334; 1880, C., B. & Q. R. Co. v. Lewis, 53 Iowa 101; 1882, Merchants v. Goddin, 76 Va. 503; 1883 Eppright v. Nickerson, 78 Mo. 482; 1887, Galloway v. Hamilton, 68 Wis., 651; 1889, Alta Silver M. Co. v. Mining Co., 78 Cal. 629; 1890, McElroy v. Nucleus Assoc., 131 Pa. St. 393; 1891, Danville Seminary v. Mott, 136 Ill. 289; 1893, Brown v. Farmer's Supply Co., 23 Ore. 541, 32 Pac. Rep. 548; 1894, Norris v. Dains, 52 Ohio St. 215; 1894, Gray v. Waldron, 101 Mich. 612; 1895, Garrett v. Belmont Land Co., 94 Tenn. 459 (collecting cases as to seal); 1897, Globe Accident I. Co. v. Reid, 19 Ind. App. 203; 1897, Jones v. Williams, 139 Mo. 1, 61 Am. St. Rep. 436; 1898, Lewis v. Pulitzer Pub. Co., 77 Mo. App. 434; 1899, Little Saw Mill V. T. & Co. v. Fed. St. R. Co., 193 Pa. 144, 45 Atl. Rep. 66; 1900, New Memphis Gaslight Co. Cases, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

As to seal, see powers of corporation to have a seal, *infra*, pp. 1136–1153.

(*b*) **Acknowledgment:** The American Bar Association (5 Report, 1882, p. 304) recommends the adoption and use of the following form for the acknowledgment by a corporation. According to the last edition of Jones' Forms of Conveyancing, p. 9, this form has been authorized by Iowa, Code 1897, §§ 2959–60; Massachusetts, Acts 1894, ch. 253; Michigan, Public Acts 1895, p. 346; Minnesota, 2 G. S. 1894, ch. 72; Missouri, R. S. 1889, § 2408; New Mexico, Comp. Laws 1897, § 3945. It undoubtedly would be sufficient in many other states, though perhaps not in all; and in any event, if there is any stat-

ute of the state upon the subject it should be consulted and carefully followed. The form suggested is:

"State of ———, county of ———, ss:

On this —— day of ———, 19—, before me, the subscriber [*insert here the title of the officer*], appeared C. D., to me personally known, who, being by me duly sworn (*or affirmed*), did say that he is the president [*or other officer or agent of the corporation or association*] of [*describing the corporation or association*], and that the seal affixed to said instrument is the corporate seal of said corporation [*or association*], and that said instrument was signed and sealed in behalf of said corporation [*or association*] by authority of its board of directors [*or trustees*], and said C. D. acknowledged said instrument to be the free act and deed of said corporation [*or association*].

[*In case the corporation or association has no corporate seal omit the words "the seal affixed to said instrument is the corporate seal of said corporation (or association) and that" and add at the end of the affidavit clause the words "and that said corporation (or association) has no corporate seal."*]

[*"In all cases add the signature and title of the officer taking the acknowledgment."*]

See the following: 1872, Merrill v. Montgomery, 25 Mich. 73; 1877, Kelly v. Calhoun, 95 U. S. 710; 1880, C. B. & Q. R. Co. v. Lewis, 53 Iowa 101; 1883, Eppright v. Nickerson, 78 Mo. 482; 1894, Gray v. Waldron, 101 Mich. 612; 1894, Jinwright v. Nelson, 105 Ala. 399.

(*c*) Notes, etc. The ordinary form of a note would be:

"One year after date, for value received, The A. B. Co. promises to pay to the X. Y. Co. or order, the sum of ——— dollars, at ———, with interest, etc.

"The A. B. Co., by C. D., its president (or officer duly authorized)."

This would be properly indorsed as follows:

"Pay to the order of John Doe.

"The X.Y. Co., by E. F., its president (or other officer authorized)."

It is not necessary to attach the corporate seal 1868, Jones v. Horner, 60 Pa. St. 214, and some of the earlier cases held that affixing the seal to what would otherwise be a negotiable instrument would make it non-negotiable: 1810, Warren v. Lynch, 5 Johns. (N. Y.) 239; 1836, Clark v. Farmer's Woolen Mfg. Co., 15 Wend. (N. Y.) 256; 1840, Frevall v. Fitch, 5 Whart. (Pa.) 325, 34 Am. Dec. 558; 1866, Conine v. Junction, etc., R. Co., 3 Houst. (Del.) 288, 89 Am. Dec. 230; 1881, Coe v. The Cayuga L. R. Co. (C.C. N. D.), 8 Fed. Rep. 534.

But the recent cases all hold otherwise: 1873, Bank v. Railroad Co., 5 S. C. 156; 1875, Jackson v. Meyers, 43 Md. 452; 1889, Miller v. Roach, 150 Mass. 140; 1891, Stevens v. Ball Club, 142 Pa. St. 52; 1894, Weeks v. Esler, 143 N. Y. 374; 1896, Chase National Bank v. Faurot, 149 N. Y. 532; 1897, Landauer v. Sioux, etc., Co., 10 S. D. 205, 72 N. W. Rep. 467; 1898, Clark v. Read, 12 App. D. C. 343.

Judge Thompson, however, thinks it is useful to affix the corporate seal, as showing it is the note of the corporation, and not that of the officer signing for the corporation, and also furnishing *prima facie* evidence of agent's authority, and of everything else necessary to the validity of the act: IV. Thompson, §§ 5054, 5105, 5123 n. 1, p. 3839; 1840, Burrill v. Nahant Bank, 2 Met. (Mass.) 163, 35 Am. Dec. 395; 1867, Gashwiler v. Willis, 33 Cal. 11, 11 Am. Dec. 607, note collecting cases, p. 616; 1889, Miller v. Roach, 150 Mass. 140. See, *infra*, pp. 1147–1153.

There is much conflict as to the effect of making and signing promissory notes in a way different from that suggested above: e. g. Where a note read "*We promise to pay*, etc.," signed "*Dubuque Matress Co., John Kapp, Pt.*"—it was held to be the note of Kapp as well as of the corporation, and parol evidence was not admitted to show it to be only the note of the corporation. 1893, Mathews v. Dubuque Matress Co., 87 Iowa 246, 54 N. W. Rep. 225. On the other hand, 1889, Liebscher v. Kraus, 74 Wis. 387, where the note read "*We promise to pay, etc.,*" signed "*San Pedro Mining and Milling Co., F. Kraus, President,*" it was held to be the note of the corporation alone, and

parol evidence was inadmissible to show Kraus was a joint maker. Again when the note read "*We promise to pay, etc.*," and was signed "*National Forge and Iron Co., Mark Swarts, President*," it was held to be ambiguous, as to whether it was the note of Swarts alone, or the company alone, or a joint-note, and parol evidence was admitted to clear up the ambiguity. 1894, Swarts v. Cohen, 11 Ind. App. 20. In neither of the foregoing was the corporate seal affixed. In Miller v. Roach, 150 Mass. 140 (1889), the note read, "We promise to pay, etc.," and in the usual place of the signature the corporate seal, giving the name of the corporation, was stamped, and "John Roach, Treasurer," was written partly across the seal. This was held to be the note of the company; see, also, City of Fond du Lac v. Otto, 113 Wis. 39, 90 Am. St. R. 830.

Judge Thompson, Vol. iv, §§ 5121–54, and Daniell's Negotiable Instruments, §§ 401–415, review many cases. The form of making and executing corporate notes is discussed in the following cases: 1823, Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; 1839, Horah v. Long, 4 Dev. & B. (N. C.) 274, 34 Am. Dec. 378; 1855, Pierce v. Robie, 39 Maine 205, 63 Am. Dec. 614; 1880, Pack v. White, 78 Ky. 243; 1889, McKensey v. Edwards, 88 Ky. 272, 21 Am. St. Rep. 339; 1889, Liebscher v. Kraus, 74 Wis. 387, 17 Am. St. Rep. 171; 1889, McCandless v. Belle Plaine, etc., Co., 78 Iowa 161, 16 Am. St. Rep. 429; 1894, Swarts v. Cohen, 11 Ind. App. 20, collecting cases; 1896, Hately v. Pike, 162 Ill. 241, 53 Am. St. Rep. 304; 1896, Nebraska Nat'l Bank v. Ferguson, 49 Neb. 109, 59 Am. St. Rep. 522; 1897, Albany Furniture Co. v. Merchants' Nat'l Bank, 17 Ind. App. 531; 1897, Taylor v. Reger, 18 Ind. App. 466; 1898, National Bank v. Allen, 90 Fed. Rep. 545, 33 C. C. A. 169; 1898, Clark v. Read, 12 App. D. C. 343; 1899, Youngs v. Perry, 42 App. Div. (N. Y.) 247; 1900, Crawford v. Albany Ice Co., 36 Ore. 535, 60 Pac. Rep. 14.

TITLE VII. CORPORATE DEATH—DISSOLUTION.

CHAPTER 11.

MODES AND EFFECT OF DISSOLUTION.

ARTICLE I. METHODS OF DISSOLUTION.

Sec. 239. In general.

THE BOSTON GLASS MANUFACTORY v. LANGDON.[1]

1834. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.
24 Pick. (Mass.) 49–54, 35 Am. Dec. 292.

[Assumpsit by Glass company upon a note given by defendant to plaintiff. Plea in abatement that there was at time of suit no such corporation—the facts showing an incorporation and organization in 1811, an assignment of all the corporate property in 1817 to trustees to pay creditors, and an omission to hold annual meetings, choose directors or transact business since that time. The jury were instructed that the corporate life continued, and they found for the plaintiff. The instructions and verdict upon them are assigned as errors.]

MORTON, J. * * * The legal establishment and due organization of the corporation were admitted; but it was contended that the facts disclosed showed a dissolution of it.

The elementary treatises on corporations describe four methods in which they may be dissolved. *It is said that private corporations may lose their legal existence by the act of the legislature; by the death of all the members; by a forfeiture of their franchises; and by a surrender of their charters.* 2 Kyd Corp. 447; 1 Bl. Comm. 485; 2 Kent's Comm. (1st ed.) 245; Angell and Ames Corp., 501; Oakes v. Hill, 14 Pick. 442. No other mode of dissolution is anywhere mentioned or alluded to.

1. In England, where the parliament is said to be omnipotent, and where in fact there is no constitutional restraint upon their action, but their own discretion and sense of right, corporations are supposed to hold their franchises at the will of the legislature. But if they pos-

[1] Statement abridged; arguments and part of opinion omitted.

sess the power to annul charters, it certainly has been rarely exercised by them. In this country, where the legislative power is carefully defined by explicit fundamental laws, by which it must be governed and beyond which it can not go, it has become a question of some difficulty to determine the precise extent of their authority in relation to the revocation of charters granted by them. But as it is not pretended that there has been any legislative repeal of the plaintiff's charter, it will not be useful further to discuss this branch of the subject.

2. As all the original stockholders are not deceased, the corporation can not be dissolved for the want of members to sustain and exercise the corporate powers. Besides, *this mode of dissolution can not apply to pecuniary or business corporations. The shares, being property, pass by assignment, bequest or descent, and must ever remain the property of some persons, who of necessity must be members of the corporation as long as it may exist.*

3. *Although a corporation may forfeit its charter by an abuse or misuser of its powers and franchises, yet this can only take effect upon a judgment of a competent tribunal.* 2 Kent's Comm. (1st ed.) 249; Corporation of Colchester v. Seaber, 3 Burr. 1866; Smith's Case, 4 Mod. 53. Whatever neglect of duty or abuse of power the corporation may have been guilty of, it is perfectly clear that they have not lost their charter by forfeiture. Until a judicial decree to this effect be passed, they will continue their corporate existence. The King v. Amery, 2 T. R. 515.

4. Charters are in many respects compacts between the government and the corporators. And as the former can not deprive the latter of their franchises in violation of the compact, so the latter can not put an end to the compact without the consent of the former. It is equally obligatory on both parties. *The surrender of a charter can only be made by some formal solemn act of the corporation; and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve that there was to form the compact. It is the acceptance which gives efficacy to the surrender.* The dissolution of a corporation, it is said, extinguishes all its debts. The power of dissolving itself by its own act would be a dangerous power, and one which can not be supposed to exist.

But there is nothing in this case which shows an intention of the corporators to surrender or forfeit their charter, nor anything which can be construed into a surrender or forfeiture.

The possession of property is not essential to the existence of a corporation. 2 Kent's Comm. (1st ed.) 249. Its insolvency can not, therefore, extinguish its legal existence. Nor can the assignment of all its property to pay its debts, or for any other purpose, have that effect. The instrument of assignment was not so intended, and can not be so construed. All its provisions look to the continuance of the corporation. It contains covenants that the assignees may use the corporate name for the collection of the debts and the disposition of the property assigned; that the corporation will not hinder or ob-

struct them in the performance of these functions; that it will make any further conveyances and assurances which may become necessary, and will do and perform any other and further acts which may be required to enable the assignees fully to execute their trust. The instrument which covenants for future acts can not be construed to take away all power of action.

The omission to choose directors clearly does not show a dissolution of the corporation. *Although the proper officers may be necessary to enable the body to act, yet they are not essential to its vitality.* Even the want of officers and the want of power to elect them, would not be fatal to its existence. It has a potentiality which might, by proper authority, be called into action without affecting the identity of the corporate body. Colchester v. Seaber, 3 Burr. 1870.

But here in fact was no lack of officers. Although no directors had been chosen for several years, yet by the by-laws of the corporation the directors, though chosen for one year, were to continue in office till others were chosen in their stead. * * *

Affirmed.

Note. **Modes of dissolution.** In Swan Land, etc., Co. v. Frank, 148 U. S. 603, 611 (1893), Mr. Justice Jackson states the following methods of dissolution: (1) By expiration of charter; (2) by failure of an essential part that can not be restored; (3) by dissolution and surrender of franchise with consent of the state; (4) by legislative enactment within constitutional authority; (5) by forfeiture of franchises and judgment of dissolution declared in regular judicial proceedings, or by other lawful means.

In 9 Am. & Eng. Ency. of Law, p. 546, 2d ed., it is said: "A corporation may be dissolved: (1) By the repeal of its charter; (2) by the happening of a condition or contingency prescribed by the charter; (3) by the natural death of all its members or the loss of an integral part; (4) by the surrender of its franchises; (5) by expiration of the period of its existence as limited in its charter; (6) by judgment of forfeiture in a judicial proceeding.

Elliott Private Corporations, § 592, says dissolution may be effected (1) by the expiration of the statutory period of its existence; (2) an act of the legislature under a reserved power to repeal; (3) the surrender of the charter with the consent of the state; (4) the forfeiture of the charter for misuse or non-use of its powers; (5) the loss of an integral part without whose existence the functions of the corporation can not be exercised, and (6) compliance with whatever statutory requirements may exist in order to effect a voluntary dissolution.

Sec. 240. Expiration of charter.

BRADLEY v. REPPELL.[1]

1896. IN THE SUPREME COURT OF MISSOURI. 133 Mo. Rep. 545-561, 54 Am. St. Rep. 685.

[Ejectment by Bradley to recover land claimed by Reppell by adverse possession. Plaintiff offered in evidence to show title a certified copy of a deed to the land executed by the West Kansas City Land

[1] Statement much abridged, arguments and much of the opinion omitted.

Company, by its president and secretary, August 20, 1880. This company was incorporated by special act of March 14, 1859, without any special provision as to its duration. The general law at the time provided that every corporation should have succession for the period limited in its charter, and when no period is limited, for twenty years, with power in the president and directors to settle up its affairs afterward. A demurrer to the plaintiff's evidence contained in the deed was sustained by the court on the ground that corporate life had ceased at the time of its execution, and there was a verdict for the defendant. Sustaining the demurrer is the error assigned. To the defendant's contention that the corporate life had ceased before the deed was executed, the plaintiff answered that a *de facto* corporation existed, and its acts could be questioned only by the state.]

BRACE, P. J. * * * This answer does not meet the question, unless it be assumed that a corporation whose corporate existence has expired by the terms of the law which created it still exists as a *de facto* corporation as to all persons except the state, an assumption that we think is not sustained by the authorities cited, and is not "the settled law in this state."

On the contrary, in this state, as elsewhere, unless otherwise provided by statute, the law is, that where the term of the existence of a corporation is fixed by its charter or the general law, upon the expiration of that term the corporation becomes *ipso facto* dissolved; it can no longer act in a corporate capacity and its title to property ceases. 2 Beach Priv. Corp., § 780; 2 Morawetz Priv. Corp., § 1031. In such an event in this state the title to its property is by statute devolved upon trustees for the settlement of its affairs and the distribution of its assets. R. S. 1855, ch. 34, § 24; R. S. 1889, § 2513. And thereafter it has no power to make a legal contract or convey property in its corporate name and capacity; it ceases to be a corporation *de jure et de facto*, for the reason that there is no law in force authorizing its existence, and no law by virtue of which it *might exist*, and no person, unless estopped by his own action, ought to be, or can be, precluded from showing this fact, apparent on the face of the law itself, without the necessity of any judicial investigation, in an issue involving his own personal rights and interests.

An examination of the authorities cited by counsel for respondents, and of all the other cases touching this question, will show that it has never been otherwise ruled in this state, nor elsewhere so far as we have been able to discover.

The first case cited by counsel for respondent, McIndoe v. St. Louis, 10 Mo. 576, does not touch the question, side, edge, or bottom. The cases of Chambers v. St. Louis, 29 Mo. 543; Land v. Coffman, 50 Mo. 243; Shewalter v. Pirner, 55 Mo. 218, and Conn. Mutual Ins. Co. v. Smith, 117 Mo. 261, go no farther in the direction of our present inquiry than to hold that where *an existing corporation* has power to acquire, hold and dispose of land, the question whether such corporation has transcended the limits of such power in respect thereto can only be raised and determined in a direct proceeding by the state

against the corporation. But this falls far short of the question here which goes to the fact of the *existence* of the corporation, conceded in these cases.

It is also well-settled law that one who has contracted with an organization as a corporation in its corporate name is estopped from denying the existence of such corporation at the time of making the contract or of alleging any defect in its organization affecting its capacity to contract or sue as a corporation upon such contract. 4 Thomp. Corp., § 5275; 4 Am. & Eng. Ency. of Law, p. 198, and cases cited, note 1, p. 199; 2 Morawetz Priv. Corp., §§ 750, 753; 1 Beach Priv. Corp., § 13.

And so it has been ruled in this state in many cases, including those next cited in the brief of counsel for respondent. Railroad v. McPherson, 35 Mo. 13; Ins. Co. v. Needles, 52 Mo. 18; St. Louis v. Shields, 62 Mo. 247; Stoutimore v. Clark, 70 Mo. 471; Studebaker Bros. v. Montgomery, 74 Mo. 101; St. Louis Gaslight Co. v. St. Louis, 84 Mo. 202, affirming 11 Mo. App. 55; Broadwell v. Merritt, 87 Mo. 95; Granby Mining Co. v. Richards, 95 Mo. 106.

Of course, such estoppel extends as well to the *privies* of as to the parties *to* such contracts. Hasenritter v. Kirchhoffer, 79 Mo. 239; Ragan v. McElroy, 98 Mo. 349; Broadwell v. Merritt, 87 Mo. 95; Reinhard v. Lead Mining Co., 107 Mo. 616.

The ruling in none of these cases, however, supports the contention that the deeds should have been admitted in evidence in the case in hand, in which, as has been already seen, there is no question of estoppel.

Nor do the cases of Finch v. Ullman, 105 Mo. 255, or Crenshaw v. Ullman, 113 Mo. 633, cited by plaintiff's counsel, in which it was ruled (where there was a law authorizing the existence of the corporation, at the time when the organization assumed to act and did act as such corporation) that its corporate existence as to such act could not be called in question in a collateral proceeding, sustain respondent's contention.

It is true in these and in other cases it is sometimes broadly stated as settled law, in substance, "that a transfer of property to or by a corporation *de facto* will be binding and valid as against all parties except the state," but this is simply a restatement in another form of the proposition ruled. It implies that the case is one in which a corporation may by law exist, for there can be no corporation *de facto* when there can not be a corporation *de jure* (1 Beach Priv. Corp., § 13; 4 Thomp. Corp., § 5275; 1 Thomp. Corp., § 523); at least as to any person who is not precluded by his own action, or that of those under whom he claims, from questioning its existence. Whatever may be the rule as to these, as to all other persons there must be at least color of law for its corporate existence to preclude such inquiry. and it would seem to go without saying that a law which gives existence to a corporation for a certain number of years, at the end of which time it must surely die, can not give color to its corporate ex-

istence after the date of its death as decreed by the terms of that same law.

Judge Thompson, in his recent work on Private Corporations, says: "There is much judicial authority for the proposition that where a corporation is brought to an end by lapse of time, that is, by the *expiration* of the distinct *limitation* of its life in its charter, any further exercise of its corporate powers may be questioned collaterally. The governing principle here is that, upon the expiration of the term limited by the charter for the existence of the corporation, its dissolution is complete. 'The dissolution in such a case,' it has been said, 'is declared by the act of legislature itself. The limited time of existence has expired, and no judicial determination of that fact is requisite. The corporation is *de facto* dead'." Thomp. Corp., § 530, citing, in support of the text, People v. Manhattan Co., 9 Wend. (N. Y.) 351; Morgan v. Ins. Co., 3 Ind. 285; Wilson v. Tesson, 12 Ind. 285; Grand Rapids Bridge Co. v. Prange, 35 Mich. 400; Dobson v. Simonton, 86 N. C. 492; Sturges v. Vanderbilt, 73 N. Y. 384; Bank of U. S. v. McLaughlin's Adm'r, 2 Cranch C. C. (U. S.) 20.

(Citing and discussing St. Louis Gaslight Co. v. St. Louis, 84 Mo. 202, and Miller v. Coal Co., 31 W. Va. 836, *contra*, and concluding the statements therein were *dicta*.) * * *

Affirmed, and this opinion adopted by the court in banc, four judges concurring, and two dissenting.

Note. Compare 1888, Miller v. Newberg Coal Co., 31 W. Va. 836, 13 Am. St. Rep. 903.

Note: See, also, 1832, Chesapeake, etc., Co. v. Balt. & O. R. Co., 4 Gill & J. (Md.) 1, on 123; 1841, Commercial Bank v. Lockwood, 2 Harr. (Del.) 8; 1844, State Bank v. Wrenn, 3 Sm. & M. (Miss.) 791; 1845, Greeley v. Smith, 3 Story 567, 658; 1846, Gallipolis Bank v. Trimble, 6 B. Mon. (Ky.) 599, 601; 1870, LaGrange, etc., R. Co. v. Rainey, 47 Tenn. (7 Cold.) 420; 1878, Sturges v. Vanderbilt, 73 N. Y. 384, 390; 1880, Eagle Chair Co. v. Kelsey, 23 Kan. 632; 1885, Asheville Div. No. 15 v. Astor, 92 N. C. 578, 585; 1888, People v. Anderson, etc., Co., 76 Cal. 190; 1891, Logan v. Western, etc., R. Co., 87 Ga. 533.

Sec. 241. Happening of a condition or contingency prescribed by the charter.

BROOKLYN STEAM TRANSIT CO. v. CITY OF BROOKLYN.[1]

1879. In the Court of Appeals of New York. 78 N. Y. Rep. 524–535.

[Suit by the transit company to restrain the city from interfering with it in constructing its road in the city streets. The charter of 1871 provided that "unless said transit company be organized, and at least one mile of such railroad * * * be laid within three years" after the pas-

[1] Statement much abridged; arguments and much of opinion on other points omitted.

sage of the act, "all the powers, rights and franchises herein granted shall be deemed forfeited and terminated." A supplementary act in 1873 provided for the construction "as provided in the original act," and enacted "the time for the construction of the one mile of railroad * * * is hereby extended to the fourth day of July, 1876. No road was constructed till June, 1878, when a mile was laid upon the surface of a portion of its route outside of Brooklyn, and about the same time operations were begun in the city, when it was prevented from proceeding further by the city. Judgment below for defendant.]

EARL, J. * * * The claim of the defendant is that the plaintiff lost its corporate existence by not building the one mile of its road before the expiration of the time limited, to wit, July 4, 1876.

The general principle is not disputed that a corporation, by omitting to perform a duty imposed by its charter, or to comply with its provisions, does not *ipso facto* lose its corporate character or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the court in an action instituted for that purpose by the attorney-general in behalf of the people; but it can not be denied that the legislature has the power to provide that a corporation may lose its corporate existence without the intervention of the courts by any omission of duty or violation of its charter or default as to limitations imposed, and whether the legislature has intended so to provide in any case depends upon the construction of the language used. Here the language used shows that the legislature intended to make the continued existence of the plaintiff as a corporation depend upon its compliance with the requirements of section seventeen of the original act. In case of non-compliance the act itself was to cease to have any operation, and all the powers, rights and franchises thereby granted were to be "deemed forfeited and terminated." There was to be not merely a cause of forfeiture which could be enforced in an action instituted by the attorney-general, but the powers, rights and franchises were to be taken and treated as forfeited and terminated.

At the end of time limited the corporation was to come to an end, as if that were the time limited in its charter for its corporate existence. A precise authority for this construction of this statute is found in the case of the Brooklyn, Winfield and Newton Railroad Company (72 N. Y. 245). That company was organized under the general railroad act of 1850, as amended by the act, chapter 775 of the law of 1867. By the last-named act it is provided that "if any corporation formed under the general act shall not, within five years after its articles of association are filed and recorded, begin the construction of its road and expend thereon ten per cent. on the amount of its capital, or shall not finish its road and put it in operation in ten years from the time of filing its articles of association, as aforesaid, its corporate existence and powers shall cease." That company had not begun the construction of its road within the time limited, and it was held that it had lost its corporate existence, and the same view was emphatically reiterated when a similar case of the same company

was again before this court (75 N. Y. 335). It was held that the statute executed itself, and that the intervention of the courts in an action instituted by the attorney-general was not necessary. The language of limitation used in section seventeen of the act of 1871, more plainly if possible indicates the legislative intention, that a failure to comply with the limitations should put an absolute end to the corporation, than the language used in the act 1867.

Judgment for defendant affirmed. * * *

Note. See, 1839, Crease v. Babcock, 23 Pick. (Mass.) 335, 34 Am. Dec. 61; 1857, Mobile, etc., R. v. State, 29 Ala. 573; 1869, N. Y., etc., R. Co. v. Boston, etc., R. Co., 36 Conn. 196; 1873, Oakland R. Co. v. Oakland, 45 Cal. 365; 1885, Commw. v. Lykens W. Co., 110 Pa. St. 391; 1888, Atchison, etc., R. Co. v. Nave, 38 Kan. 744, 5 Am. St. Rep. 800; 1889, Elizabethtown Gas L. Co. v. Green, 46 N. J. Eq. 118; 1892, Houston v. Houston Belt R. Co., 84 Tex. 581, 590; 1892, Ford v. Kansas City, etc., R. Co., 52 Mo. App. 439; 1894, Belleville v. City, etc., R. Co., 152 Ill. 171, 26 L. R. A. 681.

And compare, 1872, Flint and Fentonville P. R. Co. v. Woodhull, 25 Mich. 99, *supra*, p. 398; 1877, Wallamet, etc., Co. v. Kittridge, 5 Saw. 44; 1896, N. Y. L. I. & B. Co. v. Smith, 148 N. Y. 540; 1897, State v. Spartanburg, etc., R. Co., 51 S. C. 129, 28 S. E. Rep. 145.

Sec. 242. Death of members.

McGINTY v. ATHOL RESERVOIR COMPANY.[1]

1892. In the Supreme Judicial Court of Massachusetts. 155 Mass. Rep. 183–188.

[Action by McGinty for damages for personal injury done him while in employ of the defendant. Suit was brought originally against certain individuals who pleaded in abatement that the injury was done, if at all, by the reservoir company, a corporation of which they were members. Plaintiff then amended his writ and substituted the reservoir company as defendant, alleging it to be a corporation. This the reservoir company denies. It appears that three persons named and their associates, by an act of 1854, were "made a corporation by the name of the Athol Reservoir Co.," the capital stock not to exceed $10,000, to be issued only at a par value per share to be fixed. One of the persons named, without objection from the others, and seven persons not named, met and accepted the act of incorporation, organized and commenced business under it. Whether or not there was a corporation was left to the jury who found for the plaintiff, and defendant accepted.]

Morton, J. * * * It is clear that the persons who took part in these proceedings became a corporation under the name of the Athol Reservoir Company. Chester Glass Co. v. Dewey, 16 Mass. 94; Walworth v. Brackett, 98 Mass. 98; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385, 393; Minor v. Mechanics' Bank, 1 Pet.

[1] Statement abridged, and only part of opinion given.

46; Frost v. Frostburg Coal Co., 24 How. 278. It is true that none of the capital stock has been issued. Something in the nature of capital or joint stock has been paid in, and has been expended by the company in the construction of its dams; but neither the paying in nor the issuing of it was a condition precedent to the existence of the corporation. See cases *supra*. Nothing in the act of incorporation, nor in chapters 38 and 44 of the Revised Statutes referred to in it, required either to be done as precedent to the formation of the corporation. As soon, therefore, as the act of incorporation was accepted and an organization effected the grant from the state took effect, and the corporation began to exist.

It is contended, however, that all the persons named in the act of incorporation, and who took part in the organization, are dead; that, no stock having been issued, there was no provision for a succession of members; and that therefore the corporation has been dissolved by operation of law. *Undoubtedly a corporation may be dissolved by the death of all its members, or by the loss of an integral part of its organization, so that the exercise of its corporate functions can not be restored.* Penobscot Boom Co. v. Lamson, 16 Maine 224, 231. But it appears that the company has met annually since its organization and elected officers, and has from time to time, as occasion required, held special meetings; that it built and has maintained the dam, which it was chartered especially to build, and has built two others, and had voted to build and was constructing the dam on which the plaintiff was injured; that it has taken in the corporate name a deed of the land on which the dam authorized by the act was built, and also deeds of certain rights of flowage; and that it has transacted other business that was incident to and grew out of the purpose for which it was chartered.

There can be no reasonable doubt that the persons interested have believed that they were acting and have intended to act as a corporation, and they should be held to be one unless there are insuperable difficulties in the way. We do not think there are. The corporation was established for the purpose of constructing and supporting a reservoir to supply the mills on the stream below it. Before the act of incorporation was passed a number of mill-owners on the stream had associated themselves together by an agreement bearing date April 26, 1853, for the purpose of constructing and maintaining a reservoir across it. The agreement provided among other things, "that those who may hereafter have their (the parties) respective estates in the mills, mill-dams and mill privileges, shall succeed to their rights and be subject to their duties respectively in the reservoir;" that the business of the association should be under the control of the association, and that the proprietors of each of the several mill-dams who were parties to said agreement should be entitled to a voice in all the business of the association equal to the proportion of the expenses which such dam was to pay; and that dam-owners who were not parties might become such at any time by paying their reasonable proportion of the expenses. By article 6 of its by-laws the corporation adopted

"as the basis of their association the articles of agreement made and entered into by the members thereof as proprietors of mills, bearing date April 26, 1853." Article 5 of the by-laws provided that the capital stock should consist of $2,500 divided into shares of $25 each, and that the money already advanced for the purpose of the association should go in part payment for the shares. *It is clear that the corporation succeeded to and took the place of the association. The members of the latter became and were members of the former, and the evident intention was that as the members of the corporation died or conveyed their mills, mill-dams, or mill privileges, those who succeeded to their respective estates as heirs or purchasers should become members of the corporation in their stead, and succeed to their respective interests in it.* The uniform practice since the corporation was formed shows that this was and has been the understanding.

Ordinarily, membership in a private trading corporation arises from the ownership of stock which has been issued by it, but it is not always so. In re Philadelphia Savings Institution, 1 Whart. 461. Shares might have been issued in the present case, or could be issued now. Instead of issuing shares, however, the members in substance agreed that their rights in the joint or capital stock of the corporation should pass with the mills, mill-dams and mill privileges, thus confining the membership to persons directly interested in the maintenance of the dams. *In the absence of any restriction in the charter, we think that in the case of a corporation like this there can be no valid objection to a membership so constituted, and therefore that the objection that the corporation has been dissolved by the death of the original members can not be sustained.* Watuppa Reservoir v. Fall River, 134 Mass. 267. * * *

Exceptions sustained upon other points.

Note. See Russell v. M'Lellan, 14 Pick. (Mass.) 63.

Sec. 243. Loss of integral part.

PHILIPS v. WICKHAM ET AL.

1829. IN THE COURT OF CHANCERY OF NEW YORK. 1 Paige (N. Y.) Ch. Rep. 590–601.

[By an act of 1807, drainage commissioners were created, with powers to cease on the first Tuesday in June, 1808, at which time the owners of lands affected were to meet at a designated place, and select other commissioners for one year, and so on annually. In 1828, no election was held, and the old commissioners continued to act. In 1829, new commissioners,—the defendants,—were elected. Their power was denied on the ground that the failure to elect in 1828 terminated their official existence.]

THE CHANCELLOR (Walworth). * * * If a corporation consists of several integral parts, and some of those are gone, and the remaining parts have no power to supply the deficiency, the corpora-

tion is dissolved. As in the case in Rolle (1 Roll. Abr. 514, I.), where the corporation was to be composed of a certain number of brothers, and a certain number of sisters, and all the sisters were dead, it was admitted that all grants and acts done by the brothers afterward were void; for, after the sisters were dead, it was not a perfect corporation. But the case, which is immediately afterwards stated by Rolle, shows that if the brothers had possessed the power to appoint other sisters in the place of those who were dead, the corporation might have been revived. So, Baron Comyn says, if a corporation refuses to continue the election of officers till all die who could make an election, the corporation is dissolved. (4 Com. Dig. 273, tit. *Franchises*, G. 4.

The incapacity to receive or resuscitate the powers of a corporation may arise from three causes: 1. The absence of the necessary officers who are required to be present when the deficiency is supplied, or their incapacity or neglect to do some act which is requisite to the validity of the appointment. 2. The want of the necessary corporators who are required to unite in the appointment; and 3. The want of the proper persons from whom the appointment is to be made. The case of The Corporation of Banbury, before referred to, appears to be one of the first description. And the case cited from Rolle and that put by Chief Baron Comyn, as well as the King v. Passmore (3 Term Rep. 199), and The Corporation of Maidstone and The Borough of Teverton, referred to in that case, all appear to belong to the two last classes of cases. The statute, 11 Geo. 1, ch. 4 (15 Stat. at Large 178), has provided for the first class of cases, but the sixth section of the act expressly excludes the second class, and no provision is made for cases of the third class. The result of an examination of all the cases on this subject is the principle so ably and successfully contended for by Serjeant East in the King v. Passmore, that if the corporators have the power in themselves to supply the deficiency in their body their rights are not extinguished but only dormant. If, however, that power is gone, and they can not act until the deficiency is supplied, the corporation is dissolved. In the language of Lord Macclesfield, this is not a forfeiture for non-user, but is a consequence of law. "The corporation is dead, and not barely asleep." * * *

[The court then concluded that because of the fact that the electors could meet at a fixed time and place without the intervention of the commissioners, there was nothing requiring a continued succession of such commissioners and hence new commissioners could be elected at any annual meeting.]

Note. See 2 Kyd Cor. 448. 1717, Banbury's Case, 10 Mod. 346; 1808, Rex v. Morris, 3 East 213; 1833, Lehigh R. B. Co. v. Lehigh Coal Co., 4 Rawle (Pa.) 9; 1838, State University v. Williams, 9 Gill & J. (Md.) 365, 421, 31 Am. Dec. 72; 1854, State v. Vincennes Univ., 5 Ind. 77; 1875, Harris v. Mississippi V. R. Co., 51 Miss. 602.

Sec. 244. Surrender.

THE MECHANICS' BANK v. HEARD.[1]

1867. In the Supreme Court of Georgia. 37 Ga. Rep. 401–422.

[Suit by Heard against the bank upon bills which it refused to pay. The sheriff's return showed personal service upon "T. S. Metcalf, president of the Mechanics' Bank," September 12, 1866. Metcalf put in a traverse averring that he was not at that time president of the bank, and that it had at a meeting of the stockholders on February 20, 1866, duly called, and by a unanimous vote of the directors, surrendered the charter to the state, and by order of said meeting notice of such surrender was sent to, and received by, the governor of the state, thus dissolving the corporation. The bank asked for a special jury to try this collateral issue, and the court refused, allowing this issue to be tried with others in the case. The jury found for the plaintiff. Among the errors assigned was the refusal of a special jury to try the collateral issue as to the surrender of the corporate existence.]

Harris, J. * * * It can not be denied that all banking corporations in America are the *creatures of legislative will*, and that no power to create such corporations belongs to either of the other departments of the state government. Nor can it be denied that every act of the legislature creating a banking corporation upon its acceptance becomes an executed contract between the state and corporation. This principle, decided in Dartmouth College v. Woodard, 4 Wheaton 518, places plaintiff in error within the protection of the constitution of the United States. Under such protection it follows that the act creating the Mechanics' Bank as a corporation can not be modified or repealed by the legislature of Georgia without the free assent of the corporators, and then only when such alteration or repeal does not affect the rights of its creditors. It may be safely asserted that the legislature, its creator, has no power of *its will* merely to dissolve it. As long as it performs its engagement by the act creating it, it has a corporate existence within the limit of time fixed by the act which can not be shortened.

This brings us to consider the grounds on which corporations (private) could be dissolved at common law.

They are: 1. Death of the corporators. 2. Surrender of charter accepted and enrolled. 3. Forfeiture. Section 3, Burrows Repts. 1866.

But counsel for plaintiff in error have gravely, and with seeming earnestness, asserted a dissolution of a corporation by a voluntary surrender was unknown to the common law, that such a privilege was the creation of our code, and upon this assumption rests the plaintiff's case. Let us see if it can stand the test of examination. It is said of corporations created by letters-patent from the crown, that the

[1] Statement abridged; arguments, part of opinion, and dissenting opinion of Walker, J., omitted.

king could not *ex mero motu* alter or resume his grant. It could be dissolved upon the *free consent* of the corporators *surrendering* their franchises under the seal of the corporation. Grant on Corporations, p. 303. Rex v. Lanier, Salk. 168; 8 Meeson and Welsby, 1.

Here then we find that *surrender* was a mode whereby a corporation might be dissolved. It was *voluntary*, for it proceeded from the *free consent* of the corporators. The franchise could not be resumed *unless the grantees concurred*. Rex v. Lanier, Salk. 168; 8 Meeson and Welsby, 1. Thus we have the definition of *surrender;* its characteristic is that it is *voluntary*, springing *from the free consent* of the corporators. Can more be necessary to satisfy the enquirer that a voluntary surrender was a mode whereby a dissolution of a corporation might be effected according to the common law? To make it complete, such surrender required *the assent or acceptance of the creator* of the corporation, *duly enrolled and of record*. The English authorities cited established these doctrines.

Our code, in enumerating the grounds whereby corporations are dissolved, but repeats those existing at common law. "Surrender" is one of them. In a subsequent clause, voluntary surrender is defined, thus clearly showing that in the minds of the codifiers they were one and the same mode.

An identity is thus shown between "surrender" at common law, and the surrender or voluntary surrender of the code, proceeding alike from the *free will* of the corporators. 'Tis this which distinguishes them from another mode of dissolution by *forfeiture;* this last is the result solely of the *coercion, compulsion by the judgment of a court.* In England *the surrender* was required to be made *to the creator* of the corporation. In Georgia, the code requires it to be made to the state, by which the legislature, as the creator by law of banking corporations, must necessarily be understood. * * *

Counsel have throughout confounded the resolution to make a surrender with an actual dissolution of a corporation. These things are entirely distinct, proceeding from *different* parties. A *surrender is not a dissolution*; it is but a mode, a way, a means to an end. The corporators consent to surrender their franchise, tender it back to the legislature and ask to be dissolved as a corporation. This is their *free* act and proceeds from *one* party to the contract. If the surrender is formal under the seal of the corporation and the legislature, the *other* party to the contract in behalf of the state accepts it by an act or ordinance in some authoritative form, and that is authenticated as law and ordinances usually are, *then, and not till then*, is the dissolution of the corporation upon *surrender* and the evidence of it complete. * * *

Now corporations in Great Britain were created either by virtue of the royal prerogatives or by act of parliament; if by the crown, by letters-patent under its *seal* and duly *enrolled;* if by parliament, by an act of the three estates duly enrolled and with the great seal attached.

In the case of crown grants, when dissolved *upon surrender* by the

grantees, the *acceptance* of the king of such surrender was required to be *enrolled* and of record. 3 Burr. Rep. 1866; 1 Wooddeson's Lectures, 500; 1 Salk. Rep. 191. Parliamentary could only be dissolved by act of parliament. See Grant on Corporations.

The foregoing are familiar principles regulating the creation and dissolution of corporations, and they are in accordance with a maxim pervading the common law in other departments. *Nihil tam conveniens est naturali aequitati quam unum quoque dissolet eo ligamine quo ligatum est.*

Again, "a corporation aggregate may *surrender* and in that way dissolve itself, *but then the surrender must be accepted by government, and be made by some solemn act to render it complete.*" 2 Kent's Com. 209.

An act of the legislature repealing the act of incorporation, passed *with the assent of the corporators*, would undoubtedly be sufficient to effect a dissolution. Revere v. Boston Copper Co., 15 Pick. R. 351.

The surrender must be by a formal act of the corporation under seal; *and it can not avail but by an acceptance of such surrender by an enrolled act or law. There must be the same agreement to dissolve as to make. The power in a corporation to dissolve by its own act is too dangerous to be supposed to exist.* See Boston Glass Co. v. Langdon, 24 Pickering Rep. 49.

In this country, where corporations are usually created by act of the legislature, no mode of *surrender* is pointed out by the books as necessary to be pursued, differing from that in England, where corporations are usually created by charter from the crown. It is said *a surrender*, if *accepted*, will be sufficient. Angell and Ames on Corporations, 638; 2 Kent. Com. 250; 15 Pick. Rep. 351.

As the identity of surrender at common law as a mode of dissolution of a corporation, with the *surrender* defined by the code, can not but be conceded by every lawyer who will take the trouble of investigating the subject, and no mode or form is prescribed by the code as necessary to be pursued in order to make it effectual, there seems to me no escape from the necessity of alleging, and, in support of such allegation, exhibiting, some act or ordinance of the legislature, approved by the governor, assenting to or accepting the *proposed surrender* of their franchise by the Mechanics' Bank.

A dissolution at the will of corporators would leave no evidence of the surrender but the entry of the resolution of the corporators on the minutes of the bank, and when thus dissolved who can say where will be the depository of the minutes?

In fine the proposition of plaintiff in error involves, besides what has been said in reference to it, this striking inequality, that a law containing a contract of the highest importance between the corporation and the state may be set aside and annulled *at the will* of the corporators by a mere resolution, notice of which is given to the governor, whilst the state can not alter or repeal that law, or resume the franchises granted, or compel their delivery up or cause a dissolution

of that corporation, but upon some ground of forfeiture judicially established, and the judgment thereon of a competent court. Such inequality between the rights of contracting parties as flows from the position of plaintiff's counsel demonstrates the absurdity of such position. * * *

Affirmed.

Note. See note to § 246.

Sec. 245. Same.

MERCHANTS' AND PLANTERS' LINE v. WAGANER.[1]

1882. IN THE SUPREME COURT OF ALABAMA. 71 Ala. Rep. 581–589.

[Bill filed in 1882 by Waganer and others, as shareholders in the line corporation asking for a dissolution of the corporation, and to hold the directors thereof personally liable for misconduct and mismanagement. The corporation was organized in November, 1879, and by-laws were adopted, one of which provided, "This corporation shall be dissolved January 1, 1881." These were made part of the bill; to this a demurrer was filed, on the ground that the corporation was dissolved before the suit was brought. The demurrer was overruled in the lower court and this is the error assigned.]

STONE, J. * * * In Ang. & Ames on Corp., § 766, after enumerating several modes by which corporations may be dissolved, the authors say: "To these modes of dissolution may be added one grown to be quite common in this country: the dissolution of a corporation by expiration of the term of its duration, limited by charter or general law." And in section 772 the same authors say: "In this country, the power of a private corporation to dissolve itself by its own assent seems to be assumed by nearly all the judges who touch upon the point." Many authorities are cited in support of this; but the authors add: "It would seem that, as there are two parties to the charter compact, the assent of both would be necessary to the abrogation of the contract." In Treadwell v. Salisbury Manuf. Co., 7 Gray 393, the Supreme Court of Massachusetts held that corporations of a private nature, established solely for manufacturing purposes, may by vote, even of a majority of their members, wind up their business and close their operations, if they elect to do so. It will be observed that this right is placed on the ground that the corporation was purely of a private nature, in which the public could not be supposed to have any interest. Between such corporation and any joint adventure in which parties may associate themselves, there can be little or no difference, so far as the rights of the public are concerned. * * *

We hold that the stockholders of this corporation had the power to dissolve it, without obtaining the consent of the state. This principle was so announced in Savage v. Walshe, 26 Ala. 619. See, also, M. & O. R. Co. v. State, 29 Ala. 573; McLaren v. Pennington, 1 Paige 102; Enfield Toll Bridge Co. v. Conn. Riv. Co., 7 Conn. 45;

[1] Statement much abridged, and only part of the opinion given.

Slee v. Bloom, 19 Johns. 456; Canal Co. v. R. Co., 4 Gill & Johns. 1; McIntyre Poor School v. Zanesville Canal Co., 9 Ohio 203; Mumma v. Potomac Co., 8 Pet. 281.

In the very act of organizing this corporation the stockholders, by a by-law, fixed the term of its duration. Their language was, it shall be dissolved on the first day of January, 1881. A more solemn agreement and compact could not be entered into. We can not know that in the absence of that compact the corporation ever would have been organized, or its duties entered upon. We hold that such stipulation, embodied in the original compact, is at least as obligatory on the stockholders as a resolution afterwards adopted would be. This put an end to the corporation, as a corporation January 1, 1881. * * *

[Considered, however, as a bill to settle accounts of a dissolved corporation and of its successor, a *quasi* joint stock company resulting from a continuance of the business in the same way after dissolution, there was no substantial error in overruling the demurrer. Affirmed.]

Note. See note to § 246.

Sec. 246. Non-user, insolvency and surrender.

SLEE v. BLOOM AND OTHERS.[1]

1821. IN COURT OF CHANCERY. 1822. IN THE COURT OF ERRORS, NEW YORK. 5 Johns. Ch. (N. Y.) Rep. 366–388, 19 Johns. (N. Y.) 456–486, 10 Am. Dec. 273.

[Bill in equity by Slee against Bloom *et al.*, filed in 1819. It showed that Slee had been the owner of a cotton mill in New York, and in order to provide additional funds he, in 1814, induced Bloom and others to unite with him in the formation of a corporation for the purpose of purchasing and operating the mill. The corporation was formed under the New York Act of 1811, with a capital stock of $60,000. After organization Slee proposed to sell the mill for $30,900, which was accepted, and 172 shares of $100 each, full paid, were issued to him in part payment, leaving $13,700 yet due. From time to time calls were made upon the other shares to the extent of 50 per cent. but only a small part was paid. In December, 1815, in order to carry on the business, $10,000 were borrowed, upon the individual note of Slee, due in one year, indorsed as surety by Bloom and the other directors. In order to protect them Slee executed to them a penal bond in the sum of $20,000, with power to confess judgment against him, which they did in June, 1816. In October, 1816, it was determined to discontinue business, and Slee, as superintendent, was directed to wind up the affairs and dispose of the company's property, and upon the report of a committee appointed for that purpose it was found that the company then owed Slee $23,493 (including the note), and for security executed its penal bond, with power

[1] Only parts of opinions of Chancellor Kent and Spencer, Ch. J., are given. Arguments are omitted.

to take judgment against the company for $46,986. In May, 1817, Slee took judgment upon this, with stay till October, 1817. In August, 1817, it was resolved, with the assent of Slee, that all shareholders who paid up the 50 per cent. of subscriptions called for should be exempt from further liability. But few paid, and in November, 1817, against the protest of Slee, it was resolved that those who paid 30 per cent. of their stock should be entirely relieved. Most of the delinquents did this and wholly abandoned the corporation. No shareholders and no directors' meetings were held after May and December, 1817, respectively. Slee being unable to pay the note when due Bloom and others paid it, and in October, 1817, issued execution against Slee, whereby his land to value of $9,000, and his interest in the corporate property, became liable to sale. In order to save himself he took out execution against the company, allowed $4,105 received upon calls to be paid to Bloom and the rest, and procured one E. to become surety for the balance due on the note, by assigning to E. his property and the avails of his execution against the company, whereupon Bloom *et al.* gave up the note and were discharged from liability upon it. The sale of the corporate property under execution February 1, 1818, netted only $460, leaving (after crediting the $4,105 as payment) over $18,000 yet due, which Slee alleged he had no way of obtaining unless the stockholders should be compelled to pay their subscriptions. The statute provided "that for all debts which shall be due and owing by the company *at the time of dissolution*, the persons then composing the company shall be individually responsible to the extent of their respective shares of stock in said company and no further."

Most of the material facts were admitted by Bloom et al., and the chancellor dismissed the bill and appeal was taken. Part of the chancellor's opinion (5 Johns. Ch. 377 *et seq.*) is as follows]:

KENT, C. * * * The first and leading question in the case is whether the corporation is dissolved, so as to enable the plaintiff to call upon the individual members. It will not be disputed that without such a provision in the statute the individuals would not be responsible in their private property, either before or after the dissolution of the company for corporate debts. The facts from which an actual dissolution is inferred are, that the stockholders have not elected trustees since *April*, 1817, and that the trustees have not met as a body since the 31st of *December*, 1817, and that all the corporate property, real and personal, was sold on an execution issued in the name and at the instance of the plaintiff on the 1st of *February*, 1818, and that the members have since abandoned all attention to the institution. * * *

The omission to elect new trustees in 1818 and 1819 did not, of itself, work a dissolution according to the opinion of the supreme court in the case of the People v. Runkle (9 Johns. Rep. 147), and by the authority of the cases there referred to, a corporate election after the year would be good, upon general principles of law, if an integral part of the corporation remained, and the officers already in

would continue to be good officers after the year, and until others were elected. * * *

The members of the corporation, who are the integral part of it, are *in esse*, and I see no difficulty in a future meeting of the last elected trustees, and in a new election of trustees to be ordered and prescribed. * * *

A corporation aggregate may be dissolved within the period prescribed by its charter in certain modes and upon certain events, none of which have occurred in this case. It may be dissolved if it become *incapable* of continuing its corporate succession or executing its corporate functions, as by the death of all its members or the destruction of an integral part of it, or it may be dissolved by surrender of its franchises into the hands of the government, or by forfeiture of its charter through abuse or neglect of its franchises. The last is the alleged ground of forfeiture in this case; but I apprehend that the forfeiture in such case must be judicially ascertained and declared, and that the power, which may have been abused or abandoned, can not be taken away but by regular process. The judgment in such cases is, that the parties be ousted or that the liberty be seized into the hands of the government. (Rex v. Stevenson, Yelv. 190.) This subject underwent great and learned discussion in the case of the King v. Amery, in the K. B. (2 Term Rep. 515), and it was decided by that court as the result of the investigation, that a corporation may be dissolved and its franchises lost by non-user or neglect; but it was assumed as an undeniable proposition that the default was to be judicially determined in a suit instituted for the purpose. * * *

Assuming the charges in the bill in this case to be true, Lord Kenyon points out the proper remedy: It is by the judicial process of *scire facias*; and I believe that there is no instance of calling in question the rights of a corporation as a body, for the purpose of declaring its franchises forfeited and lost, but at the instance and on behalf of the government. * * *

(Citing Rex v. Passmore, 3 T. R. 199; Commw. v. Union Ins. Co., 5 Mass. 230; Atty.-General v. Utica Ins. Co., 2 Johns. Ch. 389.)

I conclude, therefore, that the corporation is still subsisting in judgment of law, and that this court is not authorized from anything that appears in the case to consider the corporation dissolved. It follows, then, that the bill against individual members for a corporate debt can not be sustained. * * *

SPENCER, CH. J. (In Court of Errors, 19 Johns. *473). With the most profound and undissembled respect for the Chancellor, I am constrained to differ from the opinion held by him that this corporation is not dissolved.

The object and intention of the legislature in authorizing the association of individuals for manufacturing purposes was, in effect, to facilitate the formation of partnerships without the risks ordinarily attending them, and to encourage internal manufactures. There is nothing of an exclusive nature in the statute; but the benefits from associating and becoming incorporated, for the purposes held out in the

act, are offered to all who will conform to its requisitions. There are no franchises or privileges which are not common to the whole community. In this respect, incorporations under the statute differ from corporations to whom some exclusive or peculiar privileges are granted. The only advantages of an incorporation under the statute over partnerships, and the only substantial difference between them, consists in a capacity to manage the affairs of the institution by a few and select agents, and by an exoneration from any responsibility beyond the amount of the individual subscriptions.

In coming to the conclusion that the corporation in this case is dissolved, I lay out of the case everything of misuser, or non-user, excepting the influence which the fact of non-user may have as evidence, connected with other facts, to show the renunciation of the corporate rights. Upon the authorities, and for the reasons given by the chancellor, misuser or non-user can not be relied on as a substantive and specific ground of a dissolution. The ground on which I place my opinion, that the corporation is dissolved, is, that they have done, and suffered to be done, acts equivalent to a direct surrender. The chancellor concedes, and it does not, in my judgment, admit of a doubt, that a corporation may be dissolved by a surrender of all their corporate rights.

In 2 Kyd on Corp. 467 the rational and true rule is laid down. He says, "the rule adopted in all the cases which have occurred on this question seems to have been this, that where the effect of the surrender is to destroy the end for which the corporation, or the corporate capacity, was instituted, the corporation, or the corporate capacity, is itself destroyed;" and we have the high authority of Lord Coke to the same effect. He says, if there be a warden of a chapel, and the chapel and all the possessions be aliened, he ceases to be a corporation, because he can not be warden of *nothing;* but if the body of a prebend be a manor and no more, and the manor be recovered from the prebendary, by title paramount, yet his corporate capacity remains, because he has *stallum in choro, et vocem in capitulo*, and he is prebendary, although he has no possessions. Thus, according to Lord Coke, a recovery by title paramount would have produced an extinction of the corporation, had it reached all the rights and powers of the corporation, but inasmuch as there were rights unaffected by the recovery, it did not work a dissolution. Suffering an act to be done which destroys the end and object for which the corporation was instituted, must be regarded as equivalent to the doing an act which produces the very same consequences. A surrender is an act *in pais;* it can, therefore, be no objection, in this case, that the acts which have dissolved the corporation are acts *in pais*.

This bill was not filed until the 24th of *April*, 1819. In *February*, 1818, all the estate, real and personal, of the corporation was sold under an execution; and, as has already been stated, the corporation has totally ceased from acting since *December*, 1817. The bill charges, substantially, that the corporation is dissolved, and not one of the respondents asserts that it does exist, or that there is the re-

motest idea of resuscitating it. Here is, then, a corporation possessed of nothing, abandoning the end and object of their institution, without pretending that they ever hope or expect to resume their functions; and, it may be added, all the corporators either admit the dissolution of the corporation (I speak of those who have suffered the bill to be taken *pro confesso*), or deny that they are corporators, thus presenting the phenomenon of a corporation without corporators, a nominal, inert body, pretending to have life and existence. Such an anomaly can not be recognized. The argument is, that being incorporated for twenty years, there exists a corporate capacity during that period, and that although all the functions of the corporation have ceased, yet they may be resumed. The second section of the act provides that as soon as the certificate shall be filed, the persons who shall have signed and acknowledged the same, and their successors, shall, for the term of twenty years next after, be a body politic and corporate, in fact and in name, etc. The legislature never meant, nor does the act authorize the conclusion, that the corporation should remain and continue during all that period *nolens volens*. It was implied that during that time they should do nothing to forfeit their rights, nor surrender them back, or do any act tantamount thereto. The act prolongs the corporation for twenty years, subject to all the incidents attending corporations; and I have endeavored to show that one of the incidents is an extinction of the corporation if it does what is equivalent to a surrender. I doubt, extremely, whether the capacity to resume the functions of the corporation does, in fact, exist, but it is not necessary to decide that point. I consider it merely as a matter of speculation, thrown out, without any practical reference to the cause, as a stumbling block to the attainment of justice between the parties. For all the substantial purposes of justice, and in effect, the corporation is dissolved. * * *

In point of good sense this corporation was dissolved within the meaning and intent of the act as regards creditors, when it ceased to *own* any property, real or personal, and when it ceased for such a space of time from doing any one act manifesting an intention to resume their corporate functions. The end, being and design of the corporation were completely determined, and even if it had the capacity to reorganize and reinvigorate itself, the case has happened, when, as relates to its creditors, it is dissolved.

If I am right thus far, then by the seventh section of the statute, the persons composing the company at the time of its dissolution are individually responsible to the extent of their respective shares for the debts then due and owing by the company.

With respect to the period of the dissolution, it appears to me that we may safely say it happened on the 1st of *February*, 1818, when all the property of the company was sold, for since that time no corporate act has been done. * * *

(Held also that Slee assenting to discharge of members upon payment of 50 per cent. of stock was bound by it, but that he was not

Reversed.

bound by the resolution releasing shareholders upon payment of 30 per cent.)

As to insolvency, see, also, 1857, Coburn v. Manufacturing Co., 10 Gray (Mass.) 243; 1887, Dewey v. St. Albans, etc., Co., 60 Vt. 1, 6 Am. St. R. 84; 1888 Jones v. Bank of Leadville, 10 Colo. 464, 20 Am. & Eng. C. C. 554; 1889, Rouse v. Merchants' Bank, 46 Ohio St. 493, 15 Am. St. Rep. 644; 1893, Sabin v. Columbia Fuel Co., 25 Ore. 15, 42 Am. St. 756; 1893 Larrabee v. Franklin Bank, 114 Mo. 592, 35 Am. St. Rep. 774.

Note. **Surrender.**

1. A corporation may voluntarily surrender its franchises. 1822, Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273, *supra*; 1832, Chesapeake & O. Canal Co. v. Bal. & O. R., 4 Gill & J. (Md.) 1; 1834, Boston Glass Mfy. v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292, *supra*, p. 866; 1839, Penobscot Boom Corp. v. Lamson, 16 Maine (4 Shep.) 224, 33 Am. Dec. 656; 1839, McIntire Poor School v. Zanesville, etc., Co., 9 Ohio 203, 34 Am. Dec. 436; 1858, Lauman v. Leb. V. R., 30 Pa. St. 42, 72 Am. Dec. 685; 1859, Attorney-General v. Clergy Soc., 10 Rich. Eq. (S. C.) 604; 1869, People v. California College, 38 Cal. 166; 1870, Houston v. Jefferson College, 63 Pa. St. 428; 1871, Moore v. Whitcomb, 48 Mo. 543; 1892, Cronin v. Potters' Co-op. Co., 29 Wkly. L. B. (Ohio) 52.

2. Acceptance by the state (through the legislature) is necessary in order to complete dissolution. In 2 Kyd Corporations, 447, it is said the king may accept a surrender of charters granted by himself, but not one granted by parliament. 1828, Enfield Toll B. Co. v. Conn. R. Co., 7 Conn. 28, 45; 1834, Boston Glass Mfy. v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292, *supra*, p. 866; 1834, Revere v. Boston Copper Co., 15 Pick. (Mass.) 351; 1836, Harris v. Muskingum Mfg. Co., 4 Blackf. (Ind.) 267, 29 Am. Dec. 372; 1845, Greeley v. Smith, 3 Story 657; 1847, Town v. River Raisin Bank, 2 Doug. (Mich.) 530; 1851, Norris v. Mayor, etc., 1 Swan (31 Tenn.) 164; 1861, McMahan v. Morrison, 16 Ind. 172, 79 Am. Dec. 418; 1861, Curien v. Santini, 16 La. Ann. 27; 1870, Wilson v. Central Br. Co., 9 R. I. 590; 1870, LaGrange, etc., R. Co., 7 Colw. (Tenn.) 420, 437; 1895, Combes v. Keyes, 89 Wis. 297, 46 Am. St. Rep. 839; 1896, The Attorney-General v. Superior, etc., R. Co., 93 Wis. 604. See, *contra*, Merchants' and Planters' Line v. Waganer, 71 Ala. 581, *supra*, p. 880, and cases therein stated. A statutory method of voluntary dissolution under a general law giving the state's consent when certain formalities are complied with, is quite usually provided by the states.

3. As to the right of the majority to surrender the charter and dissolve the corporation, there seems to be considerable conflict. The question is closely allied to the right of a majority to dispose of the assets of the corporation, and the following cases, or many of them, are upon this point.

a. In the case of a solvent, going, private business corporation the majority can not, against the wishes of the minority, dispose of the assets and dissolve the corporation: 1813, Smith v. Smith, 3 Des. Eq. (S. C.) 557; 1844, Ward v. Soc. of Attys., 1 Coll. 370; 1857, Mobile & O. R. v. State, 29 Ala. 573, 586; 1861, Curien v. Santini, 16 La. Ann. 27; 1861, Abbott v. Am. Hard Rubber Co., 33 Barb. (N. Y.) 578; 1867, Zabriskie v. Hackensack, etc., R., 18 N. J. Eq. 178, 90 Am. Dec. 617; 1868, Clinch v. Financial Corp., L. R. 5 Eq. Cas. 450; 1872, Bird v. Bird's, etc., Co., L. R. 9 Ch. App. 358; 1873, Black v. Del. & R. Canal Co., 9 C. E. Green (24 N. J. Eq.) 455; 1876, Buford v. Keokuk N. L. Co., 3 Mo. App. 159; 1882, Bergman v. St. Paul, etc., M. B. Assn., 29 Minn. 275; 1883, Balliet v. Brown, 103 Pa. St. 546; 1887, Barton v. The Enterprise Loan, etc., Co., 114 Ind. 226; 1889, *In re* Sovereign Life Assurance Co., 42 Ch. D. 540, 61 L. T. R. 455; 1890, Rothwell v. Robinson, 44 Minn. 538; 1892, Chicago, etc., Cab. Co. v. Yerkes, 141 Ill. 320, 33 Am. St. Rep. 315; 1892, People v. Ballard, 134 N. Y. 269; 1895, Byrne v. Schuyler Elec. Mfg. Co., 65 Conn. 336; 1896, McCutcheon v. Merz Capsule Co., 37 U. S. App. 586; 1897, Pringle v. Eltringham Constr. Co., 49 La. Ann. 301, 6 A. & E. C. C. (N. S.) 385; 1898, Forrester v. Boston M. M. Co., 21 Mont. 544, 55 Pac. Rep. 229.

b. But the majority may dispose of the assets of a corporation, surrender its charter and dissolve the corporation, even against the wishes of a minority, when the corporation is in failing circumstances, unable to go on and accomplish its ends, in the absence of unfairness, oppression or fraud: 1847, Sargeant v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; 1850, Hodges v. New Eng. Screw Co., 1 R. I. 312, 53 Am. Dec. 624; 1856, Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; 1862, Bank of Switzerland v. Bank, 5 L. T. (N. S.) 549; 1870, Wilson v. Proprietors, etc., 9 R. I. 590; 1881, Hancock v. Holbrook, 9 Fed. Rep. 353; 1883, Sheldon Hat Co. v. Eickmeyer, etc., Co., 56 How. Pr. (N. Y.) 70; 1886, Ervin v. Oregon R. & Nav. Co., 27 Fed. Rep. 625; 1886, Hutchinson v. Green, 91 Mo. 371; 1888, Berry v. Broach, 65 Miss. 450; 1888, Botts v. Simpsonville Tp. Co., 88 Ky. 54; 1889, Mason v. Pewabic Min. Co., 133 U. S. 50; 1889, Sawyer v. Dubuque, etc., Co., 77 Iowa 242; 1890, Hayden v. Official Hotel, etc., Co., 42 Fed. Rep. 875; 1891, Trisconi v. Winship, 43 La. Ann. 45; 1892, Skinner v. Smith, 134 N. Y. 240; 1893, Price v. Holcomb, 89 Iowa 123; 1893, Sewell v. East Cape May, etc., Co., 50 N. J. Eq. 717; 1896, Elyton Land Co. v. Dowdell, 113 Ala. 177; 1897, Peabody v. Westerly W. W., 20 R. I. 176, 37 Atl. Rep. 807; 1899, Phillips v. Prov. Steam, etc., Co., 21 R. I. 302, 45 L. R. A. 560.

Sec. 247. Repeal.

See, *infra*, The State and Corporation, §§ 453–73. Also see Proprietors of Piscataqua Bridge v. New Hampshire, 7 N. H. 35, *supra*, p. 309; Flint & F., P. R. Co. v. Woodhull, 25 Mich. 99, *supra*, p. 398; Commonwealth v. Cullen, 13 Pa. St. 133, *supra*, p. 417; Dartmouth College v. Woodward, 4 Wheat. 518, *supra*, p. 708; Hawthorne v. Calef, 2 Wall. 10, *supra*, p. 752; Tomlinson v. Jessup, 15 Wall. 454, *supra*, p. 754; Ireland v. Palestine Turn. Co., 19 Ohio St. 369, *supra*, p. 757; Mormon Church (Romney) v. United States, 136 U. S. 1, *infra*, p. 906.

Sec. 248. Forfeiture.

See, *infra*, The State and Corporation, §§ 410–18. Also see King v. Mayor of London, 1 Show. 280, *supra*, p. 152; People v. N. R. Sug. R. Co., *supra*, p. 100; Higgins v. Downward, 8 Houst. (Del.) 227, *supra*, p. 152; State v. Standard Life Assn., 38 Ohio St. 281, *supra*, p. 234; State v. Curtis, 35 Conn. 374, *supra*, p. 259; State Bank v. The State, 1 Blackf. (Ind.) 267, *infra*, p. 891.

Sec. 249. Ownership of stock by one member.

LOUISVILLE BANKING COMPANY v. EISENMAN.[1]

1894. In the Court of Appeals of Kentucky. 94 Ky. Rep. 83–96, 42 Am. St. Rep. 335, 19 L. R. A. 684, with note.

[Suit by the bank to hold J. C. Eisenman personally liable upon an acceptance for the accommodation of Mattingly & Sons of drafts to the amount of $20,000, drawn by them upon the corporation of Eisenman Bros. & Co., and accepted by it, after J. C. Eisenman had become the sole owner of the stock of the corporation. The failure

[1]Statement much abridged. Arguments and part of opinion omitted.

of Mattingly & Sons to meet the drafts rendered Eisenman Bros. & Co. insolvent. The bank knew the circumstances under which the drafts were accepted. The statute provided "any number of persons may associate themselves *together*, and become incorporated," etc. The bank contended that the sole ownership of stock dissolved the corporation, and rendered the sole owner individually liable. The lower court held otherwise.]

PRYOR, J. * * * The purpose of the statute was to enable two or more persons possessed of capital or skill to associate themselves in business, and to limit their liability as against the improvident acts of each other, or the act of the corporation, in the event of pecuniary loss in the legitimate and proper conduct of its business. It invites the investment of the capital stock of one to be placed in the same business with the skill of another, or a combination of capital that encourages trade, the burden of which mere individual enterprise would be unwilling to assume, and it could not have been the legislative intent that any one man could form a corporation of which he is the creature and sole stockholder, so as to limit his liability for the debts contracted, and from which he has derived the benefit, to the extent only of what he might designate his corporate estate. He owns the entire property belonging to the corporation—it is his. He can sell or dispose of it as he pleases; borrow money, acquire property, in the name of the corporation, for the sole purpose of exempting him from any responsibility, other than that belonging to the corporation; and however reckless or improvident he may be, he has all to gain and nothing to lose. He could make a gift of the entire corporate estate, dispense with all corporate forms, and to say, when exercising such unlimited control, he is not personally responsible for every debt he contracts, would be to pervert the plain purpose of the statute.

There is no such being in this state as a sole corporation, and certainly none such allowed to be created by the statute.

This corporation, however, was properly organized, had its several stockholders and board of directors and was prospering in its business until these drafts were drawn for the benefit of Mattingly & Sons. * * *

That both the appellant and appellee were acting on the belief that the corporation was alone liable is beyond dispute, and the corporation, as it was called, the appellee being the sole owner of the stock, submitted to the judgment against it for the drafts in an action by the bank, and the appellee is making no resistance to its payment out of the property of the corporation, but insists that no personal liability exists. The appellant has obtained all he contracted for. There was no fraud practiced upon it by the appellee, and certainly no intention to bind himself personally, nor any of the proceeds of these drafts applied to his benefit in any manner or to the benefit of what he supposed was an existing corporation. If the stock had been held as it was originally the pecuniary condition of the corporation would have been the same, as no act had been done by the appellee by which the interest of creditors or those dealing with the corporation would have

been prejudiced. Nor are we prepared to adjudge, after a corporation has been created by the statute, with the stock distributed among several stockholders, that the purchase by one stockholder of all the stock destroys the corporate existence and places all the property of the corporation upon the same footing with the other estate of the individual stockholder. The legal title to the estate of the corporation is still vested in it, and while the stockholder's interest could be subjected to the payment even of his individual debt, when he contracts in behalf of the corporation, and with no fraudulent intent, it seems to us the party with whom he contracts gets all he bargains for when he subjects the corporate property to the payment of his debt. (Citing and commenting upon Swift v. Smith, 65 Md. 428.) * * *

In the case before us there was no surrender of the franchise, but the business conducted in good faith and under the belief that the corporate estate was alone liable. The corporation still lived and had such vitality as enabled the holder of the stock to transfer it and proceed with the corporate powers as if he had never become the sole owner; and the argument that such a construction as to the meaning of the statute would enable two or more to organize a corporation with a view of vesting the entire stock in one of the corporators is not available, for the reason that the corporate property in the hands of one stockholder, when made liable by him for his corporate or individual debts, remains so, although he may transfer the stock to others, as they must take it subject to the incumbrances the sole stockholder has placed upon it prior to his sale of the stock. (Citing and commenting upon Button v. Hoffman, 61 Wis. 20; Wilde v. Jenkins, 4 Paige 481; Winona, etc., R. Co. v. St. Paul, etc., R. Co., 23 Minn. 359; Cook on Stock, § 631; Morawetz, p. 635.) * * *

While we recognize the general rule on the subject sustained by the authorities referred to, it must be held that the purchase by one of all the shares in a corporation *created under the statute* is a dissolution of the corporation to the extent that it suspends the exercise of the rights under the franchise until the owner transfers the stock in good faith, so as to maintain an organization under the statute. There is a difference between the attempt to create one person a corporation under this statute, and the purchase in good faith of all the stock after the corporation has been created. In the first instance there is no corporation, and in the last there is a franchise, the operations of which are suspended until the stock may be transferred to others; and while in the hands of one person the corporate and individual property are ordinarily alike liable for the payment of any debt contracted by the owner, and subsequent purchasers of stock take it subject to the liens or equities of the creditors of the sole owner created prior to the transfer of the stock to them. * * *

Affirmed.

Note. **One-man companies.**

1. It seems that where a statute provides that "any number of persons" may form a corporation, the courts will hold that more than *one* person is meant. Louisville Banking Co. v. Eisenman, 94 Ky. 83, 42 Am. St. Rep. 335, *supra*, p. 887; Montgomery v. Forbes, 148 Mass. 249, *supra*, p. 594. Yet the

English case of Salomon v. Salomon, 1897, App. Cas. 22, 66 L. J. Ch. 35, holds that the court can not go back of the record, when regular, to inquire into the motive of those forming the corporation. The Iowa Code of 1897, title ix, ch. 1, § 1608, provides that, "Except as otherwise provided by law, a single person may incorporate under the provisions of this chapter, thereby entitling himself to all the privileges and immunities herein, but if he adopts the name of an individual or individuals as that of the corporation, he must add thereto the word 'incorporated' (Code 1873, § 1088; Code 1888, § 1638)." So far as I am aware this is the only state that permits this. Since the foregoing chapter provides for stock corporations as well as others, it is submitted that if a stock corporation is created by one man it would not be a corporation sole. See note, *supra*, p. 200; but if not a stock corporation, whether or not a corporation sole, *quaere*?

2. By the great weight of authority, if a stock corporation is once validly created, the fact that one person, or fewer persons than may lawfully incorporate, acquire in good faith all the stock, does not affect the corporation; it still owns and controls all its property, and the individual acts of the sole or other owners of stock do not bind the corporation. 1811, Smith v. Smith, 3 Desaus. (S. C.) *557, *582; 1819, Williamson v. Smoot, 7 Martin (La.) 31, *supra*, p. 70; 1833, Russell v. McLellan, 14 Pick. (Mass.) 63; 1833, Spencer v. Champion, 9 Conn. 536; 1834, Wade v. Jenkins, 4 Paige Ch. (N. Y.) 481; 1839, Penobscot Boom Corp. v. Lamson, 16 Maine 224, *supra*, p. 283; 1843, Wheelock v. Moulton, 15 Vt. 519 (deed by all the shareholders is not the deed of the corporation); 1846, Queen v. Arnaud, 25 L. J. (16 N. S.) Q. B. 50, *supra*, p. 58; 1850, Evarts v. Killingworth Mfg. Co., 20 Conn. 447, 458; 1856, Bohannon v. Binns, 31 Miss. 355; 1858, Lillard v. Porter, 2 Head (Tenn.) 176; 1860, Frost v. Frostburg Constr. Co., 24 How. (U. S.) 278, 283; 1871, Newton Mfg. Co. v. White, 42 Ga. 148; 1877, Winona & St. P. R. Co. v. St. Paul & S. R. Co., 23 Minn. 359; 1879, Balwin v. Canfield, 26 Minn. 43; 1880, Keith v. Clarke, 4 Lea (Tenn.) 718; 1884, Button v. Hoffman, 61 Wis. 20, 50 Am. Rep. 131; 1884, Mathis v. Morgan, 72 Ga. 517, 525; 1886, England v. Dearborn, 141 Mass. 590; 1890, Fitzhugh v. Mo. Pac. R. Co., 45 Fed. Rep. 812; 1890, Humphreys v. McKissock, 140 U. S. 304, 312; 1893, Gallagher v. Germania Brewing Co., 53 Minn. 214; 1893, Foster & Son v. Comm'rs of Inland Rev., L. R. (1894) 1 Q. B. 516, *supra*, p. 60; 1895, Matter of Belton, 47 La. Ann. 1615; 1896, Parker v. Bethel Hotel Co., 96 Tenn. 252; 1897, Harrington v. Connor, 51 Neb. 214; 1897, Salomon v. Salomon, App. Cas. 22, 66 L. J. Ch. 35; 1898, Louisville, etc., Co. v. Kaufman, 20 Ky. L. Rep. 1069, 48 S. W. Rep. 434; 1898, First Nat'l Bank v. Winchester, 119 Ala. 168, 72 Am. St. Rep. 904; 1899, Chase v. Mich. Tel. Co., 121 Mich. 631, 11 Am. & E. C. C. (N. S.) 715; 1899, *In re* Hirth, 1 Q. B. 612, 68 L. J. Q. B. 287; 1898, Durlacher v. Frazer, 8 Wyo. 58, 80 Am. St. Rep. 918, 55 Pac. 306. But it has been held in Maryland, that the ownership of stock by one person virtually suspends the corporate existence during such sole ownership. 1831, Bellona Cos. Case, 3 Bland. Ch. (Md.) 442, 446; 1886, Swift v. Smith, 65 Md. 428, 57 Am. Rep. 336; 1898, First Nat'l Bank v. Winchester, 119 Ala. 168, 72 Am. St. Rep. 904; see, however, 1903, Cannon v. Brush El. Co., 96 Md. 446, 94 Am. St. R. 584.

3. But in equity, or in case of fraud, or evasion of corporate duties, the acts of all the shareholders as individuals will be treated as the acts of the corporation, if necessary to work out justice. 1882, Bundy v. Ophir Iron Co., 38 Ohio St. 300; 1890. People v. North Riv. S. Ref. Co., 121 N. Y. 582, 18 Am. St. Rep. 843, *supra*, p. 100; 1892, State v. Standard Oil Co., 49 Ohio St. 137; 1898, First Nat'l Bank v. Winchester, 119 Ala. 168, 72 Am. St. Rep. 904. See also, *supra*, the corporation as a collection of persons, secs. 16-21, and note, p. 109, *et seq.*

ARTICLE II. EFFECT OF DISSOLUTION.

Sec. 250. Lands, chattels and debts at common law.

STATE BANK v. THE STATE.[1]

1823. IN THE SUPREME COURT OF INDIANA. 1 Blackf. (Ind.) Rep. 267–285, 12 Am. Dec. 234.

[*Quo warranto* against the bank for numerous violations of its charter. The defendant pleaded not guilty to all the charges. On the trial in the lower court the jury found them guilty of nine of the charges. A motion in arrest of judgment was made and overruled, and judgment given that the privileges, liberties and franchises be seized into the custody of the state, together with all the goods, chattels, rights, credits and effects of every kind. Various errors were assigned, two of which were: 1, that the charges did not justify a forfeiture, and 2, the judgment of seizure of the franchises and property violated the constitution of the state, providing that no man's property should be taken for a public use without the consent of his representatives, etc.]

HOLMAN, J. * * * That a corporation may forfeit its charter for misusing or abusing its franchises is a doctrine that can not now be disputed. See 1 Bl. Comm., 485; 2 Kyd Cor., 474, and the cases there cited. For there is an implied condition annexed to each particular grant, which, if violated, forfeits the whole franchise. 2 Bac., 31. Inasmuch as it is the duty of corporations to act up to the end or design for which they were created (1 Bl. Comm., 480) so when they pursue such measures as wholly frustrate this design the reason of their existence ceases, and it is but just that their existence should also be terminated. Whether every slight deviation from the intention of the charter should occasion a forfeiture is not the question, but when the grand, leading conditions and restrictions in the charter have been violated there can be no question but the franchises are thereby forfeited. Several of the charges found by the jury against this corporation are of this nature, and show that they have evidently abused their most important privileges to the manifest injury of others and of the community in general. (Considering the charges in detail.) * * *

But if it be contended that such a private property exists in the individual shareholders as will be destroyed if the franchises of the corporation be seized, and, inasmuch as the private property is guaranteed by the constitution, that the constitution must also of necessity guaranty the continued existence of those franchises or otherwise this property will be annihilated, we shall find that this doctrine is not warranted by the constitution. The privilege of holding stock in this bank is inseparably connected with its existence as a corporation, and inasmuch as we have seen that the existence of the corporation depends on the implied condition that it will not violate its charter, so this privilege of holding stock in this bank must depend for its continuance on the same implied condition. The president and directors of the corporation become the agents of the stockholder, and if they vio-

[1] Statement much abridged, and much of opinion omitted.

late the conditions on which he enjoys this privilege, his privilege is immediately subjected to forfeiture by this act of his agents. Nor will the regard which the constitution has for private property secure such property from annihilation by a dissolution of the corporation. So that we see nothing in the constitution to prevent the seizure of those franchises, let the effect upon private property be what it may. And there can be no doubt but that this judgment, so far as it authorizes a seizure of the franchises into the hands and custody of the state, is warranted by law. When it appears that the liberty has been once granted, and is forfeited by misuser or non-user, the judgment shall be that it be seized into the king's hands. Year Book 15 Ed. 4, cited in 2 Kyd Corp., 407. And such appears to be the law at present. * * *

There are but two grounds on which it can be contended that the corporate effects fall into the hands of the state: 1. As a forfeiture for abusing the franchises; or 2. For the want of an owner by the dissolution of the corporation. When we examine the first of these grounds we find nothing in the books to support an idea that the abuse of corporate franchises occasions forfeiture of lands or goods, rights or credits, or, in fact, occasions any other forfeiture but the franchises themselves. The consequence of a breach of the implied condition on which their liberties were granted was not that they should forfeit their property or possessions if they abused their franchises, but only that they should forfeit their franchises. That which comes out of the hands of the king is the proper subject of forfeiture; the king, by the seizure, resuming what originally flowed from his bounty. Authorities leading to this conclusion are numerous. See the cases cited in 2 Bac., 32, and in The King v. Amery, 2 T. R. 515. For the forfeiture is the same for non-user when no property has been held or rights exercised, as for misuser or abuser after the possession of much property and the exercise of extensive rights and credits; and the judgment is the same in both cases. Consequently, the judgment could not direct a seizure of the corporate possessions as a forfeiture for the violation of the charter. Nor is the second ground— that the property falls to the state for the want of an owner, on the dissolution of the corporation—more tenable as a foundation on which to sustain this judgment. For the ownership of the corporation does not cease until its dissolution. And whether it is dissolved by the judgment of seizure or not, until the state has execution on that judgment. is not here very material. For if the corporation is dissolved by the judgment, the judgment must be regularly entered, and have its full effect before the dissolution takes place, and it is not till then that the property can be said to be without an owner. The loss of the property to the corporation is a consequence of the judgment, and it is a contradiction of the first principles of reason—a complete reversal of effect and cause—to make such loss of property a part of the judgment. That which can not exist until after the judgment, can never be the subject-matter on which the judgment is given. But the better opinion seems to me, that the corporation is not dissolved by the judgment of seizure, but that it exists until the franchises are seized by

execution on that judgment. See Kyd Corp., 409, 410, and the authorities there cited. Consequently, the last shadow of a support for this judgment on this ground must vanish.

We have thus far examined the judgment which directs a seizure of the goods and chattels, rights and credits, lands and tenements of the corporation, on the assumed position that they will necessarily fall to the state on the dissolution of the corporation. We shall now inquire into the correctness of this position. In order to elucidate the subject we shall examine it in detail, and in the first place inquire what becomes of the lands and tenements; secondly, what becomes of the goods and chattels, and thirdly, what becomes of the rights and credits of the corporation? and we shall find that each of these three items is governed by different principles.

First. **As to the lands and tenements:** "When a corporation is dissolved," says Sir Wm. Blackstone, "the lands and tenements revert to the person or his heirs who granted them to the corporation; for the law doth annex a condition to every such grant, that if the corporation be dissolved the grantor shall have the lands again. The grant is only during the life of the corporation, which may endure forever, but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life." 1 Bl. Comm., 484. This is the doctrine advanced by Lord Coke, Co. Litt. 13*b*. See, also, 2 Kyd Cor., 516; 2 Bac., 32; 2 Cruise, 493; Colchester v. Seaber, 3 Burr. 1866. We see but little in the books that contradicts or questions those authorities, and the cases that look a different way maintain that the lands would escheat. 2 Bac. 32. If either of those principles be correct we feel warranted in determining that the corporate lands and tenements can not be seized into the hands of the state, and certainly not in the manner contemplated by this judgment.

Secondly. **As to the goods and chattels:** On this subject the books are almost silent. In the argument of Colchester v. Seaber, it is said by Sir Fletcher Norton, on the authority of 1 Ro. Ab. 816, that the goods and chattels go to the crown. An *English* writer, who has collected together most of the cases on corporations, concludes his remarks on the effect of a dissolution in these words: "What becomes of the personal estate is, perhaps, not decided; but probably it vests in the crown." 2 Kyd on Corp., 516. We do not feel under the necessity of resolving any doubts which may rest on this subject; for if the law were conclusive, that the goods and chattels in this case would vest in the state on the dissolution of the corporation, yet we have already seen that this would not be as a forfeiture, but because they are without an owner, and that the claim of the state could not exist until after judgment; consequently, it is impossible to include them in the terms of the judgment.

Thirdly. **As to the rights and credits of the corporation:** These, as applying to the debts, etc., due to the corporation, are supposed to be of considerable amount, and have formed a principal feature in every view of this case. But the importance of the case, arising from the

amount in controversy, can not affect the principles by which it is governed; and when those principles are fixed they must be declared, let the consequence to individuals or the community be what it may. That the debts are necessarily lost to the corporation naturally follows from the principles we have examined. For when dissolved they have no existence, and can have no claim to, nor control over, anything whatever. They not only die, but leave no representative behind them. This, in every respect, is the case with aggregate corporations. Sole corporations depend, in this respect, upon principles somewhat different; but with them we have now no concern. But although the debts fall out of the lifeless hands of the corporation at the same time with their real and personal estate, yet when thus out of their hands, they are very different in their natures from the real and personal estate.

Lands and goods have a necessary existence, although they may be without an owner in being or in expectancy. They continue in being and may be made the subject of possession by occupancy. But this is not the case with respect to debts. They have no necessary existence, and are so conclusively personal that they can not exist without an obligor and obligee in being or in expectancy. And on the death of the obligor or obligee, without the possibility of a representative, the obligation ceases. Such appears to be the case on the dissolution of a corporation aggregate. Blackstone says: "The debts of a corporation, either to or from it, are totally extinguished by its dissolution, so that the members thereof can not recover or be charged with them, in their natural capacities. 1 Bl. Comm., 484; 2 Kyd Corp., 516, uses the same language. 2 Bac., 32, advances nearly the same doctrine, on the authority of Lev., 237; Owen, 73, and 2 And., 107. And this doctrine is either directly or indirectly supported in a variety of cases. See the before-mentioned case of Colchester v. Seaber; also Rex v. Pasmore, 3 T. R. 199; The Mayor, etc., of Scarborough v. Butler, 2 Lev. 237; 4 Com. Dig., 273. If this doctrine be correct, and we find it uncontradicted, the seizure of the rights and credits of the corporation is impossible in the nature of things, because their existence ceases as the claim of the state commences. But even if they could be seized into the hands of the state they would be unavailing. The debts due to the corporation could not, on any common law principle, be collected by the state or its agent, there being no privity of contract, either in fact or law, between the state and debtor to the corporation. * * *

Thus, in no view of the case, can that part of the judgment which directs a seizure, into the hands of the state, of the goods and chattels, rights, credits and effects, lands, tenements and hereditaments of the corporation, be supported.

Affirmed as to seizure of franchises but reversed as to seizure of property.

Note. See following cases and note, *infra*, p. 910.

Sec. 251. Contracts of shareholders.

FOSTER v. ESSEX BANK.[1]

1820. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 16 Mass. Rep. 245–274.

[Assumpsit against the bank for $50,000, begun April term 1819. At the trial term it was suggested the bank's charter had expired. By the act creating it, it was to exist for twenty years from July 1, 1799. By an act of June 19, 1819, all such corporations were "continued bodies corporate and politic, for the term of three years from and after the day on which their powers would expire," for the purpose of prosecuting and defending suits, now or hereafter instituted, and to settle their concerns, and divide their capital stock, but not for continuing business. It was contended that this statute impaired the obligation of the shareholders' contracts.]

PARKER, C. J. * * * In the first place, we see no pretense for saying that it impairs the force of contracts. Certainly it has not that effect on contracts made by or with the bank; but the very object of the statute is to enforce such contracts.

It is said, however, that the contract with the government was that at the end of twenty years the corporation should be dissolved, and each member take his share out of the common fund. But it should be considered that, by the original charter, each member's share was liable for all the debts of the bank, and that he would have no moral right to withdraw it until all the debts of the bank were paid; so that there was an equitable lien upon his share; and the legislature, we think, had a right, if it was not their duty, to provide the means of enforcing this moral obligation.

The law complained of is a general law operating upon all bodies corporate, and it is convenient for them and the public that their power of suing and being sued should be continued beyond the period within which they are empowered to make contracts, in order that their concerns may be properly adjusted.

Nor do we think it an objection that this additional term should be granted by an act made subsequent to the time when their charter was granted. A debtor to the bank could not object to a suit on the ground that the original term of the charter had expired, for the very bringing of the suit would be an acceptance of the prolongation of the charter, and it would be absurd for him to say that his debt was discharged, or that there were no means of recovering it because he contracted with the corporation on a supposition that it would continue in being only a certain number of years. We think it equally incompetent for such corporation to deny its existence against a statute of the government, the object of which is to give a right of action on contracts upon which they were legally and morally bound under their charter.

It is said that the members of such a corporation associated upon

[1] Statement abridged. Much of the opinion, and the elaborate arguments of Saltonstall, Pickering and Webster, omitted.

the faith that after the time limited in their charter they might separate and take their shares of the stock. But it is to be answered that their stock is, in an equitable view, pledged for the payment of all debts due from the corporation, and that it would be fraudulent to withdraw the funds, knowing that there were debts to be paid, leaving no means of coercing the payment of those debts. What should be said of a banking company which just before its expiration should divide all the stock, making no provision for the payment of its debts? Yet this might be done if the legislature have no authority to establish by law a mode by which it should be compelled to fulfill its obligations. For it is certainly doubtful whether any means exist, under our laws, of pursuing the funds into the hands of individual corporators and subjecting them to the claims of creditors. We see no violation of the rights of the corporators, no impairing of the obligation of contracts, for it can never be the right of any person to withhold a just debt from his creditor. * * *

(The suggestion filed can not impede the progress of the suit.)

Note. See following cases, and note, *infra*, p. 910.

Sec. 252. Contracts of creditors.

MUMMA v. THE POTOMAC COMPANY.[1]

1834. IN THE SUPREME COURT OF THE UNITED STATES. 8 Peters (33 U. S.) Rep. *281–7.

[Mumma, in 1818, obtained a judgment in the circuit court of the District of Columbia against the Potomac Company for $5,000. No attempt was made to enforce it till April 18, 1828, when a *scire facias* was issued to revive the judgment; this revivor case was continued till 1830, when the facts were agreed to be that after the rendition of the judgment in question and in accordance with a provision of the laws of Virginia, Maryland and the United States incorporating the Chesapeake and Ohio Canal Company, so authorizing, the Potomac Company had surrendered all its property, rights and privileges by deed of August 15, 1828, to and the same had been accepted by the Chesapeake and Ohio Canal Company, whereby the charter of the Potomac Company was vacated and annulled, and its powers vested in the canal company. It was contended, secondly, that the deed of surrender and the acts of the legislature were void as impairing the obligation of contracts. The lower court gave judgment for the defendant.]

STORY, J. * * * Unless, then, the second point can be maintained, there is an end of the cause, for there is no pretense to say that a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation any more than against a dead man. We are of opinion that the dissolution of the corporation, under the acts of Virginia and Maryland (even supposing the act of confirmation of congress out of the way), can not, in any just sense, be considered,

[1] Statement abridged, only part of opinion given.

within the clause of the constitution of the United States on this subject, an impairing of the obligation of the contracts of the company by those states, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives, and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws. Besides, the twelfth section of the act incorporating the Chesapeake and Ohio Canal Company makes it the duty of the president and directors of that company, so long as there shall be and remain any creditor of the Potomac Company who shall not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company (which the act enables him to do), to pay to such creditor or creditors, annually, such dividend or proportion of the net amount of the revenues of the Potomac Company, on an average of the last five years preceding the organization of the said Chesapeake and Ohio Canal Company, as the demand of the said creditor or creditors at that time may bear to the whole debt of $175,800 (the supposed aggregate amount of the debts of the Potomac Company). So that here is provided an equitable mode of distributing the assets of the company among its creditors, by an apportionment of its revenues in the only mode in which it could be practically done upon its dissolution; a mode analogous to the distribution of the assets of a deceased insolvent debtor.

Independent of this view of the matter, it would be extremely difficult to maintain the doctrine contended for by the plaintiff in error, upon general principles. A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for willful misuser and non-user. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence, contrary to public policy, and the nature and objects of its charter. * * *

Affirmed.

See following cases, and note, *infra*, p. 910.

Sec. 253. Executory contracts.

GRIFFITH ET AL. v. BLACKWATER BOOM AND LUMBER CO.[1]

1899. IN THE SUPREME COURT OF WEST VIRGINIA. 46 W. Va. 56, 33 S. E. Rep. 125–128.

[In a suit by creditors against the lumber company to settle up its affairs there were three contested claims in favor of one Thompson,

[1] Statement abridged; only part of the opinion given.

for over $115,000. One of these, for over $98,000, was adjudged not to be a preferred claim, but if of any validity at all, to be such as to share only pro rata with other claims. This claim arose out of a contract called the stocking contract, whereby Thompson was to cut, saw and deliver all its timber at the mill at a certain price. Before any part of this contract was carried out the company's affairs were placed in the hands of a receiver by consent of all parties interested. Thompson claimed damages for the breach of this contract, and over $98,000 was found to be the proper amount, if he was entitled to anything. He claimed also that under a statute making claims for work and labor preferred claims, the damages for a breach of contract for work and labor would have the same preference. The lower court decreed that this was not a preferred claim, but allowed it to be a valid claim. Other creditors appealed.]

DENT, P. * * * The last report of the receiver shows that, if the three contested claims of Albert Thompson are allowed, the assets of the company will greatly fall short of the liabilities; but, if such claims are disallowed, there will be in the neighborhood of $30,000 to be distributed among the stockholders. So these amounts are of very grave importance to the stockholders, Albert Thompson, and the other creditors, the most important of which is his right to recover the alleged profits of his abrogated contract by way of damages, ascertained by the final decree to amount to $98,661.56, as of the 24th day of November, 1896. These damages are claimed by reason of an alleged breach of its contract by the company. This, however, is a legal impossibility, for the reason that, at the time the alleged breach occurred, the company had ceased to exist save only in name, and its bones were already bleaching on the plains of corporate existence amid millions of their kind. By force of law, it had been compelled to surrender its franchises into the hands of a receiver on account of its inability to further carry on its business, without great threatened loss to its creditors and stockholders, and it was afterwards finally dissolved by the disposal of all its property, to all which Albert Thompson was present and gave his assent, with certain reservations in his own interest. Where an insolvent corporation is forced into liquidation and dissolution all its executory contracts perish with it, for this is an implied condition of their execution.

In 7 Am. & Eng. Ency. Law (2 ed.), 116, the law is stated to be: "When performance of a contract is dependent upon the continued existence of a given perron or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation." The continued existence of the corporation was assumed as the basis of the contract with Albert Thompson, and its involuntary dissolution put an end to performance on its part, and the contract ceased to be binding, as there was no one left to perform it according to its terms. People v. Globe Mut. Life Ins. Co., 91 N. Y. 174; 1 Am. & Eng. Corp. Cas. 586, note 594. Such, however, is not the law where a solvent corporation is voluntarily dissolved. By its own act it can not

relieve itself from its contracts, but its assets will be held liable for breaches thereof. It must be taken as an implied condition of all such contracts that such corporation will not voluntarily try to escape or evade fulfillment, and if it does, equity will not recognize its dissolution nor permit the distribution of its assets until its contracts are satisfied. Glass Co. v. Stoehr, 54 Ohio St. 157, 43 N. E. Rep. 279; Schleider v. Dielman, 44 La. Ann. 462, 10 South. 934. The appellee, Thompson, claims that the dissolution of the corporation was voluntary, for the reason that the officers assented thereto. They assented because its business had assumed such a condition that it could not be continued without great loss to its creditors and stockholders. And to this the appellee, Thompson, also assented. Hence its dissolution was not voluntary, but was brought about by the force of circumstances, and the final determination of its affairs shows that it was not solvent. * * *

A receiver is not bound to carry out executory contracts of the corporation, but he may disregard them. Beach Rec., § 328. The power to adopt or reject the defendant's contract, to accept those which are of advantage to the trust estate, and reject the burdensome ones, is restricted to the receiver. The rule is not reciprocal, hence it is called "anomalous." Section cited:

"The court, however, may order the receiver to complete unfinised contracts, if by so doing the interests of all parties will be better conserved, and in such case whatever is done by the receiver in the performance of such contracts becomes an obligation upon the receivership and its property, to be protected by the court." Smith Rec., pp. 102, 103, § 35. The receiver in this case did adopt, under the instruction of the court, and partly carry out the stocking contract; but finally the court, reaching the conclusion, with the assent of all parties, except Albert Thompson, determined to, and did, abandon the stocking contract and direct a sale of the property. This the court had the legal and equitable power to do. It thereby determined that the carrying out of the contract would be injurious to those in interest. After this action on the part of the court, the corporation, the receiver or Albert Thompson would be in contempt even in seeking to carry out the same. * * *

Decree below reversed.

Note. See following cases and note, *infra*, p. 910.

Sec. 254. Generally upon rights and liabilities in equity.

BACON ET AL. v. ROBERTSON.[1]

1855. IN THE SUPREME COURT OF THE UNITED STATES. 18 How. (59 U. S.) Rep. 480–489.

[Appeal from United States circuit court for the southern district of Mississippi. In 1843 the legislature of Mississippi directed that ac-

[1] Statement abridged, and much of opinion omitted.

tions in *quo warranto* be instituted against all banking corporations in the state that had so violated their charters as to incur their forfeiture, and provided that trustees should be appointed by the court declaring a forfeiture, whose duty it should be to collect the assets, and after paying the debts distribute the surplus, if any, ratably among the stockholders. The charter of the Commercial Bank of Natchez, after due proceedings, was declared forfeited, and Robertson appointed trustee to pay debts and make distribution. After all debts were paid he refused to distribute the $4,000,000 surplus. Bacon and the other shareholders brought their bill in equity to obtain their shares. Upon demurrer the circuit court dismissed the bill and plaintiffs appealed.]

CAMPBELL, J. * * * To comprehend the import of this legislation we must consider the mischiefs it was designed to prevent or remove, and the mode adopted to accomplish the end, for the legislation is of a character wholly remedial. The common law of Great Britain was deficient in supplying the instrumentalities for a speedy and just settlement of the affairs of an insolvent corporation whose charter had been forfeited by a judicial sentence. The opinion usually expressed as to the effect of such a sentence was unsatisfactory and questioned. There had been instances in Great Britain of the dissolution of public or ecclesiastical corporations by the exertion of the public authority, or as a conseqnence of the death of their members, and parliament and the courts had affirmed in these instances that the endowments they had received from the prince or pious founders would revert in such a case. Stat. de Terris Templariorum, 17 Edw. II; Dean and Canons of Windsor, Godb. 211; Johnson v. Norway, Winch. 37; Owen, 73; 6 Vin. Abr., 280. What was to become of their personal estate and of their debts and credits had not been settled in any adjudged case, and as was said by Pollexfen in the argument of the *quo warranto* against the city of London was perhaps "*non definitur in jure.*" * * *

It may be admitted that the courts of law could not give any relief to the shareholders of a corporation disfranchised by a judicial sentence in respect to a corporate right. Their modes of proceeding do not provide for the case, as they have not for many others. 1 Plow, 276, 277; Richards v. Richards, 2 B. & Adol. 447; Will. Ex., 1129. But this concession does not involve an acknowledgment that the rights of the corporations are extinguished. Courts of chancery have been forced into a closer contact with these associations, and have formed a more rational conception of their constitution and a more accurate estimate of their importance to the industrial relations of society. Those courts have evinced a spirit of accommodation of their modes of proceeding so as to adapt them to the changing exigencies of society. (Citing and quoting as illustrating this doctrine, Lord Cottenham in Wallworth v. Holt, 4 M. & C. 635, Sir James Wigram, V. C., in Foss v. Harbottle, 2 Hare 491; Bank of U. S. v. Deveaux, 5 Cr. 61; Lennox v. Roberts, 2 Wheat. 373; Mumma v. Potomac Co., 8 Pet. 281; Curran v. Arkansas, 15 How. 304.) * *

The tendency of the discussions and judgments of the court of chancery in Great Britain, and of the courts of this country, is to concede the existence of a distinct and positive right of property in the individuals composing the corporation in its capital and business, which is subject in the main to the management and control of the corporation itself, but that cases may arise where the corporators may assert not only their own rights but the rights of the corporate body. And no reason can be given why the dissolution of a corporation, whether by judicial sentence or otherwise, whose capital was contributed by shareholders for a lawful and perhaps laudable enterprise, with the consent of the legislature, should suspend the operation of these principles, or hinder the effective interference of the court of chancery for the preservation of individual rights of property in such a case. The withdrawal of the charter—that is, the right to use the corporate name for the purposes of suits before the ordinary tribunals—is such a substantial impediment to the prosecution of the rights of the parties interested, whether creditors or debtors, as would authorize equitable interposition in their behalf within the doctrine of chancery precedents. Stainton v. The Carron Company, 23 L. and E. 315; Travis v. Milne, 9 Hare 141; Travis v. Milne, 2 Hare 491. For the sentence of forfeiture does not attain the rights of property of the corporators or corporation, for then the state would appropriate it. If those rights are put an end to, it would seem to be rather from a careless disregard, or hardened and reckless indifference to consequences on the part of the public authority, than from any preconceived plan or purpose. For, according to the doctrine of the text-writers on this subject, the consequences are visited without any discrimination; the losses are imposed upon those who are not blameworthy, and the benefits are accumulated upon those who are without desert.

The effects of a dissolution of a corporation are usually described to be, the reversion of the lands to those who had granted them; the extinguishment of the debts, either to or from the corporate body, so that they are not a charge nor a benefit to the members. The instances which support the *dictum* in reference to the lands consist of the statutes and judgments which followed the suppression of the military and religious orders of knights, and whose lands returned to those who had granted them, and did not fall to the king as an escheat; or of cases of dissolution of monasteries and other ecclesiastical foundations, upon the death of all their members, or of donations to public bodies, such as a mayor and commonalty. But such cases afford no analogy to that before us. The acquisitions of real property by a trading corporation are commonly made upon a bargain and sale, for a full consideration, and without conditions in the deed; and no conditions are implied in law in reference to such conveyances. The vendor has no interest in the appropriation of the property to any specific object, nor any reversion, where the succession fails. If the statement of the consequences of a dissolution upon the debts and credits of the corporation is literally taken, there can be no objection to it. The members can not recover nor be charged with them, in

their natural capacities, in a court of law. But this does not solve the difficulty.

The question is, has the *bona fide* and just creditor of a corporation, dissolved under a judicial sentence for a breach in its charter, any claim upon the corporate property for the satisfaction of his debt, apart from the reservation in the act of the legislature which directed the prosecution? Can the lands be resumed in disregard of their rights by vendors, who have received a full payment of their price, and executed an absolute conveyance? Can the careless, improvident or faithless debtor plead the extinction of his debt or of the creditor's claim, and thus receive protection in his delinquency? The creditor is blameless—he has not participated in the corporate mismanagement, nor procured the judicial sentence; he has trusted upon visible property acquired by the corporation in virtue of its legislative sanction. How can the vendors of the lands or the delinquent debtors resist the might of his equity? But, if the claims of the creditor are irresistible those of the stockholder are not inferior, at least against the parties who claim to hold the corporate property. The money, evidences of debts, lands and personalty acquired by the corporation were purchased with the capital they lawfully contributed to a legitimate enterprise conducted under the legislative authority. The enterprise has failed under circumstances, it may well be, which entitled the state to withdraw its special support and encouragement, but the state does not affirm that any cause for the confiscation of the property, or for the infliction of a heavier penalty, has arisen. It is a case, therefore, in which courts of chancery, upon their well-settled principles, would aid the parties to realize the property belonging to the corporation, and compel its application to the satisfaction of the demands which legitimately rest upon it.

In our view of the equity of this bill we have the support and sanction of the legislature of Mississippi. Their legislation excludes all the consequences which have been imputed as necessary to a sentence of dissolution on a civil corporation. From the plentitude of their powers for the amelioration of the condition of the body politic, and the supply of defects in their system of remedial laws, they have afforded a plan for the liquidation and settlement of the business of these corporations in which the equities of the creditors and shareholders respectively are recognized as attaching to all the corporate property of whatever description. And the inquiry arises, who is authorized to obstruct the enforcement of these equities in so far as the stockholders of the Commercial Bank of Natchez are concerned? The creditors have been satisfied. The defendant in the present suit is the trustee appointed under these legislative enactments. His demurrer confesses that he has received money, stocks, evidences of debt, lands, and personal property, which he refuses to distribute. He claims that the stockholders have no rights since the dissolution of the corporation, and if any, they must be looked for in the circuit court of Adams county, Mississippi. But the trustee can not deny the title of the stockholders to a distribution. To collect and distrib-

ute the property of the corporation among the creditors and stockholders is his commission—for this end he was placed in the possession of the property, and was armed with all the powers he has exercised.

His title is in subordination to theirs, and his duties are to maintain their rights and to consult their advantage. Pearson v. Lindley, 2 Ju. 758; 3 Pet., 43; 4 Bligh 1; Willis Trus., 125, 172, 173. He is estopped from making the defense of a want of title in the stockholders. * * * Reversed.

Note. See following cases, and note, *infra*, p. 910.

Sec. 255. Reversion of land.

WILSON v. LEARY.[1]

1897. IN THE SUPREME COURT OF NORTH CAROLINA. 120 N. C. Rep. 90–94, 58 Am. St. Rep. 778.

[Action to recover land. In 1849, plaintiff's ancestor conveyed the land in fee to an Odd Fellows Lodge, which was incorporated the following year and duly chartered by the grand lodge. This lodge took and held possession till 1872, when it ceased to exist, and was never revived. Under the direction of the Grand Lodge the land was sold in 1873 to the defendants. Suit was brought in 1892, by the heirs of the original grantor, claiming a reverter upon the extinction of the subordinate lodge; and the lower court so found.]

CLARK, J. * * * The plaintiff's counsel insist, however, that at the time of the conveyance the Revised Statutes (ch. 26, sec. 17) provided that a corporation, unless otherwise specially stated in its charter, had existence for only thirty years, and as there was no special provision in this charter, the grantor only parted with the property for thirty years and held a resulting trust. But the conveyance was in fee, and a corporation limited in duration can take a fee-simple conveyance just as a natural being, whose existence is also limited. Either may convey away the property, and upon the death of either, without having disposed of it, the property will go to pay creditors, to heirs, to stockholders, or as an escheat, according to the circumstances, but in neither case is there any reverter to the grantors. On the death of a corporation the property is usually administered by a receiver, and on the death of a natural person, by the personal representative, or passes to the heirs.

It is true it was held in an opinion by Gaston, J. (Fox v. Horah, 36 N. C. 358), that by the common law, upon the dissolution of a corporation by the expiration of its charter or otherwise, its real property reverted to the grantor, its personal property escheated to the state, and its choses in action became extinct, and hence that on the expiration of the charter of a bank a court of equity would enjoin the collection of notes made payable to the bank or its cashier, the debtor be-

[1] Statement abridged, and part of opinion omitted.

ing absolved by the dissolution. Judge Thompson (5 Thomp. Corp., § 6720) refers to this decision "in accordance with the barbarous rule of the common law" as "probably the last case of its kind," and notes that it has since been in effect overruled in Von Glahn v. De Rossett, 81 N. C. 467, and it is now expressly overruled by us. Chancellor Kent (2 Comm., 307, note) says "this rule of the common law has, in fact, become obsolete and odious," and elsewhere he stoutly denied that it had ever been the rule of the common law, except as to a restricted class of corporations (5 Thompson, *supra*, § 6730). The subject is thoroughly discussed by Gray on Perpetuities, §§ 44–51, and he demonstrates that my Lord Coke's doctrine rested on the dictum of a fifteenth century judge (Mr. Justice Choke, in the Prior of Spalding's Case, 7 Edward IV, 1467), and is contrary to the only case deciding the point, Johnson v. Norway, Winch. 37 (1622), though Coke's statement has often been referred to as law. But whatever the extent of this rule at the common law, if it was the rule at all, it was not founded upon justice and reason, nor could it be approved by experience, and has been repudiated by modern courts. The modern doctrine is, as held by us, that "upon a dissolution the title to real property does not revert to the original grantors or their heirs, and the personal property does not escheat to the state." Thompson, *supra*, § 6746; Owen v. Smith, 31 Barb. 641; Towar v. Hale, 46 Barb. 361. The crude conceptions of corporations naturally entertained in a feudal and semi-barbarous age, when they were few in number and insignificant in value and functions, by even so able a man as Sir Edward Coke, and the fanciful reason given by him (Coke Lit., 136) for the reverter of their real estate, to wit, that a conveyance to them must necessarily be a qualified or base fee, have long since become outworn and discredited. That which is termed "the common law" is simply the "right reason of the thing" in matters as to which there is no statutory enactment. When it is misconceived and wrongly declared, the common rule is equally subject to be overruled, whether it is an ancient or a recent decision. Upon the facts agreed judgment should be entered below against the plaintiffs, dismissing their action.

Reversed.

See following cases and note, *infra*, p. 910.

Sec. 256. Reversion of property of mutual company.

TITCOMB v. KENNEBUNK MUT. F. INSURANCE CO.

1887. IN THE SUPREME JUDICIAL COURT OF MAINE. 79 Maine Rep. 315–317.

WALTON, J. The Kennebunk Mutual Fire Insurance Company was incorporated in 1856. It has issued no policies since 1877.

In 1884, its last policy having expired, the company voted to close

up its affairs and to do no more business. A decree has been obtained at *nisi prius* dissolving the corporation, from which no appeal has been taken or claimed; and the only question before the law court is to determine what shall be done with the assets of the company. Our statutes contain ample provisions for the disposition of the assets of stock companies. R. S., ——, c. 46, §§ 25, 26, 27 and 54. But this is a mutual company and has no stockholders, and the provisions cited do not apply. According to the old settled law of the land, says Chancellor Kent, upon the civil death of a corporation, when there is no special statute to the contrary, all its real estate reverts to the grantors and their heirs, and all its personal estate vests in the people. 2 Kent. (10th ed.), 385, 386. To the same effect is Angell and Ames on Corp., c. 22, § 6 (2d ed.).

But it is said that in this class of cases the corporators named in the act of incorporation should be regarded as stockholders. They are not stockholders, and to hold that they are would be a fiction, and fictions are not favored, and are never resorted to except to work out some strong and inherent equity, and there is no such equity in favor of the corporators of a mutual insurance company. They contribute nothing towards its assets, and we think it would be against public policy to allow them to have a pecuniary interest in them. Such an interest would inevitably tend to create a temptation to fix the rates of insurance higher than would be necessary to meet losses, and then, when a surplus had been thus obtained, to divide it among themselves and thus reap a profit from business in which they had invested no capital and had taken no risks, and this at the expense of the policy-holders. We think there is a much stronger equity in favor of the former policy-holders, whose money has contributed to produce the assets. But we do not think they can be regarded as stockholders after their policies have expired and their premium notes have been canceled or given up to them. They have then received in full the benefits for which they contracted and are no longer members of the company, and to distribute among them a small amount of assets, and to determine what each former policy-holder's share ought in equity to be, would be attended with difficulties and an amount of labor which the end would not justify. When a man dies leaving no wife or kindred his property descends to the state. And when a corporation which, like a mutual insurance company, has no stockholders, ceases to exist, we are not prepared to say that the rule of the common law, which gives its surplus assets to the state, is not a wise one. * * * (Ordered that balance after paying debts, costs, etc., be paid to the state treasurer for the use of the state.)

Note. See, 1899, Cummings v. Hollis (Ga.), 33 S. E. 919; 1883, Mason v. Fire Co., 70 Ga. 604. Also next case, and note, *infra*, p. 910.

Sec. 257. Reversion of property, charitable corporation.

MORMON CHURCH v. UNITED STATES.[1]

ROMNEY v. UNITED STATES.

1890. IN THE SUPREME COURT OF THE UNITED STATES. 136 U. S. Rep. 1–67.

BRADLEY, J. The principal questions raised are, first, as to the power of congress to repeal the charter of the Church of Jesus Christ of Latter-Day Saints; and, secondly, as to the power of congress and the courts to seize the property of said corporation and to hold the same for the purposes mentioned in the decree.

The power of congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio river (which belonged to the United States at the adoption of the constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No state of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident.

* * *

This brings us directly to the question of the power of congress to revoke the charter of the Church of Jesus Christ of Latter-Day Saints. That corporation, when the territory of Utah was organized, was a corporation *de facto*, existing under an ordinance of the so-called State of Deseret, approved February 8, 1851. This ordinance had no validity except in the voluntary acquiescence of the people of Utah then

[1] Facts sufficiently stated in opinion; arguments and much of opinion omitted.

residing there. Deseret, or Utah, had ceased to belong to the Mexican government by the treaty of Guadalupe Hidalgo, and in 1851 it belonged to the United States, and no government without authority from the United States, express or implied, had any legal right to exist there. The assembly of Deseret had no power to make any valid law. Congress had already passed the law for organizing the territory of Utah into a government, and no other government was lawful within the bounds of that territory. But after the organization of the territorial government of Utah under the act of congress, the legislative assembly of the territory passed the following resolution: "*Resolved by the Legislative Assembly of the Territory of Utah*, That the laws heretofore passed by the provisional government of the state of Deseret, and which do not conflict with the organic act of said territory, be and the same are hereby declared to be legal and in full force and virtue, and shall so remain until superseded by the action of the legislative assembly of the territory of Utah." This resolution was approved October 4, 1851. The confirmation was repeated on the 19th of January, 1855, by the act of the legislative assembly, entitled "An act in relation to the compilation and revision of the laws and resolutions in force in Utah Territory, their publication and distribution." From the time of these confirmatory acts, therefore, the said corporation had a legal existence under its charter. But it is too plain for argument that this charter or enactment was subject to revocation and repeal by congress whenever it should see fit to exercise its power for that purpose. Like any other act of the territorial legislature, it was subject to this condition. Not only so, but the power of congress could be exercised in modifying or limiting the powers and privileges granted by such charter, for if it could repeal, it could modify; the greater includes the less. Hence there can be no question that the act of July 1, 1862, already recited, was a valid exercise of congressional power. Whatever may be the effect or true construction of this act, we have no doubt of its validity. As far as it went it was effective. If it did not absolutely repeal the charter of the corporation, it certainly took away all right or power which may have been claimed under it to establish, protect or foster the practice of polygamy, under whatever disguise it might be carried on; and it also limited the amount of property which might be acquired by the Church of Jesus Christ of Latter-Day Saints, not interfering, however, with vested rights in real estate existing at that time.

If the act of July 1, 1862, had but a partial effect, congress had still the power to make the abrogation of its charter absolute and complete. This was done by the act of 1887. By the seventeenth section of that act it is expressly declared that "the acts of the legislative assembly of the territory of Utah, incorporating, continuing or providing for the corporation known as the Church of Jesus Christ of Latter-Day Saints, and the ordinance of the so-called general assembly of the State of Deseret, incorporating the said church, so far as the same may now have legal force and validity, are hereby disapproved and annulled, and the said corporation, so far as it may now have, or

pretend to have, any legal existence, is hereby dissolved." This absolute annulment of the laws which gave the said corporation a legal existence has dissipated all doubt on the subject, and the said corporation has ceased to have any existence as a civil body, whether for the purpose of holding property or of doing any other corporate act. It was not necessary to resort to the condition imposed by the act of 1862, limiting the amount of real estate which any corporation or association for religious or charitable purposes was authorized to acquire or hold, although it is apparent from the findings of the court that this condition was violated by the corporation before the passage of the act of 1887. Congress, for good and sufficient reasons of its own, independent of that limitation and of any violation of it, had a full and perfect right to repeal its charter and abrogate its corporate existence, which, of course, depended upon its charter.

The next question is whether congress or the court had the power to cause the property of the said corporation to be seized and taken possession of as was done in this case.

When a business corporation instituted for the purposes of gain or private interest is dissolved, the modern doctrine is that its property, after payment of its debts, equitably belongs to its stockholders. But this doctrine has never been extended to public or charitable corporations. As to these the ancient and established rule prevails, namely: that when a corporation is dissolved its personal property, like that of a man dying without heirs, ceases to be the subject of private ownership, and becomes subject to the disposal of the sovereign authority, whilst its real estate reverts or escheats to the grantor or donor, unless some other course of devolution has been directed by positive law, though still subject, as we shall hereafter see, to the charitable use. To this rule the corporation in question was undoubtedly subject. But the grantor of all or the principal part of the real estate of the Church of Jesus Christ of Latter-Day Saints was really the United States, from whom the property was derived by the church or its trustees through the operation of the town-site act. Besides, as we have seen, the act of 1862 expressly declared that all real estate acquired or held by any of the corporations or associations therein mentioned (of which the Church of Jesus Christ of Latter-Day Saints was one), contrary to the provisions of that act, should be forfeited, and escheat to the United States, with a saving of existing vested rights. The act prohibited the acquiring or holding of real estate of greater value than $50,000 in a territory, and no legal title had vested in any of the lands in Salt Lake City at that time, as the town-site act was not passed until March 2, 1867. There can be no doubt, therefore, that the real estate of the corporation in question could not, on its dissolution, revert or pass to any other person or persons than the United States.

If it be urged that the real estate did not stand in the name of the corporation but in the name of a trustee or trustees, and therefore was not subject to the rules relating to corporate property, the substance of the difficulty still remains. It can not be contended that the prohibition of the act of 1862 could have been so easily evaded as by put-

ting the property of the corporation into the hands of trustees. The equitable or trust estate was vested in the corporation. The trustee held it for no other purpose, and the corporation being dissolved, that purpose was at an end. The trust estate devolved to the United States in the same manner as the legal estate would have done had it been in the hands of the corporation. The trustee became trustee for the United States instead of trustee of the corporation. We do not now speak of the religious and charitable uses for which the corporation, through its trustee, held and managed the property. That aspect of the subject is one which places the power of the government and of the court over the property on a distinct ground.

Where a charitable corporation is dissolved and no private donor or founder appears to be entitled to its real estate (its personal property not being subject to such reclamation), the government or sovereign authority, as the chief and common guardian of the state, either through its judicial tribunals or otherwise, necessarily has the disposition of the funds of such corporation, to be exercised, however, with due regard to the objects and purposes of the charitable uses to which the property was originally devoted so far as they are lawful and not repugnant to public policy. * * *

The property in question has been dedicated to public and charitable uses. It matters not whether it is the product of private contributions, made during the course of half a century, or of taxes imposed upon the people, or of gains arising from fortunate operations in business, or appreciation in values, the charitable uses for which it is held are stamped upon it by charter, by ordinance, by regulation and by usage, in such an indelible manner that there can be no mistake as to their character, purpose or object. * * *

The manner in which the due administration and application of charitable estates is secured, depends upon the judicial institutions and machinery of the particular government to which they are subject. In England, the court of chancery is the ordinary tribunal to which this class of cases is delegated, and there are comparatively few which it is not competent to administer. Where there is a failure of trustees, it can appoint new ones; and where a modification of uses is necessary in order to avoid a violation of the laws, it has power to make the change. There are some cases, however, which are beyond its jurisdiction; as where, by statute, a gift to certain uses is declared void and the property goes to the king; and in some other cases of failure of the charity. In such cases the king as *parens patriæ*, under his sign manual, disposes of the fund to such uses, analogous to those intended, as seems to him expedient and wise.

These general principles are laid down in all the principal treatises on the subject, and are the result of numerous cases and authorities. See Duke on Char. Uses, ch. 10, §§ 4, 5, 6; Boyle on Char., bk. 2, ch. 3, 4; 2 Story's Eq. Jur., §§ 1167, *et seq.*; Attorney-General v. Guise, 2 Vernon 266; Moggridge v. Thackwell, 7 Ves. 36, 77; De Themmines v. De Bonneval, 5 Russ. 289; Town of Pawlet v. Clark, 9 Cranch 292, 335, 336; Beatty v. Kurtz, 2 Pet. 566; Vidal v. Girard's

Executors, 2 How. 127; Jackson v. Phillips, 14 Allen 539; Ould v. Washington Hospital, 95 U. S. 303; Jones v. Habersham, 107 U. S. 174. * * *

It is obvious that any property of the corporation which may be adjudged to be forfeited and escheated will be subject to a more absolute control and disposition by the government than that which is not so forfeited. The non-forfeited property will be subject to such disposition only as may be required by the law of charitable uses; whilst the forfeited and escheated property, being subject to a more absolute control of the government, will admit of a greater latitude of discretion in regard to its disposition. As we have seen, however, congress has signified its will in this regard, having declared that the proceeds shall be applied to the use and benefit of common schools in the territory. Whether that will be a proper destination for the non-forfeited property will be a matter for future consideration in view of all the circumstances of the case. * * *

Decree affirmed generally, Fuller, C. J., Field and Lamar, J.J., dissenting.

Note. **Effect of dissolution.**

1. *Franchises* can no longer be exercised: 1844, White v. Campbell, 5 Humph. (Tenn.) 38; 1844, Bank of Mississippi v. Wrenn, 11 Miss. (3 Sm. & M.) 791; 1877, Turnpike Co. v. Illinois, 96 U. S. 63; 1879, State v. Lawrence Bridge Co., 22 Kan. 438; 1881, Greenwood v. Freight Co., 105 U. S. 13, *infra*, p. 1422; 1882, Campbell v. Talbot, 132 Mass. 174; 1889, People v. O'Brien, 111 N. Y. 1, *infra*, p. 1426; 1890, Marysville Invest. Co. v. Munson, 44 Kan. 491. And see *supra*, pp. 868–871.

2. *Executory contracts:*

a. Involuntary dissolution, at common law, extinguished executory contracts, and all claims for damages for non-performance: 1797, Bracken v. William & M. College, 1 Call (Va.) 161; 1876, Silliman v. Fredericksburg, etc., R. Co., 27 Gratt. (Va.) 119; 1883, People v. Globe Mut. L. Ins. Co., 91 N. Y. 174; 1892, Schleider v. Dielman, 44 La. Ann. 462; 1897, Rosenbaum v. U. S. Cred. Sys. Co., 60 N. J. L. 294; 1899, Griffith v. Blackwater B. & L. Co., 46 W. Va. 56, 33 S. E. Rep. 125, *supra*, p. 897.

b. Voluntary dissolution does not extinguish executory contracts: 1834, Revere v. Boston Copper Co., 15 Pick. (Mass.) 351; 1865, Muscatine T. V. v. Funck, 18 Iowa 469, on 472; 1870, Pahquioque Bank v. Bethel Bank, 36 Conn. 325, 4 Am. Rep. 80; 1877, Shields v. Ohio, 95 U. S. 319, on 324; 1892, Schleider v. Dielman, 44 La. Ann. 462; 1896, Tiffin Glass Co. v. Stoehr, 54 Ohio St. 157.

c. In equity the obligation of such contracts survives, and may be enforced against corporate assets: 1819, Vose v. Grant, 15 Mass. 505, on 522; 1819, Spear v. Grant, 16 Mass. 9, on 15; 1824, Wood v. Dummer, 3 Mason 308; 1834, Mumma v. Potomac Co., 8 Pet. (U. S.) 281, *supra*, p. 896; 1852, Coulter v. Robertson, 16 Ind. 46, 79 Am. Dec. 405; 1853, Curran v. Arkansas, 15 How. (U. S.) 304, on 311–2; 1855, Bacon v. Robertson, 18 How. (U. S.) 480–6, *supra*, p. 899; 1861, State v. Bailey, 99 Mass. 267, 96 Am. Dec. 747; 1867, Powell v. North Mo. R. Co., 42 Mo. 63, on 68; 1873, Oakland R. Co. v. Oakland, etc., R. Co., 45 Cal. 365, 13 Am. Rep. 181; 1876, Broughton v. Pensacola, 93 U. S. 266, on 268; 1877, Shields v. Ohio, 95 U. S. 319, on p. 324; 1877, Wallamet Falls Canal, etc., Co. v. Kittridge, 5 Saw. 44, on 50; 1877, Shamokin Valley, etc., R. Co. v. Malone, 85 Pa. St. 25, on 36; 1882, Taylor v. Holmes, 14 Fed. Rep. 498; 1887, Stamm v. N. W. Mut. Ben. Assn., 65 Mich. 317, on 330; 1899, Boyd v. Hankinson, 92 Fed. Rep. 49. See *infra*, 35, and *dicta* in cases next paragraph.

d. Under statutes rights arising from executory contracts are preserved:

1843, Read v. Frankfort Bank, 23 Maine 318; 1866, Towar v. Hale, 46 Barb. (N. Y.) 361; 1877, Shields v. Ohio, 95 U. S. 319; 1879, Von Glahn v. De Rosset, 81 N. C. 467, 473; 1880, People v. Trust Co., 82 N. Y. 283; 1882, Life Assoc. v. Fassett, 102 Ill. 315; 1882, Taylor v. Holmes, 14 Fed. Rep. 498; 1886, Beck v. Henderson, 76 Ga. 360; 1889, Mott v. Danville Seminary, 129 Ill. 403; 1891, Nelson v. Hubbard, 96 Ala. 238, 244; 1892, Schleider v. Dielman, 44 La. Ann. 462; 1894, Mason v. Pewabic Min. Co., 66 Fed. Rep. 391, on 394; 1896, Tiffin Glass Co. v. Stoehr, 54 Ohio St. 157.

3. *Debts due to or from the corporation:*

a. At common law debts were extinguished: 1835, Commercial Bank v. Lockwood, 2 Har. (Del.) 8; 1841, Fox v. Horah, 1 Ired. Eq. (N. C.) 358, 36 Am. Dec. 48; 1844, White v. Campbell, 5 Humph. (Tenn.) 38; 1847, Commercial Bank v. Chambers, 8 Sm. & M. (Miss.) 9; 1849, Town of Port Gibson v. Moore, 13 Sm. & M. (Miss.) 157; 1850, Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; 1854, Moultrie v. Smiley, 16 Ga. 289; 1863, Malloy v. Mallett, 59 N. C. (6 Jones Eq.) 345; 1867, Conwell v. Pattison, 28 Ind. 509; 1872, Exchange Bank v. Teddy, 67 N. C. 169; 1878, Bank of Mississippi v. Duncan, 56 Miss. 166; 1888, Higgins v. Downward, 8 Houst. (Del.) 227, 40 Am. St. 141, *supra*, p. 152.

b. But debts and claims are preserved in equity: 1861, State, *ex rel.* Brown, v. Bailey, 16 Ind. 46, 79 Am. Dec. 405; 1868, Folger v. Columbia Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; 1877, McCoy v. Farmer, 65 Mo. 244; 1883, Howe v. Robinson, 20 Fla. 352; 1888, People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684, *infra*, p. 1426; 1888, Higgins v. Downward, 8 Houst. (Del.) 227, 40 Am. St. Rep. 141, *supra*, p. 152; 1890, Havermeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192; 1895, Conover v. Hull, 10 Wash. 673, 45 Am. St. Rep. 810. See, *supra*, 2*c*.

c. And very generally now by statute, rights, credits or liabilities arising *ex contractu* or *ex delicto* are preserved, and trustees provided for the settlement of such claims: 1847, Commercial Bank v. Chambers, 8 Sm. & M. (Miss.) 9; 1856, Robinson v. Lane, 19 Ga. 337; 1860, Hargroves v. Chambers, 30 Ga. 580; 1861, Bank of Salem v. Caldwell, 16 Ind. 469; 1867, Hunt v. Columbia Ins. Co., 55 Maine 290, 92 Am. Dec. 592; 1885, Society Perun v. Cleveland, 43 Ohio St. 481, *supra*, p. 617; 1888, Miller v. Newburg Coal Co., 31 W. Va. 836, 13 Am. St. Rep. 903; 1891, Hepworth v. Union Ferry Co., 62 Hun (N. Y.) 257; 1891, Grafton v. Union Ferry Co., 19 N. Y. Supp. 966, *contra;* 1894, People v. Troy St. & I. Co., 82 Hun 303, 1 N. Y. Ann. Cas. 138; 1894, Marsteller v. Mills, 143 N. Y. 398, 38 N. E. Rep. 370; 1898, State v. Fogerty, 105 Iowa 32; 1899, American Surety Co. v. Great W. S. Co., 58 N. J. Eq. 526, 43 Atl. Rep. 579; 1899, Boyd v. Hankinson, 92 Fed. Rep. 49. See, *supra*, 2*d*. Compare, 1885, Gray v. National S. S. Co., 115 U. S. 116 (tort).

4. *Personal property*, at common law, upon dissolution, vested in the crown or state: Coke's Littleton, 13*b*; Rex v. Pasmore, 3 Term R. 199; 1823, State Bank v. State, 1 Blackf. (Ind.) 267, *supra*, p. 891; 1841, Fox v. Horah, 1 Ired. Eq. (N. C.) 358, 36 Am. Dec. 48; 1844, White v. Campbell, 5 Humph. (Tenn.) 38; 1856, Erie R. Co. v. Casey, 26 Pa. St. 287. See *infra*, 5*c*.

5. *Real property:*

a. At common law real estate reverted to the grantor. 1823, State Bank v. State, 1 Blackf. (Ind.) 267, *supra*, p. 891; 1844, White v. Campbell, 5 Humph. (Tenn.) 38; 1848, Bingham v. Wiederwax, 1 N. Y. 509; 1852, Nicoll v. N. Y. & E. R. Co., 12 Barb. 460; 1856, Erie, etc., R. v. Casey, 26 Pa. St. 287 (goes to the state); 1862, Plitt v. Cox, 43 Pa. St. 486 (same); 1869, People v. College of California, 38 Cal. 166; 1875, Mercer Academy v. Rusk, 8 W. Va. 373; 1877, Turnpike Co. v. Illinois, 96 U. S. 63; 1885, New York, etc., R. v. Parmalee, 1 Ohio C. C. 239; 1891, Danville Seminary v. Mott, 136 Ill. 289. See also, *supra*, 3*c*.

b. But a corporation whose duration is limited may take or grant an estate in fee: 1848, People v. Mauran, 5 Denio 389; 1852, Nicoll v. N. Y. & E. R. Co., 12 Barb. 460; 1854, Nicoll v. N. Y. & E. R. Co., 12 N. Y. 121; 1856, Rives v. Dudley, 3 Jones Eq. (56 N. C.) 126, 67 Am. Dec. 231; 1864, Erie R. Co. v. State, 31 N. J. L. 531, 86 Am. Dec. 226; 1889, Bailey v. Platte, etc., Co., 12

Colo. 230; 1889, Davis v. Memphis, etc., R., 87 Ala. 633; 1890, Miner v. N. Y., etc., R., 123 N. Y. 242; 1894, Detroit Citizens' St. R. v. Detroit, 64 Fed. Rep. 628; 1896, Union, etc., R. Co. v. Chicago, etc., R., 163 U. S. 564; 1897, Sioux, etc., Co. v. Trust Co., 82 Fed. Rep. 124; 1897, Wilson v. Leary, 120 N. C. 90, 58 Am. St. Rep. 778, *supra*, p. 903.

c. But in equity or by statute, real or personal estate, or the proceeds from its sale, are considered a fund for the payment of debts, and distribution among shareholders, and there is no reversion either to the grantor or to the state in the case of private business corporations, but in eleemosynary and non-business corporations the common law doctrines are applied frequently: 1860, Owen v. Smith, 31 Barb. (N. Y.) 641; 1866, Towar v. Hale, 46 Barb. (N. Y.) 361; 1872, Heath v. Barmore, 50 N. Y. 302; 1887, Titcomb v. Kennebunk Mut. F. Ins. Co., 79 Maine 315, *supra*, p. 904; 1888, People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684; 1889, Bailey v. Platte L. D. Canal & M. C., 12 Colo. 230; 1889, Davis v. Memphis, etc., R., 87 Ala. 633; 1890, Havermeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192; 1890, Mormon Church v. United States, 136 U. S. 1, *supra*, p. 906; 1891, Danville Seminary v. Mott, 136 Ill. 289; 1893, Sulphur S. &. M. P. R. v. St. Louis, 2 Texas Civ. App. 650; 1897, Wilson v. Leary, 120 N. C. 90, 58 Am. St. Rep. 778, *supra*, p. 903; 1901, Noble v. Gadsen Land Co., 133 Ala. 250, 91 Am. St. R. 27; 1902, Insurance Co. v. Dunscomb, 108 Tenn. 724, 91 Am. St. R. 769.

6. *Actions by a corporation:*

a. Suits by a corporation at common law abate upon its dissolution: 1810, Bank of U. S. v. McLaughlin, 2 Cranch C. C. 20, Fed. Cas. 928; 1843, May v. State Bank, 2 Rob. (Va.) 56, 40 Am. Dec. 726; 1844, Bank of Miss. v. Wrenn, 3 Sm. & M. (Miss.) 791; 1844, Miami Exporting Co. v. Gano, 13 Ohio 269; 1846, Bank of Gallipolis v. Trimble, 6 B. Mon. (Ky.) 599; 1851, Ingraham v. Terry, 11 Humph. (Tenn.) 572; 1852, Torry v. Robertson, 24 Miss. 192; 1891, Van Pelt v. Home Bldg. Assn., 87 Ga. 370.

b. But see the following cases holding dissolution of a plaintiff corporation after suit is begun is not ground for nonsuit: 1828, Agnew v. Bank, 2 Har. & G. (Md.) 478; 1842, City of Louisville v. Bank of U. S., 3 B. Mon. (Ky.) 138; 1849, Grand Gulf Bank v. Wood, 12 Sm. & M. (Miss.) 482; 1850, Kimball v. Grafton Bank, 20 N. H. 347; 1877, Kansas City Hotel Co. v. Saner, 65 Mo. 279; 1882, Butchers' & D. Bank v. Pulitzer, 11 Mo. App. 594.

c. Statutes may prevent abatement of suits by dissolution of plaintiff corporation: 1826, President, etc., of N. J., etc., Bank v. Thorp, 6 Cow. (N. Y.) 46; 1847, Bank of U. S. v. Leathers, 8 B. Mon. (Ky.) 126; 1857, State v. Bank, 18 Ark. 554; 1897, Richmond Union Pass. Co. v. R. Co., 95 Va. 386; 1898, Singer & Talcott Stone Co. v. Hutchinson, 176 Ill. 48.

7. *Suits against a corporation:*

a. No valid judgment at common law could be rendered against a dissolved corporation: 1836, Rider v. Nelson, etc., Fac., 7 Leigh (Va.) 154, 30 Am. Dec. 495; 1845, Musson v. Richardson, 11 Rob. (La.) 37; 1845, Greeley v. Smith, 3 Story 657, Fed. Cas. 5748; 1849, Merrill v. Bank, 31 Maine 57, 50 Am. Dec. 649; 1874, McCullough v. Norwood, 58 N. Y. 562; 1874, First National Bank v. Colby, 88 U. S. 609; 1878, Sturgis v. Vanderbilt, 73 N. Y. 384; 1880, Ferry v. Merchants', etc., Bank, 66 Ga. 177; 1891, Pendleton v. Russell, 144 U. S. 640; 1895, *In re* N. Y. Oxygen Co., 33 N. Y. Supp. 726, 24 Civ. Proc. Rep. 398; 1895, Combes v. Keyes, 89 Wis. 297, 46 Am. St. Rep. 839; 1897, *In re* Directors, etc., Brewing Co., 24 App. Div. (N. Y.) 223. See, *infra*, *c* and *d* and 8.

b. Attachment or garnishment proceedings are terminated by dissolution of defendant corporation: 1844, Farmers', etc., Bank v. Little, 8 W. & S. (Pa.) 207, 13 Am. Dec. 293; 1874, Frailey v. Central Fire Ins. Co., 9 Phil. 219; 1895, Walters v. Western, etc., R. Co., 69 Fed. Rep. 679. But see, 1840, Lindell v. Benton, 6 Mo. 361; 1882, Hays v. Lycoming Fire Ins. Co., 99 Pa. St. 621, *contra;* 1901, Fitts v. Natl. Life Assn., — Ala. —, 30 So. 374.

c. Statutes may provide that dissolution shall not abate suits pending, nor prevent the bringing of suits against the defunct corporation: 1859, Blake v. Portsmouth, etc., R. Co., 39 N. H. 435; 1870, Ramsay v. Peoria, etc., Ins. Co., 55 Ill. 311; 1887, Greenbrier Lumber Co. v. Ward, 30 W. Va. 43; 1890, Lake Superior Iron Co. v. Brown, B. & Co., 44 Fed. Rep. 539; 1894, People v. Troy Steel & Iron Co., 82 Hun (N. Y.) 304; 1895, State v. Port Royal, etc.,

R., 45 S. C. 413, 23 S. E. Rep. 363; 1898, Steinhaur v. Colmar, 11 Colo. App. 494, 55 Pac. Rep. 291; 1901, Shayne v. Evening Post Pub. Co., 168 N. Y. 70, 55 L. R. A. 777.

An action for libel against a corporation which abates by the expiration of the corporate charter may be revived against the trustees of the dissolved corporation in office at the time of dissolution: 1901, Shayne v. Evening Post Pub. Co., 168 N. Y. 70, 55 L. R. A. 777.

d. And it seems that a decree dissolving a corporation may provide that pending suits against the corporation shall not be affected: 1882, Life Association v. Funck, 102 Ill. 315; 1891, Hepworth v. Union Ferry Co., 62 Hun (N. Y.) 257; 1895, People v. Troy Steel, etc., Co., 82 Hun (N. Y.) 303, 1 N. Y. Ann. Cas. 138.

8. *Judgments*: At common law, a judgment in favor of a corporation was extinguished by the dissolution of the corporation: 1842, May v. State, 2 Rob. (Va.) 56, 40 Am. Dec. 726; but if such judgment was assigned before dissolution the assignee could enforce it after dissolution: 1855, De Vendell v. Hamilton, 27 Ala. 156; 1861, Leach v. Thomas, 27 Ill. 457.

A judgment against a corporation, obtained while an appeal from a judgment of dissolution is pending, may be enforced before the judgment of dissolution is affirmed: 1894, Giles v. Stanton, 86 Tex. 620, 26 S.W.Rep. 615, 1111.

PART III.

THE CORPORATION AS A SUBJECT AND SOURCE OF RIGHTS AND OBLIGATIONS.

TITLE I. RIGHTS AND DUTIES OF THE CORPORATION IN GENERAL.

CHAPTER 12.

POWERS AND AUTHORITY IN GENERAL.

ARTICLE I. THEORIES OF CORPORATE CAPACITY.

Sec. 258. Corporate powers.—"The capacities of corporations are limited: (1) by natural possibility, i. e., by the fact that they are artificial and not natural persons; (2) by legal possibility, i. e., by the restrictions which the power creating a corporation may impose on the legal existence and action of its creature.

"First, of the limits set to the powers and liabilities of corporations by the mere fact that they are not natural persons. The requirement of a common seal is sometimes said to spring from the artificial nature of a corporation. The fact that it is not known in Scotland is, however, enough to show that it is a mere positive rule of English law. The correct and comprehensive proposition is that a corporation can do no act except by an agent (for even if all the members concur they are but agents). * * *

"We come now to consider the far more difficult and complicated questions of special restrictions. * * * On this there have been many decisions, much discussion, and some real conflict of judicial opinions. There are two opposite views by which the consideration of the matter may be governed, and they may be expressed thus:

"1. A corporation is an artificial creature of the law, and has no existence except for the purposes for which it was created. No act exceeding the limits of those purposes can be the act of the corporation, and no one can be authorized to bind the corporation to such an act. In each particular case, therefore, the question is: Was the corporation *empowered* to bind itself to this transaction?

"2. A corporation once duly constituted has all such powers and capacities of a natural person as in the nature of things can be exercised by an artificial person. Transactions entered into with apparent authority in the name of the corporation are presumably valid and binding, and are invalid only if it can be shown that the legislature has expressly or by necessary implication deprived the corporation of the power it naturally would have had of entering into them. The question is, therefore: Was the corporation *forbidden* to bind itself to this transaction? * * * *

"These views we may call (1) the doctrine of *special capacities*, and (2) the doctrine of *general capacity*." Pollock on Contracts, pp. 86-91.

Sec. 259. Special capacities.

THOMAS v. RAILROAD COMPANY.[1]

1879. IN THE SUPREME COURT OF UNITED STATES. 101 U. S. 71–87.

[Error to the circuit court of the United States for the eastern district of Pennsylvania.

This was an action of covenant, by Thomas et al. against the West Jersey Railroad Company, and they, to maintain the issue on their part, offered to prove that:

In October, 1863, the Millville and Glassboro Railroad Company, incorporated by the legislature of New Jersey in 1859, entered into an agreement with them leasing its road, buildings and rolling-stock to them for twenty years from August, 1863, for the consideration of one-half of the gross sum collected from the operation of the road by the plaintiffs during that period; and providing that the company might at any time terminate the contract and retake possession of the railroad, and in such case, if the plaintiffs so desired, arbitrators should decide upon the value of the contract and the loss incurred by the termination thereof; and the decision was to be final, conclusive, and binding upon the parties.

In October, 1867, articles of agreement were entered into between

[1] Statement abridged.

the Millville and Glassboro Railroad Company and the West Jersey Railroad Company, the defendant, whereby it was agreed that the former should be merged into and consolidated with the latter.

In November, 1867, a written notice was served by the Millville and Glassboro Railroad Company upon the plaintiffs, putting an end to the contract and to all the rights thereby granted, and notifying them that the company would retake possession of the railroad on the first day of April, 1868.

In March, 1868, the legislature of New Jersey enacted that, upon the fulfillment of certain preliminaries, the Millville and Glassboro Railroad Company should be consolidated with the West Jersey Railroad Company, "subject to all the debts, liabilities and obligations of both of said companies." These conditions were fulfilled, and the railroad was duly delivered by the plaintiffs to the West Jersey Railroad Company on the first of April, 1868.

Notices to arbitrate according to the terms of the agreement were served by the plaintiffs upon the Millville and Glassboro Railroad Company, and immediately thereafter upon the West Jersey Railroad Company. An agreement of submission was entered into whereby arbitrators were appointed, with power to settle the controversy between the parties. An award was made by which the value of the unexpired term of the lease, and the loss sustained by reason of the termination thereof, to and by the plaintiffs, was adjudged to be the sum of $159,437.07; and the West Jersey Railroad Company was ordered to pay that sum to the plaintiffs. This award was subsequently set aside in a suit in equity brought in New Jersey.

The plaintiffs further offered to prove their compliance in all respects with the terms of the lease, its value, and the loss and damage they had sustained by reason of its termination as aforesaid. The court excluded the offered testimony on the ground that the lease by the Millville and Glassboro Railroad Company to the plaintiffs was *ultra vires*, and directed the jury to return a verdict for the defendant. The plaintiffs duly excepted, and sued out this writ.]

MILLER, J. * * * The ground on which the court held the contract to be void, and on which the ruling is supported in argument here, is that the contract amounted to a lease, by which the railroad, rolling-stock, and franchises of the corporation were transferred to plaintiffs, and that such a contract was *ultra vires* of the company.

It is denied by the plaintiffs that the contract can be fairly called a lease.

But we know of no element of a lease which is wanting in this instrument. "A lease for years is a contract between lessor and lessee, for possession of lands, etc., on the one side, and a recompense by rent or other consideration on the other." 4 Bac. Abr. 632. * * *

The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter:

"That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements

with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight, or passengers, and to enforce the fulfillment of such contracts."

This is no more than saying: "You may do the business of carrying goods and passengers, and may make contracts for doing that business. Such contracts you may make with any other corporation or with individuals." No doubt a contract by which the goods received from railroad or other carrying companies should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease, or transfer to others the entire road and the rights and franchises of the corporation. To do so is to deprive the company of the power of making those contracts which this clause confers, and of performing the duties which it implies. * * *

It is next insisted, in the language of counsel, that though this may be so, "a corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter a shareholder may enjoin its execution, and the state may, by proper process, forfeit the charter."

We do not concur in this proposition. *We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.* * * *

[Citing and discussing East Anglian R. Co. v. Eastern Counties R. Co., 11 C. B. 775; Eastern Counties R. Co. v. Hawkes, 5 H. L. Cas. 331; McGregor v. Deal & Dover R. Co., 22 Law J. Q. B. 69, 18 Q. B. 618.]

There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.

That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy. * * * [Citing New

York & M. L. R. Co. v. Winans, 17 How. 30; Beman v. Rufford, 1 Sim. (N. S.) 550; Winch v. Birkenhead, L. & C. J. R. Co., 13 Eng. L. & Eq. 506; Black v. Delaware & R. Canal Co., 22 N. J. Eq. 130.]

It remains to consider the suggestion that the contract, having been executed, the doctrine of *ultra vires* is inapplicable to the case. There can be no question that, in many instances where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred.

In regard to corporations the rule has been well laid down by Comstock, C. J., in Parish v. Wheeler, 22 N. Y. 494, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.

But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action. Damages for a material part of the contract never performed; damages for the value of a contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-performance. As to this it is not an executed contract.

Not only so, but it is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the company and to the public, give to the plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts.

We can not see that the present case comes within the principle that requires that contracts, which, though invalid for want of corporate power, have been fully executed, shall remain as the foundation of rights acquired by the transaction.

We have given this case our best consideration on account of the importance of the principles involved in its decision, and after a full examination of the authorities we can see no error in the action of the circuit court. Judgment affirmed.

Note. Special capacities. Only the following among numerous authorities are given: 1804, Head v. Providence Ins. Co., 2 Cranch (6 U. S.) 127;

1807, Beatty v. Marine Ins. Co., 2 Johns. (N. Y.) 109, 3 Am. Dec. 401; 1818, People v. Utica Ins. Co., 15 Johns. 358, 8 Am. Dec. 243; 1819, Dartmouth College v. Woodward, 5 Wheat. (U. S.) 518, 636, *supra*, p. 708; 1827, Fuller v. Plainfield, 6 Conn. 532; 1828, State v. Stebbins, 1 Stew. (Ala.) 299; 1830, Providence Bank v. Billings, 4 Pet. (29 U. S.) 514; 1831, Betts v. Menard, 1 Ill. (Breese) 395; 1839, Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, 587; 1839, Penobscot Boom Co. v. Lamson, 16 Maine 224, 33 Am. Dec. 656; 1839, Thomas v. Dakin, 22 Wend. 9, *supra*, p. 19; 1841, State v. Washington S. L. Co., 11 Ohio 96; 1846, Coleman v. Eastern Counties R. Co., 10 Beav. 1; 1846, Janesville Bridge Co. v. Stoughton, 1 Pin. (Wis.) 667; 1850, Perrine v. Ches. & D. C. Co., 9 How. (50 U. S.) 172; 1851, East Anglian R. Co. v. Eastern Counties R., 11 C. B. (73 E. C. L.) 775; 1852, Bank of Pennsylvania v. Commonwealth, 19 Pa. St. 144; 1853, Hood v. N. Y. & N. H. R. Co., 22 Conn. 502; 1856, Commw. v. Erie & N. E. R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; 1858, Pearce v. Madison & Ind. R. Co., 21 How. (62 U. S.) 441; 1858, Abby v. Billups, 35 Miss. 618, 72 Am. Dec. 143; 1859, Talmadge v. North Am. C. & T. Co., 3 Head (40 Tenn.) 337; 1860, Bissell v. Mich. Southern, etc., R. Co., 22 N. Y. 258; 1860, Memphis & St. F. P. R. Co. v. Rives, 21 Ark. 302; 1860, McCracken v. City of San Fran., 16 Cal. 591; 1865, Hannibal & St. J. R. Co., v. Marion Co., 36 Mo. 294; 1868, Rochester Ins. Co. v. Martin, 13 Minn. 59 (Gil. 54); 1869, Monument Nat'l Bank v. Globe Works, 101 Mass. 57; 1873, Fowler v. Scully, 72 Pa. St. 456, 13 Am. Rep. 699; 1875, Ashbury R. Co. v. Riche, L. R. 7 H. L. Rep. 653; 1877, Franklin Co. v. Lewiston Inst. For Sav., 68 Maine 43; 1880, Houston & T. C. R. v. Shirley, 54 Texas 125; 1881, Davis v. Old Colony R. Co., 131 Mass. 258; 1885, Ewing v. Toledo Sav. Bank, 43 Ohio St. 31; 1888, Chewackla Lime Works v. Dismukes, 87 Ala. 344; 1888, State v. Atchison & N. R. Co., 24 Neb. 143, 8 Am. St. Rep. 164; 1890, Central Trans. Co. v. Pullman P. C. Co., 139 U. S. 24, 48; 1894, Commw. v. N. El. R. Co., 161 Pa. St. 409; 1897, Farwell Co. v. Josephson, 96 Wis. 10, 37 L. R. A. 138, 65 Am. St. Rep. 22; 1897, Pullman's Car Co. v. Cent. Trans. Co., 171 U. S. 138; 1897, Franklin Nat'l Bank v. Whitehead, 149 Ind. 560, 63 Am. St. Rep. 302; 1898, Nicollet Nat'l Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334; 1899, De La Vergne Refrigerating Machine Co. v. German Sav. Inst., 175 U. S. 40; 1899, National Loan, etc., Assn. v. Home Sav. Bank, 181 Ill. 35, 72 Am. St. Rep. 245.

Sec. 260. General capacity.

RICHE v. THE ASHBURY RAILWAY CARRIAGE & IRON CO., LTD.[1]

1874. In the Court of Exchequer. L. R. 9 Ex. 224–297.

[The defendants were incorporated as a limited company under the companies' act, 1862, the objects of the company, as stated in the memorandum of association, being "To make, sell, or lend on hire, railway carriages and wagons, and all kinds of railway plant, fittings, machinery and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work and sell

[1] Statement of facts abridged, arguments, part of opinion of Blackburn, J., and dissenting opinion of Archibald, J., omitted. Brett and Grove, JJ., concurred with Blackburn, and Keating and Quain, JJ., concurred with Archibald, J. The court being evenly divided, the judgment below was affirmed. Upon appeal to the house of lords, 1875, Ashbury, etc., R. Co. v. Riche, L. R. 7 H. L. Rep. 653, the decision above was overruled, and the doctrine of *special capacities* established as to parliamentary corporations. See note, *infra*. p. 924.

mines, minerals, land and buildings; to purchase and sell as merchants timber, coal, metal and other materials, and to buy and sell any such materials on commission as agents." And by article 4 of their articles of association, "An extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association, shall take place only in pursuance of a special resolution."

The defendants' directors in January, 1865, entered into contracts on behalf of the company, by which the company became purchasers of a concession granted by the Belgian government for the construction of a railway in Belgium, and contracted with the plaintiff that, through the medium of a *societe anonyme* which the company were to form in Belgium, he should be employed to construct the line, and that they would pay certain sums of money into the treasury of the *societe anonyme* for the purpose of payments being made to him thereout for the construction of the railway. These contracts were afterward modified in certain particulars by agreements entered into, October, 1865, by the directors on behalf of the company.

In October, 1865, the plaintiff entered on the construction of the line; the *societe anonyme* was formed, and for some time payments were made by the company into the treasury of the *societe* in pursuance of their contract with the plaintiff.

In May, 1866, defendants repudiated the contracts, on the ground that they were *ultra vires*. Afterwards these contracts were ratified at an annual meeting of the shareholders. Plaintiffs claimed the contracts were not *ultra vires*, but if they were they could be ratified by the shareholders.]

BLACKBURN, J. * * * It is of great importance, when we come to construe a statute creating a corporation, to consider what would be the incidents at common law conferred on a corporation created by charter.

The leading authority on this subject is the case of Sutton's Hospital, 10 Co. 1. There were many points raised in that case. Those which I think material to the present point arose on a part of the charter set out in the special verdict (p. 10*b*), by which the king incorporated the first governors of the charterhouse, and expressly provided, 1. That they should have power to purchase, etc., as well goods, chattels, etc., as lands. 2. To sue and be sued. 3. To have a common seal, "whereby the same corporation shall or may seal any manner of instrument touching the said corporation and the manor, lands, etc., thereto belonging, or in any wise touching or concerning the same. Nevertheless, it is our true intent and meaning that the said governors, for the time being, and their successors, nor any of them, shall do, or suffer to be done, at any time hereafter, any act or thing whereby or by means whereof any of the manors, etc., of the said incorporation, or any estate, etc., shall be conveyed, etc., to any other whatsoever contrary to the true meaning hereof, other than by such leases as are hereafter mentioned, and that in such manner and form as is hereafter expressed, and not otherwise." The king, therefore,

by this charter not only did not in express terms give a power of alienation, but by express negative words forbade any alienation except by lease. But the resolution of the court, as reported by Coke (at p. 30*b*), was that "when a corporation is duly created all other incidents are *tacite* annexed; * * * and, therefore, divers clauses subsequent in the charter are not of necessity, but only declaratory, and might well have been left out. As, 1. By the same to have authority, ability, and capacity to purchase; but no clause is added that they may alien, etc., and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, etc., that is also declaratory, for when they are incorporated they may make or use what seal they will. 4. To restrain them from aliening or demising but in a certain form; that is an ordinance testifying the king's desire, but it is but a precept and doth not bind in law."

This seems to me an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own. And further, that an attempt to forbid this on the part of the king, even by express negative words, does not bind at law. Nor am I aware of any authority in conflict with this case.

If there are conditions contained in the charter that the corporation shall not do particular things, and these things are nevertheless done, it gives ground for a procceeding by *scire facias* in the name of the crown to repeal the letters-patent creating the corporation. See Reg. v. Eastern Archipelago Company, 2 E. & B. 857, 22 L. J. Q. B. 196. But if the crown take no such steps it does not, as I conceive, lie in the mouth, either of the corporation or of the person who has contracted with it, to say that the contract into which they have entered was void as beyond the capacity of the corporation.

I am aware of no decision by which a corporation at common law has been permitted to do so. I take it that the true rule of law is, that a corporation at common law has, as an incident given by law, the same power to contract and subject to the same restrictions that a natural person has. And this is important when we come to construe the statutes creating a corporation. For if it were true that a corporation at common law has a capacity to contract to the extent given it by the instrument creating it, and no further, the question would be, does the statute creating the corporation, by express provision or by necessary implication, show an intention in the legislature to confer upon this corporation capacity to make the contract? But if a body corporate has, as incident to it, a general capacity to contract, the question is, does the statute creating the corporation, by express provision or necessary implication, show an intention in the legislature to prohibit, and so avoid the making of a contract of this particular kind?

I think this is the real question, and for that I refer to the judgment of Parke, B., in South Yorkshire R. Co. v. Great Northern R. Co., 9 Ex. 55, 84, 22 L. J. Ex. 305, 313, and the various other cases cited

by my late brother Willes and by myself in Taylor v. Chichester and Midhurst R. Co., L. R. 2 Ex., at pp, 375, 389.

And when we are construing a statute creating and regulating a corporation, it is right to bear in mind that, as Lord Coke says, "It is a maxim in the common law that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law." 2 Inst. 200. Affirmative words may no doubt be used so as to imply a negative (see Plowden Com., 113), but I take it the general principle is that thus laid down by Cresswell, J., in the Eastern Archipelago Company v. Reg., 2 E. & B., at p. 888, 23 L. J. Q. B. 82, "that to make the words giving an express liberty or right have the effect of controlling or limiting that which would otherwise exist, they must be very plain."

I now come to consider the construction of the act of 1862, under which the present company is formed. The sections of the act of 1862 bearing on the present case seem to me to be only sections 6, 8, 9, 10 and 12.

By the sixth section of the act of 1862, any seven persons may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this act in respect of registration, form an incorporated company with or without limited liability.

The eighth, ninth and tenth sections provide that the memorandum of association shall contain the objects for which the proposed company is to be established.

The twelfth section provides that the company may make certain specified alterations in the memorandum of association, not including a change in the objects for which the company is to be established. and then, in express negative words provides that, "save as aforesaid, no alteration shall be made in the conditions contained in the memorandum of association."

The objects of the proposed company must, therefore, always remain the same, and that has, I think, two important effects: First, I think that if the company as a body proposes to do anything beyond these objects, any one dissentient shareholder (who has not precluded himself from doing so) may prevent it from doing so.

Secondly. No person can be entitled to fix the company with a contract made by the board for any purpose beyond those objects, on the ground that the board had an ostensible or apparent authority to make contracts of that kind, but must, in order to fix the company, at least prove an actual authority given to the board to make the particular contract he seeks to enforce.

Now, if I thought that it was at common law an incident to a corporation that its capacity should be limited to the extent conferred on it by the instrument creating it, I should agree that the capacity of a company incorporated under the act of 1862 was limited to the objects in the memorandum of association. But if I am right in the opinion which I have already expressed, that the general power of contracting is an incident to a corporation which it requires an indication of intention in the legislature to take away, I see no such indi-

cation here. There are not even affirmative words, those used in § 25 of 7 and 8 Vict., ch. 110, to which I shall now refer, having been (I presume advisedly) not repeated.

The 7 and 8 Vict., ch. 110, § 25, enacts that from the date of the certificate the shareholders shall be incorporated "by the name of the company as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of this act, and of such deed as aforesaid." And then express powers are given to the company to enter into contracts for any "necessary purpose of the company."

I think if the question was whether the legislature had conferred on a corporation created under this act capacity to enter into contracts beyond the provisions of the deed, there could be only one answer. The legislature did not confer such capacity.

But if the question be, as I apprehend it is, whether the legislature have indicated an intention to take away the power of contracting, which at common law would be incident to a body corporate, and not merely to limit the authority of the managing body and the majority of the shareholders to bind the minority, but also to prohibit and make illegal contracts made by the body corporate in such a manner that they would be binding on the body if incorporated at common law, I think the answer should be the other way. There certainly is ground for suspecting that the person who framed the act, 7 and 8 Vict., ch. 110, thought that the corporation would have no other powers than those thus expressly given to it, and perhaps meant to restrict its powers accordingly, but when we remember the canon of construction that affirmative words do not take away the common law right, I think he has not used words sufficient to effect such a purpose. It would be different if negative words had been used, and it had been said that the company should not do any other acts than those necessary for the purpose for which it is formed.

The two acts, 7 and 8 Vict., ch. 110, and the act of 1862, are so much in *pari materia*, that if it had been settled by judicial construction that a company under 7 and 8 Vict., ch. 110, was forbidden to make any contract for objects beyond those specified in the deed, I should endeavor to put the same construction on the act of 1862, unless the change in the language showed an intention in the legislature to alter the law.

There are many *dicta* in courts of equity worthy of great respect, which indicate an opinion not only that such acts are beyond the authority of the board, or even of a majority of the shareholders, but also that they are beyond the capacity of the company, though unanimous.

These are worthy of great attention, but I can find no case in which it has been decided that a contract so made or ratified by the whole company that it would have bound the company in its corporate capacity (but for the provisions of the statute) has, either at law or in equity, been held void on account of the provisions of that act. And I think that the three cases already referred to of Spackman v. Evans,

L. R. 3 H. L. Cas. 171; Evans v. Smallcombe, L. R. 3 H. L. Cas. 249, and Houldsworth v. Evans, L. R. 3 H. L. Cas. 263, all decided in the house of lords, are at least authorities for the contrary doctrine. * * *

I think, for the reasons I have above given, that in this case the unanimous shareholders have, in fact, assented to the ratification under the seal of the company of this contract, and that such a ratification, at all events, makes the contract binding on the company in its corporate capacity.

I think, therefore, that the judgment of the court below should be affirmed.

Note. General capacity. While the rule of special capacities is verbally almost universally adhered to, there is a tendency, especially in the decisions of the state courts, when no public interest or policy is specially involved, and creditors' rights are not affected, practically to allow a general capacity to do everything in every way an individual could do, within the field covered by the business in which the corporation was organized to engage. As was stated in 1851, by Willard, P. J., in Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 27, 53, "modern decisions tend to assimilate the actions, rights, duties and liabilities of corporations to those of individuals and commercial partnerships;" or as stated in 1857, in Shrewsbury & B. R. Co. v. N. W. R. Co., 6 H. L. Cases 113, "*Prima facie* all corporate bodies are bound by contracts under their common seal, but this *prima facie* power to contract can not be insisted on as to matters where, from the nature of the corporate body or the object of its incorporation, it is expressly or impliedly, 'by reasonable inference,' prohibited from contracting. A contract as to such matters is *ultra vires*." So, too, in 1859, Lord Wensleydale, in Scottish N. E. R. Co. v. Stewart, 3 Macq. H. L. Cas. 382, said: "There can be no doubt that a corporation is fully capable of binding itself by any contract, except when the statutes by which it is created or regulated expressly or by necessary implication prohibit such contract between the parties. *Prima facie* all its contracts are valid, and it lies on those who impeach any contract to make out that it is bad." And in 1887, Lord Selborne said in A.-G. v. Great Eastern R. Co., 5 App. Cas. 478, "The doctrine of *ultra vires* is one which ought to be reasonably and not unreasonably applied, and whatever may fairly be regarded as incidental to or consequential upon those things which the legislature has authorized, ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*."

Cook Corporations, 4th ed., 1898, § 3, states the modern tendency more broadly than other writers, and perhaps too broadly. He says: "The theory of a corporation is that it has no powers except those expressly given or necessarily implied. But this theory is no longer strictly applied to private corporations. A private corporation may exercise many extraordinary powers, provided all of its stockholders assent and none of its creditors are injured. There is no one to complain except the state, and the business being entirely private, the state does not interfere. * * * The old theory of a corporation was that it could not legally do anything in excess of its express or implied powers. But the modern view is that a private corporation may, if all its stockholders assent and if creditors are paid. Public policy does not require business corporations to confine themselves strictly within the limits of the words of their charter." He cites particularly, 1879, Kent v. Quicksilver Mining Co., 78 N. Y. 159, 186; 1896, Bath Gaslight Co. v. Claffy, 151 N. Y. 24, 29-31, 33, 34, 37; 1897, Augusta, etc., R. Co. v. City Council, 100 Ga. 701, 28 S. E. Rep. 126; 1897, Farwell Co. v. Wolf, 96 Wis. 10, 70 N. W. Rep. 289.

This latter case holds that "*none but a person directly* interested in the corporation or the state can question such [corporate] authority;" and the following cases seem to support this doctrine: 1860, Natoma, etc., Co. v. Clarkin,

14 Cal. 544; 1876, Grant v. Henry Clay, etc., Co., 80 Pa. St. 208; 1878, National Bank v. Whitney, 103 U. S. 99; 1883, Hovelman v. Kansas City, etc., Co., 79 Mo. 632; 1884, Alexander v. Tolleston Club, 110 Ill. 65; 1886, Baker v. North West, etc., Loan Co., 36 Minn. 185; 1889, Fritts v. Palmer, 132 U. S. 282; 1893, Prescott Nat'l Bank v. Butler, 157 Mass. 548; 1898, Rogers v. R. Co., 33 C. C. A. 517, 91 Fed. Rep. 299; 1898, South & N. A. R. Co. v. Highland Ave., etc., 119 Ala. 105, 24 So. Rep. 114; 1898, Chapman v. Iron Clad R. Co., 62 N. J. L. 497, 41 Atl. Rep. 690; 1898, Bishop v. Kent & Stanley Co., 20 R. I. 680, 41 Atl. Rep. 255; 1898, Miller v. American Tobacco Co., 55 N. J. Eq. 352, 42 Atl. Rep. 1117; 1899, Union Trust Co. v. M. L. H. Co., 189 Pa. St. 263, 42 Atl. Rep. 129; 1899, Murphy v. Arkansas & L. L. & I. Co. (C. C. Ark.), 97 Fed. Rep. 723; 1899, Colorado Springs Co. v. Am. Pub. Co. (C. C. A. Colo.), 97 Fed. Rep. 843; 1899, International B. & L. Assn. v. Wall, 153 Ind. 554, 55 N. E. Rep. 431; 1900, Burke Land & L. S. Co. v. Wells F., etc., Co., — Idaho —, 60 Pac. Rep. 87; 1900, City of Spokane v. Amsterdamsch T. K., 22 Wash. 172, 60 Pac. Rep. 141.

Late cases hold also that the state will not object except when some special public interest is injuriously affected: 1836, State v. Essex Bank, 8 Vt. 489; 1860, Bissell v. Mich. So. R. Co., 22 N. Y. 258, 289; 1879, State v. Oberlin B. & L. Assn., 35 Ohio State 258; 1889, State v. Minnesota Thresher Co., 40 Minn. 213; 1890, People v. North River S. R. Co., 121 N. Y. 582, *supra*, p. 100; 1890, Martin v. Niagara Falls Co., 122 N. Y. 165; 1892, Oliver v. Gilmore (C. C. Mass.), 52 Fed. Rep. 562; 1892, Edgar Collegiate Institute v. People, 142 Ill. 363; 1896, State v. Janesville Water Co., 92 Wis. 496, 501; 1897, Illinois Health Univ. v. People, 166 Ill. 171; 1898, State v. National School of Osteopathy, 76 Mo. App. 439.

These two doctrines—that the state alone can complain, and that it will complain only when the public are injuriously affected—with the extension of the doctrine of implied powers indicated below, leave but little of the old doctrine of special capacities, and approximate to the doctrine of *general capacity* —an unwise extension in the writer's opinion.

ARTICLE II. CLASSES OF CORPORATE POWERS.

Sec. 261. 1. **Incidental powers**—those tacitly annexed without any express words to every corporation duly created. These are:

(1) To have perpetual succession during the period for which the corporation is created.

(2) To have a corporate name and to contract, to grant and receive, and to sue and be sued thereby.

(3) To purchase and hold real and personal property for the purposes authorized by the charter.

(4) To have and use a common seal.

(5) To make by-laws.

(6) To remove members or officers, under some circumstances, called the power of *disfranchisement* (in case of removal of members) and *amotion* (in case of removal of officers). 2 Kent Comm., 277, 278; 1 Blackstone's Comm., ch. 18. *Supra*, Warner v. Beers, p. 2; Thomas v. Dakin, p. 19; Sutton's Hospital Case, p. 264; and the cases following, under the next title.

Sec. 262. 2. **Express powers,** such as are specifically enumerated in the charter or general law, and constitutionally granted therein, together with such as are lawfully inserted in the articles of incorporation.

3. **Implied powers,** such as are reasonably necessary or proper for the execution of the powers expressly granted, and not expressly or impliedly excluded.

THE PEOPLE v. THE PULLMAN'S PALACE CAR COMPANY.[1]

1898. IN THE SUPREME COURT OF ILLINOIS. 175 Ill. Rep. 125–182.

[*Quo warranto* against the car company specifying twenty-five usurpations of power by the defendant, justifying as alleged a forfeiture of the corporate franchises. Pleas were put in by the defendant alleging other facts by way of answer to the complaint. Demurrers to the various pleas admitted the allegations of fact.]

BOGGS, J. * * * A corporation in our state has its existence by virtue of the enactment, general or special, of the law-making power. The appellee corporation was created by a special act of the general assembly. The only difference between a corporation organized under a general law and one created by a special statute is, "that in the former we look to the certificate of the promoters, while in the latter we look to the special statute to ascertain the scope of the powers of the corporation." The rule for construing the instruments must necessarily be the same, viz., the powers specifically enumerated, and such other powers as are incidental or necessary to carry those powers into effect, but none others may be exercised by the corporation. Rockhold v. Canton Masonic Benevolent Society, 129 Ill. 440.

The enactment creating the appellee corporation is the full measure of its power. In order to enable it to carry into execution the powers thus conferred it may exercise other powers, known to the law as incidental or implied powers. Implied powers exist only to enable a corporation to carry out the express powers granted—that is, to accomplish the purpose of its existence—and can in no case avail to enlarge the express powers, and thereby warrant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly but only remotely connected with its specific corporate purposes. A power which the law will regard as existing by implication must be one in a sense necessary—that is, needful, suitable and proper to accomplish the object of the grant—and one that is directly and immediately appropriate to the execution of the specific powers, and not one that has but a slight, indirect or remote relation to the specific pur-

[1] Facts sufficiently stated in the opinion. Arguments and much of the prevailing and dissenting opinions omitted.

poses of the corporation. Illinois Conference Female College v. Cooper, 25 Ill. 133; Caldwell v. City of Alton, 33 Ill. 416; Chicago, Pekin and Southwestern R. Co. v. Town of Marseilles, 84 Ill. 643; Chicago Gas Light Co. v. People's Gas Light Co., 121 Ill. 530; Mott v. Danville Seminary, 129 Ill. 403; People v. Chicago Gas Trust Co., 130 Ill. 268; North Side R. Co. v. Worthington (Tex.), 30 S. W. Rep. 1055; Field Corporations, §§ 53, 54; IV Thompson Law of Corp., § 5638; 2 Beach Private Corp., § 385; Green's Brice's Ultra Vires, 88, 89.

Keeping these definitions as to implied powers in view, we may proceed to determine whether the acts set forth in the pleas are within or beyond the measure of power possessed by the appellee company.

It appears from the averments of those pleas which are intended to answer the allegations of the information set forth hereinbefore as Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 24, that the defendant company about the year 1880 acquired and now holds a certain tract of land containing about eighty-three acres, on a portion of which, in the year 1880—at least not later than 1882—it caused to be constructed a large number of dwellings and tenement houses, some of the height of two stories and others three stories in height; that the total number of such buildings is twenty-two hundred, and that it has laid out and now maintains the usual and necessary streets and alleys to afford the tenants to whom it rents said dwellings and tenement houses the proper and usual means of ingress and egress to and from their homes and places of business; that it now rents said dwellings and tenements to its employes; that upon the same plat of ground upon which said dwellings and tenements stand and where said streets and alleys are located, it caused to be erected a number of school-houses, a church edifice, a hotel, a large building called "The Arcade," in which are a number of rooms, some of which were constructed to be rented for dry goods, grocery and other retail stores, and other of the rooms were built for school, lecture and theatre rooms and for the use of religious congregations for church purposes, and that it now rents the rooms in said "Arcade" for the various purposes for which they were intended when built; that it has also constructed on the same plat of ground a large building called "Market Hall," the lower floor whereof it caused to be fitted up for meat and vegetable markets, and it has rented and now rents them to retail dealers in such articles of food, and the upper floor is a large hall where concerts, dances and other entertainments may be given, and is rented by it for such purposes; that it maintains a system of water-works and sewers and a gas plant, and for a consideration supplies those who inhabit its houses with water, light and heat. * * *

Manifestly the acts of the corporation which have resulted in the creation of this town or city and its acts in connection with the streets, alleys, dwellings, tenements, school, church and business houses, water system, sewerage, heat, etc., which the plea admits it was performing at the time of the filing of the information, can not be regarded as the exercise of powers expressly given. Can they be justi-

fied as the proper exercise of powers incidental to the express powers possessed by the corporation, or by the provision in the sixth clause of the charter that it may be lawful for the corporation to acquire and hold such real estate as may be deemed necessary for the successful prosecution of its business? The declaration of the sixth clause is not that the company may acquire and hold such real estate as it or its directory may deem necessary, but such as may be deemed necessary to the successful prosecution of its business. The true meaning of this clause is not that the company or its governing body is vested with unlimited and unbridled power to acquire and hold such real estate as it may deem necessary, but with power to purchase and hold only such real estate as, under the rules of law, may be deemed necessary for the successful prosecution of its business. "The rule of construction, when any doubt arises out of any language employed in such a charter, is, that every power that is not clearly granted is withheld, and that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public." (American Trust Co. v. Minnesota and Northwestern Railroad Co., 157 Ill. 641; Illinois Health University v. People, 166 Ill. 171.) "Irrespective of the operation of statutory restrictions, it is a settled principle of American jurisprudence that a corporation can not take and hold land except in so far as reasonably necessary to carry out the objects of its creation. These bodies, which never die, are not allowed, against the objection of the state, to take and hold land for purposes wholly foreign to the purposes for which the state endowed them with corporate existence and the power of perpetual succession." 5 Thompson's Law of Corp., § 5772.

This court has declared that it is against the public policy of this state to allow corporations to own real estate beyond what is necessary for the transaction of their corporate business, or such as is acquired in the collection of debts. (Carroll v. City of East St. Louis, 67 Ill. 568; United States Trust Co. v. Lee, 73 Ill. 142.) And in furtherance of this declared public policy statutes have been enacted by the general assembly, requiring all corporations which have acquired lands in the collection of debts to sell and dispose of all that is not necessary to the purposes of the corporation, and providing remedies designed to coerce compliance with such requirements. Revised Statutes, section 517, chapter 32, entitled "Corporations." * * *

With a view of showing that the situation at the time justified the course pursued by the company, and was sufficient to invest it with the legal right to pursue such course, the appellee company filed pleas averring, in substance, as follows: That after it had been for several years in the exercise of the powers conferred by its charter, its business increased to such an extent that it became necessary for it to build large and extensive shops in which to manufacture cars; that a large amount of land was necessary on which to locate such shops; that it was decided to locate and build said shops in the county of Cook, in or near the city of Chicago, where its general offices and headquarters were, and where its principal officers resided; that it found that it

could not acquire a sufficient amount of land upon which to erect said shops within the city of Chicago on account of the high price of land in said city; that after diligent and careful inquiry as to the price of land and the means of access thereto, it decided to build its shops where they are now situated. * * *

[It is claimed that]: "Accordingly, in the exercise of its best judgment, appellee selected and purchased about 350 acres of land situated upon the shores of Lake Calumet, fourteen miles distant from its offices and ten miles beyond the then limits of the city of Chicago. The land at that time was practically an unoccupied waste. It was surrounded for a very considerable distance in all directions save toward the lake, by farming and unoccupied lands. There were no convenient places where employes of the company could find homes or dwelling places. The construction of the manufactory therefore involved, not the expediency simply, but the necessity, of providing places suitable for the occupancy of those who were to do its work. The manufactory and the homes for the workmen were mutually and equally necessary to the success of the enterprise. 'The power to manufacture cars' was barren without the other charter power 'to purchase, acquire and hold such real estate as may be deemed necessary.' It was only by the combination of the two—by their exercise together, in the manner which has been described—that the object of the charter, 'the successful prosecution of their business,' could be accomplished. Accordingly, the exercise of these powers was undertaken cotemporaneously. The construction of the works and the construction of the dwelling places of those who were to operate them was undertaken at the same time and as a part of a single, harmonious scheme. Two years of time and the labor of 4,000 men transported daily to and fro between Chicago and the point of location, were devoted to the work. At the expiration of that time the result appeared in the completed structures of a manufactory giving employment to 5,000 persons, and in its immediate vicinity dwelling houses sufficient in number for the comfortable occupancy of a large part of these persons with their families and those dependent upon them, with the necessary school-houses for the education of their children, churches for their religious instruction, stores and shops where the necessaries of life could be procured, halls suitable for lectures and social entertainments—all so arranged with such accessories of streets, parks and other provisions, as to minister not simply to the necessities, but also to the comfort and well-being of those who might be employed."

The averment of the plea the corporation was obliged to construct such houses and tenements is but the statement of a conclusion, and we find the facts pleaded do not justify such a deduction. No reason existed, nor do we find in the pleas even a suggestion that there was reason or ground, for the apprehension that individual enterprise and private capital would not at once, after the purpose and intention of the corporation became known, provide all necessary dwellings and tenements for the accommodation of the workmen, or that the wants

of the community composed of such workmen would not at once be met by the location in its midst of schools, churches, dry goods and grocery stores, meat markets, etc., or that the necessary streets, alleys, and public ways would not be provided without any intervention whatever on the part of the corporation. The public laws of the state would have supplied the requisite school-houses and teachers, and the inclinations of the individual members of the community could have been safely relied upon to provide church houses and rooms for imparting religious instruction. It is idle to argue it became in any sense necessary or directly appropriate to the accomplishment of the lawful and chartered purposes or objects of the corporation it should engage its efforts or capital in the construction of dwellings, tenement houses, store houses, streets, alleys, theaters, hotel, churches, school-houses, water-works, a system of sewers, etc. Workmen, if they have families, must have homes, or if unmarried must be accommodated with boarding and places of lodging. Homes, groceries, vegetables, bread, meat, clothing, furniture, light, heat, water, school books, medicine, the services of physicians, dentists and other professional men, and many other things, become necessary to the health, comfort, or convenience of such workmen and their families; but the right and power to supply such wants had, in this instance, so far as the pleas show, no direct relation or connection with the successful prosecution of the specific object of the appellee corporation. The relation was but remote, indirect and mediate,—not direct and immediate. Implied power can not be invoked to authorize a corporation to engage in collateral enterprises but remotely connected with the specific purposes it was created to accomplish. A power which a corporation may exercise by implication must be bounded by the purposes of the corporate existence and the terms and intention of the charter, and acts which tend only remotely and by indirection to promote its interests and chartered objects can not be justified by implication of law, but are *ultra vires*.

Cases cited holding corporations operating mines or mills engaged in sawing lumber had implied power to construct dwellings and boarding-houses for their employes can have little or no influence upon the question here presented. In those cases the fact the works or mills of the corporation were necessarily located at mines or near large forests, and other circumstances peculiar to the respective cases, were deemed sufficient to justify the corporations in arranging for the lodging or boarding of their workmen or in building homes to shelter them and their families. The circumstances in each of such cases as can be accepted as having been well considered, were such it became, in a legal sense, necessary to the accomplishment of the chartered purposes of the corporation that it should exercise such power as was accorded it by implication of law. Exceptional circumstances or extraordinary conditions may make it necessary to the proper prosecution of the business of a corporation that it shall be accorded implied power to perform acts beyond its express power, and which, except for the prevailing conditions, would be wholly unwarranted. But in

the case in hand the appellee corporation voluntarily assumed to devote its corporate capital and power to that which, to say the least, but remotely and indirectly tended to aid the accomplishment of the purposes it had the right to pursue under conditions and circumstances which were neither rare nor unusual.

The argument of counsel for appellee that the construction of the manufacturing plant involved, not the expediency simply, but the necessity of providing places suitable for the occupancy of those who were to do its work, "and that in view of this the company determined to undertake, and did undertake, to construct its works and dwelling places for its workmen at the same time and as a part of a single harmonious plan," is fallacious. It ignores the palpable fact that no duty of providing houses for its workmen was pressed upon the company by surrounding conditions or circumstances as a necessity, but was adopted as a matter of choice, based, it may have been, upon motives which were in part benevolent or charitable in their nature. Had it purchased only that quantity of ground needful for its proper corporate uses, and restricted its efforts and expenditures to the construction of such buildings as would have answered its corporate wants, there appears to us no reason to believe that the question of homes for its workmen, market places or stores where such workmen could purchase supplies, or school rooms where their children could receive instruction, or the making of streets and alleys, would ever have demanded the thought or attention of its governing body. It is beyond reason to conclude that had the way been left open private capital and individual enterprise would have overlooked this desirable field of operations, or that merchants, tradesmen, butchers and other classes of business men would not have appeared and entered into business rivalry for the custom of the workmen and their families, and that the prosecution of the business of the corporation would have suffered because its workmen could not find homes or places where the articles necessary to supply their wants and add to their comfort could be purchased, and yet it is upon this ground it is sought to justify the acts of the corporation which are now under consideration.

The prohibition of the law against the unauthorized exercise of power by corporations is based upon grounds of public policy, and the wisdom of the rule may here find exemplification. Conceding the rectitude of the purpose which it is alleged operated to induce the acts of the corporation which resulted in the creation of the town or city of Pullman, we are constrained to declare the corporation had not lawful power to perform such acts, and that the existence of a town or city where the streets, alleys, school-houses, business houses, sewerage system, hotels, churches, theaters, water-works, market places, dwellings and tenements are the exclusive property of a corporation is opposed to good public policy, and incompatible with the theory and spirit of our institutions. It is clearly the theory of our law that streets, alleys and public ways, and public school buildings, should be committed to the control of the proper public authorities,

and that real estate should be kept as fully as possible in the channels of trade and commerce, and good public policy demands that the number of persons who should engage in the business of selling such articles as are necessary to the support, maintenance and comfort of the people of any community should not be restricted by the will of any person, natural or artificial, but should be left to be determined by the healthy, wholesome and natural operations of the rules of trade and business, free from all that which tends to stifle competition and foster monopolies.

We think the averments of the plea in response to the allegations of the information under consideration were insufficient to present a legal defense. * * *

[The court held further that the construction and operation of a sewerage system and sewerage farm, with truck gardening thereon, though necessary to the health of the dwellers in Pullman, was not justified by its relation to the usurped power of owning the town of Pullman; that under the express power to "sell supplies" to persons traveling on its cars, it was authorized to sell beer, wine and whisky as beverages; that the ownership of fifty-five acres of vacant land, upon which to dump cinders was lawful; that the ownership of twenty-three acres solely to meet the necessity for additional dwelling houses was unlawful; that the ownership of twenty-five acres, for the purpose of providing for the proper storage of its cars when needed in the future, was lawful; that it was lawful to construct very large steam boilers with a view of anticipating its probable future wants, and, in the meantime, until needed, to furnish an adjoining manufacturing company with steam; that it is unlawful to hold shares of stock in the Pullman Iron and Steel Company though all its product, being necessary in the construction of cars, is used by the defendant, so that in effect the Steel Company is a mere department of the defendant; that the existence of the alleged usurpations for eighteen years, with the knowledge of the state, and the collection of taxes during that time upon the property was not a waiver, nor sufficient to work an estoppel, upon the part of the state.]

Reversed and remanded.

CRAIG, WILKIN AND CARTWRIGHT, JJ., dissenting, approved the following statement as to *implied powers:*

"It is axiomatic that corporations have not only the powers expressly granted but those which are necessarily implied; that while they derive all their powers from the legislature which creates them, it is also true that what is fairly implied is as certainly granted as what is expressed; that unless restrained by their charters they have the power to deal precisely, in carrying out the corporate purposes, as individuals seeking to accomplish the same ends; that they may 'resort to any means that would be necessary and proper for an individual in executing the same, unless they be prohibited by the terms of their charters or some public law from so doing;' that while, in regard to their express powers, the grants are construed most liberally

in favor of the state and most strictly against the corporation, yet in regard to incidental powers neither strict nor liberal, but only reasonable, rules of construction are applied; that corporations may so far develop and extend their operations as to engage in matters not primarily contemplated by their founders, provided these matters be fairly within their scope, and provided, also, that in so developing and extending their undertakings they employ direct, and not indirect, means; that different rules of construction are to be applied to charters of corporations organized under special acts and those organized under a general law, the greater strictness of interpretation being employed in dealing with the latter; that 'necessary,' when used in defining the powers of corporations, does not mean what is simply indispensable, but also what is useful, convenient and proper to carry into effect the franchises granted. 1 Spelling on Corp., §§ 68, 73, 75, and cases cited; Green's Brice's Ultra Vires, pp. 66, 71, 73, 75, 87, 91, and cases cited; Curtis v. Leavitt, 15 N. Y. 9; Union Bank v. Jacobs, 6 Humph. 525; Railroad Co. v. Berks County, 6 Pa. St. 70; P. & S. R. Co. v. Lewis, 33 Pa. St. 33; New England Fire and Marine Ins. Co. v. Robinson, 25 Ind. 541; Brown v. Winnisimmet Co., 11 Allen 326; Old Colony R. Co. v. Evans, 6 Gray 25; McCulloch v. Maryland, 4 Wheat. 316; State v. Hancock, 35 N. J. L. 537; Crawford v. Longstreet, 43 N. J. L. 328; Ellerman v. Railway Co., 49 N. J. Eq. 217; 2 Cook Stockholders (3d ed.), § 681." See, also, Madison, etc., Co. v. Watertown, etc., Co., 5 Wis. 173, and Clark v. Farrington, 11 Wis. 321.

In the case of Curtis v. Leavitt, 15 N. Y. 9, it was held that corporations, along with their specific powers, take all the reasonable means of execution, all that are convenient and adapted to the end in view; that the corporation has a liberty of choice amongst those means, and that if in the exercise of such liberty an intelligent good faith is used, then the power to select the means adopted can not be called in question.

In State v. Hancock, 35 N. J. L. 537, it was said by Chief Justice Beasley: "Power necessary to a corporation does not mean simply power which is indispensable. Such phraseology has never been interpreted in so narrow a sense. There are a few powers which are, in the strict sense, absolutely necessary to those artificial persons, and to concede to them powers only of such a character, while it might not entirely paralyze, would very greatly embarrass their operations. Such in similar cases has never been the legal acceptance of this term. A power which is obviously appropriate and convenient to carry into effect the franchise granted has always been deemed a necessary one." And further said: "The term comprises a grant of the right to use all the means suitable and proper to accomplish the end which the legislature had in view at the time of the enactment of the charter."

Note. (1) **Implied powers.** 1825, The Banks v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706; 1831, Attorney-General v. Stevens, 1 Saxton Ch. (N. J.) 369, 22 Am. Dec. 526; 1840, Commercial Bank v. Newport Mfg. Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171; 1848, McIntire v. Preston, 5 Gil. (Ill.) 48,

48 Am. Dec. 321; 1852, State v. Comm'rs, 3 Zabr. (N. J.) 510, 57 Am. Dec. 409; 1853, Southern Life Ins. & T. Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448; 1853, Smith v. Nashua, etc., R. Co., 27 N. H. 86, 94, 59 Am. Dec. 364; 1859, Philadelphia, etc., R. v. Lewis, 33 Pa. St. 33, 75 Am. Dec. 574; 1859, Hope Mut. Life Ins. Co. v. Weed, 28 Conn. 51, 63; 1860, Miles v. Gleason, 11 Wis. 470, 78 Am. Dec. 721; 1860, Downie v. White & Hoover, 12 Wis. 174, 176, 78 Am. Dec. 730, 731; 1862, Bardstown, etc., R. Co. v. Metcalf, 4 Metcf. (Ky.) 199, 81 Am. Dec. 541; 1863, Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298; 1865, Brown v. Winnissimmet, 11 Allen (Mass.) 326, 334; 1867, Cleveland, etc., R. Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84; 1867, Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623; 1871, State v. Hancock, 35 N. J. L. 537, 545; 1877, Low v. Central Pac. R., 52 Cal. 53, 28 Am. Rep. 629; 1878, Deringer v. Deringer, 5 Houst. (Del.) 416, 1 Am. St. Rep. 150; 1880, Attorney-General v. Great East. R. Co., L. R. 5 App. 473; 1883, Liebke v. Knapp, 79 Mo. 22, 49 Am. Rep. 212; 1884, London Finan. Assn. v. Kelk, L. R., 26 Ch. Div. 107; 1885, Graber v. Washington, etc., R. Co., 92 N. C. 1; 1885, Sutro Tunnel Co. v. Segregated B. M. Co., 19 Nev. 121; 1887, Elevator Co. v. Memphis, etc., R. Co., 85 Tenn. 703, 4 Am. St. Rep. 798; 1889, People v. Chicago, etc., T. Co., 130 Ill. 268, 17 Am. St. Rep. 319; 1890, Killingsworth v. Portland Trust Co., 18 Ore. 351, 17 Am. St. Rep. 737; 1891, Ellerman v. Chicago Jc. R. Co., 49 N. J. Eq. 217; 1892, Richelieu Hotel Co. v. Internat'l Mill En. Co., 140 Ill. 248, 33 Am. St. Rep. 234; 1894, Fort Worth City v. Smith Bridge Co., 151 U. S. 294, 44 Am. & E. C. C. 604; 1894, Wheeler Osgood, etc., Co. v. Everett L. Co., 14 Wash. 630; 1895, B. S. Green Co. v. Blodgett, 159 Ill. 169, 50 Am. St. Rep. 146; 1895, Northside R. Co. v. Worthington, 88 Texas 562, 53 Am. St. Rep. 778, n. 789; 1895, Jacksonville, etc., R. Co. v. Hooper, 160 U. S. 514; 1896, Bath Gas Light Co. v. Claffy, 151 N. Y. 24; 1897, Winterfield v. Cream Brewing Co., 96 Wis. 239; 1897, Malone v. Lancaster L. Co., 182 Pa. St. 309; 1898, Nicollet Nat'l Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. 334; 1899, Central Ohio Natural Gas Co. v. Capital City Dairy Co., 60 Ohio St. 96; 1899, Parkman Sugar Co. v. Bank, etc., Co., 60 Kan. 474, 57 Pac. Rep. 126; 1899, State v. Newman, 51 La. Ann. 833, 72 Am. St. Rep. 476; 1899, Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 46 L. R. A. 255.

(2) **Rules of construing corporate charters.**

1. The cardinal rule here, as in all cases, is to ascertain the legislative intent, and give it full effect. 1836, Middle Bridge Proprietors v. Brooks, 13 Maine 391, 29 Am. Dec. 510; 1846, Enfield T. B. Co. v. H. & N. R. Co., 17 Conn. 454, 44 Am. Dec. 556; 1848, Mayor, etc., v. B. & O. R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531; 1854, Boston & L. R. Co. v. Salem & L. R. Co., 2 Gray (68 Mass.) 1; 1855, Straus, etc., v. Eagle Ins. Co., 5 Ohio State 59, 61; 1858, State v. Passaic T. P. Co., 27 N. J. Law 217; 1859, Pennock v. Coe, 23 How. (64 U. S.) 117; 1859, State v. Noyes, 47 Maine 189; 1860, Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210; 1862, Moran v. Miami Co. Comm'rs, 2 Black (67 U. S.) 722; 1869, Home of Friendless v. Rouse, 8 Wall. (75 U. S.) 430; 1887, Lawrence v. Morgan, etc., Co., 39 La. Ann. 427, 4 Am. St. Rep. 265; 1888, West Branch, etc., Co. v. Lumber, etc., Co., 121 Pa. St. 143, 6 Am. St. Rep. 766.

2. With the exceptions noted below, the language granting corporate powers should neither be construed strictly nor liberally, but according to its fair and natural import, with reference to the purposes and objects of the corporation; the whole law should be considered, and the words given their ordinary meaning, unless custom or usage has clearly given them a different one. 1846, Enfield T. B. Co. v. H. & N. R. Co., 17 Conn. 454, 44 Am. Dec. 531; 1853, Belleville, etc., R. Co. v. Gregory, 15 Ill. 20, 58 Am. Dec. 589; 1855, Straus v. Eagle Ins. Co., 5 Ohio State 59; 1859, Dexter Lime-Rock Co. v. Dexter, 6 R. I. 353; 1860, Downing v. Mt. Washington R. Co., 40 N. H. 230; 1865, The Binghamton Bridge, 3 Wall. (70 U. S.) 51; 1865, Brown v. Winnisimmet Co., 11 Allen (Mass.) 326, 334; 1876, State v. Fla. Cent. R. Co., 15 Fla. 690, 699; 1878, Whitaker v. Canal Co., 87 Pa. St. 34, 37; 1880, Attv.-Gen'l v. Great East. R. Co., L. R., 5 App. 473; 1880, Fairchild v. Masonic

Hall Assn., 71 Mo. 526; 1884, National Bank v. Continental L. Ins. Co., 41 Ohio St. 1, 13; 1891, Ellerman v. Chicago Jct. R. Co., 49 N. J. Eq. 217; 1892, Riker v. Leo, 133 N. Y. 519, 524; 1895, Jacksonville, etc., R. Co. v. Hooper, 160 U. S. 514, 523; 1896, Wheeler v. Everett Land Co., 14 Wash. 630, 633; 1900, Inter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438, 75 Am. St. Rep. 184.

3. The enumeration of certain powers and privileges, by implication excludes all other unnecessary powers: 1818, People v Utica Ins. Co., 15 Johns. (N. Y.) 358, 383; 1825, N. Y. F. Ins. Co. v. Ely, 5 Conn. 560, 572, 13 Am. Dec. 100; 1831, Life, etc., Ins. Co. v. Mech. F. I. Co., 7 Wend. (N. Y.) 31; 1850, Perrine v. Ches. & O. Canal Co., 9 How. (50 U. S.) 172, 183; 1852, Talmage v. Pell, 7 N. Y. 328, 345; 1875, Ashbury R., etc., Co. v. Riche, 7 H. L. Rep. 653; 1888, State v. Atchison, etc., R. Co., 24 Neb. 143, 8 Am. St. Rep. 164; 1889, Case v. Kelly, 133 U. S. 21, 26.

4. While the rule of statutory construction that general words following special words shall extend to and include only things of a nature similar to those specially mentioned, is applied in some cases to the construction of corporate charters: 1875, Ashbury R., etc., Co. v. Riche, L. R. 7 H. L. Rep. 653; 1876, Navigation Co. v. County of Galveston, 45 Tex. 272, 290; 1894, State v. International Inv. Co., 88 Wis. 512, 43 Am. St. Rep. 920; yet it does not seem to be followed in other cases. 1881, Wells F. & Co. v. N. P. R. Co., 23 Fed. Rep. 469, 474; 1889, Brown v. Corbin, 40 Minn. 508; 1889, National Bank v. Texas Inv. Co., 74 Tex. 421, 434; 1894, State v. Corkin, 123 Mo. 56.

5. When the question is one between the state and the corporation, or when the public interest is involved, "All rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power it does not exist. If on a fair reading of the instrument reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state."—Davis, J., in The Binghamton Bridge, 3 Wall. (70 U. S.) 51 (1865). This rule is applied in

(*a*) Cases where the state restricts its own action, as in exemptions from taxation: 1830, Providence Bank v. Billings, 4 Pet. (29 U. S.) 514; 1861, Jefferson Bank v. Skelly 1 Black (66 U. S.) 436; 1878, Railroad Co. v. Gaines, 97 U. S. 697; 1881, Bank v. Tennessee, 104 U. S. 493; 1885, Chesapeake, etc., R. Co. v. Miller, 114 U. S. 176; 1892, Wilmington, etc., R. Co. v. Alsbrook, 146 U. S. 279; 1896, Bank of Commerce v. Tennessee, 161 U. S. 134; 1899, Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 10 Am. & E. C. C. N. S. 540. See note, *supra*, p. 749.

(*b*) Cases in which an exclusive privilege or monopoly is claimed: 1837, Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420; 1883, Georgia, etc., R. Co. v. Smith, 70 Ga. 694; 1885, Birmingham, etc., R. Co. v. Birmingham St. R. Co., 79 Ala. 465, 58 Am. Rep. 615; 1888, Rockland Water Co. v. Camden, etc., Co., 80 Maine 544; 1889, Syracuse Water Co. v. Syracuse, 116 N. Y. 167; 1890, State v. Hamilton, 47 Ohio St. 52; 1890, Indianapolis Cable, etc., Co. v. Citizens, etc., R., 127 Ind. 369; 1891, Stein v. Bienville Water Imp. Co., 141 U. S. 67; 1895, Pearsall v. Great Northern R. Co., 161 U. S. 646, 664; 1900, Adirondack R. Co. v. New York, 176 U. S. 336.

(*c*) Cases in derogation of common right, as in the appropriation of private property under eminent domain proceedings, or erecting nuisances, etc.: 1848, Moorehead v. Little Miami R. Co., 17 Ohio 340; 1856, Edward v. Lawrenceburgh, etc., R. Co., 7 Ind. 711; 1860, Downing v. Mt. Washington R. Co., 40 N. H. 230; 1871, N. Y., etc., R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; 1878, Fertilizing Co. v. Hyde Park, 97 U. S. 659; 1883, Alabama, etc., R. Co. v. Gilbert, 71 Ga. 591; 1887, Snell v. Buresh, 123 Ill. 151.

(*d*) Cases in derogation of common law: 1872, Moyer v. Penn. Slate Co., 71 Pa. St. 293.

(*e*) Cases directly interfering with the use of franchises already granted, as one railroad encroaching upon the right of way of another, or of a turnpike or canal: 1878, Boston, etc., R. Co. v. Lowell, 124 Mass. 368; 1880, Penn-

sylvania R. Co.'s Appeal, 93 Pa. St. 150; 1888, Barre R. Co. v. Montpelier, 61 Vt. 1, 4 L. R. A. 785; 1888, Appeal of Sharon R., 122 Pa. St. 533, 9 Am. St. Rep. 133; 1891, Cincinnati, etc., R. Co. v. Belle Centre, 48 Ohio St. 273; 1901, Edison Elec. L., etc., Co. v. Merchants', etc., Co., 200 Pa. St. 209, 86 Am. St. R. 712; 1901, Postal Tel., etc., Co. v. Oregon, etc., Ry. Co., 23 Utah 474, 90 Am. St. R. 705.

6. *General and special laws* under which corporations are formed: There seems to be some conflict of expression as to rules of construing charters under general laws as compared with the rules when the corporation is created by a special act. Granger, C. J., in National Bank of Wash. v. Ins. Co., 41 Ohio St. 1, on p. 11 (1884), says: "A radical change has occurred in the relation of corporations to the state and the people. * * * Special charters granted to persons named * * * gave special powers and rights, that as a rule were beyond legislative control; only in the rare cases where the power to amend, alter or repeal was expressly reserved could the legislature modify, limit, or take away power once granted. In those days a corporation was a monopoly. It was necessary to strictly construe the grants made in order to protect the interests of the state and of people generally. But now the legislature has far more power over corporations than over individuals. It may alter or repeal all acts granting corporate power. * * * There is no longer reason to hesitate to apply to the language of acts of incorporation the same rules of interpretation as applied to like words in any contract or statute."

On the other hand, in regard to corporations formed under general laws, Justice Miller, in Oregon R. Co. v. Oregonian R. Co., 130 U. S. 1, on p. 26 (1888), says: "If the articles of association * * * instead of being the mere adoption by the corporators themselves, of the declaration of their own purposes and powers, had been an act of the legislature * * * conferring such powers on the corporations, they would be subject to the rule above stated (strict construction in favor of the state and against the grantee) and to a rigid construction in regard to the powers granted. How much more, then, should this rule be applied, and with how much more reason should a court, called upon to determine the powers granted by these articles of association, construe them rigidly, with the stronger leaning in doubtful cases in favor of the public and against the private corporation." To the same effect is, 1896, Ross-Meehan Brake Shoe F. Co. v. Southern M. I. Co., 72 Fed. Rep. 957.

TITLE II. PARTICULAR POWERS AND LIABILITIES.

CHAPTER 13.

PARTICULAR POWERS.

ARTICLE I. PERPETUAL SUCCESSION.

Sec. 263. See State v. Payne, 129 Mo. 468, *supra*, p. 830; also, Warner v. Beers, *supra*, p. 2, and Thomas v. Dakin, *supra*, p. 19.

ARTICLE II. NAME.

Sec. 264. See, *supra*, chapter 9. Smith v. Tallassee Branch, etc., 30 Ala. 650, *supra*, p. 817; Newby v. Oregon Central R., Deady 609, *supra*, p. 819; Armington v. Palmer, 42 Atl. Rep. (R. I.) 308, *supra*, p. 820. Note, *supra*, p. 823.

ARTICLE III. POWER TO CONTRACT.

Sec. 265. (*A*) **As to form.**

1. *In general:* "In determining whether a contract may be enforced against a corporation, three things are to be considered: First, did the corporation have the power to enter into such a contract? Second, was the contract entered into by a duly authorized agent of the corporation? Third, was the contract drawn, signed, and sealed in a form which binds the corporation?

"A corporation may be bound by a contract which is executed in any of the following ways: by a written instrument sealed with the corporate seal, and either with or without the

corporate name signed thereto; by an unsealed written instrument signed with the corporate name; by a written record of a resolution of its directors; by an unwritten resolution of its directors; by the oral agreements of its authorized agents; or by ratifying, acquiescing in, or accepting the benefits of contracts made in its name by unauthorized agents."—Cook Corporations, 4th ed., part of §§ 704 and 721. See also, *supra*, §§ 190, 191, 193, 194, 228–238.

2. *As to seal.* See, *infra*, Art. VII., p. 1136.

Sec. 266. (*B*) **As to subject-matter.**

(1) In general. See, *supra*, §§ 258–262.

Sec. 267. (2) Contract debts and borrow money.

See Barry v. Merchants' Exchange Co., 1 Sandf. Ch. (N. Y.) 280, *supra*, p. 766.

Note. See, also, 1889, Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412; 1890, Woolverton v. Taylor, 132 Ill. 197, 22 Am. St. Rep. 521; 1890, Davis v. Jackson, 152 Mass. 58. See note at end of next case.

Sec. 268. Same.

FRANKLIN COMPANY v. LEWISTON INSTITUTION FOR SAVINGS.[1]

1877. IN THE SUPREME JUDICIAL COURT OF MAINE. 68 Maine Rep. 43–49.

[In 1875 the Savings Company subscribed for $50,000 of the capital stock of a manufacturing company, having no money with which to pay for the same. The Franklin Company agreed to pay the sum, take the notes of the Savings Company for the amount, and hold the stock as security. Notes for this amount were duly given, and the stock was issued directly to the Franklin Company as collateral, but not to the Savings Company, or with its knowledge. The Savings Company failed in 1876, and commissioners were appointed to pass upon the claims presented; the notes and a claim for $50,000 for money paid out at the request of the Savings Company were presented by the Franklin Company and rejected by the commissioners: the validity of the claims is the question involved.]

WALTON, J. * * * The first question is whether it is compe-

[1] Statement abridged and part of opinion omitted.

tent for the trustees of a savings bank, at a time when there are no funds in the bank for investment, to agree to take shares in a manufacturing corporation, and thereby create a debt binding upon the bank.

We think not. It is familiar law that a corporation possesses such powers, and such only as the law of its creation confers upon it. The rule is stated with great uniformity.

[After quoting to this effect from several cases proceeds:] It would seem, therefore, upon principle as well as authority, that it is not within the authority of the trustees of a savings bank to invest its funds in the stock of manufacturing corporations, unless expressly authorized so to do by its charter or the public laws of the state.

But we do not rest our decision upon this ground. We rest it upon the broader ground that it is not competent for the trustees of a savings bank to purchase on credit property of any kind not needed for immediate use, or the investment of existing funds. No such power is expressly conferred upon them, nor do we think it can be sustained as an incidental power.

It is suggested that it may be convenient in this way to provide in advance for the investment of funds that may afterward come into the possession of the bank. We think the creation of debts by corporations or individuals, for no other purpose than to provide a ready way to dispose of future acquisitions, a proceeding of very questionable convenience; that in the great majority of cases it would be likely to prove, as it did in this case, very inconvenient. But it is a sufficient answer to say that the law imposes no duty upon the trustees of savings banks to provide for the investment of future funds or future deposits. Their whole duty is performed when they have provided safe investments for the funds already committed to their care. To hold that they may create debts binding upon existing depositors, for the benefit of future depositors, whose money after all may never be committed to their care, would be a doctrine as startling as it would be unprecedented.

[The court further held that the Franklin Company, having knowingly participated in the illegal transaction, could not claim the privileges of a bona fide holder of the notes, and the Savings Company having received no benefit from the transaction was not estopped to set up the defense of *ultra vires*.]

Claim not allowed.

Note.—A corporation can not borrow money for the purpose of purchasing its own shares: 1894, Adams & W. Co. v. Deyette, 5 So. Dak. 418, 49 Am. St. Rep. 887; 1896, Adams & W. Co. v. Deyette, 8 So. Dak. 119, 59 Am. St. Rep. 751.

The statutes frequently fix a limit as to the amount that a corporation is allowed to borrow; in such a case the courts hold strictly that it has no power to exceed those limits, and an attempt to do so can be restrained: 1884, Wenlock v. River Dee Comm'rs, 10 App. Cas. 354; 1889, Commonwealth's Appeal, 24 W. N. C. (Pa.) 530; 1889, Commw. v. Lehigh Ave. R. Co., 129 Pa. St. 405; 1893, First Nat'l Bank v. K. M. Co., 95 Ky. 97. One who loans a corporation money in excess of the authorized limit can not collect the excess, though he may collect up to the limit. 1874, Osippee, etc., Mfg. Co. v. Canney, 54 N. H. 295; 1878, DeCamp v. Dobbins, 29 N. J. Eq. 36; 1879, Humphrey

v. Patron's M. Assoc., 50 Iowa 607; 1881, Auerbach v. Le Seuer M. Co., 28 Minn. 291, 41 Am. Rep. 285; 1886, Garrett v. Burlington, etc., Co., 70 Iowa 697, 59 Am. Rep. 461; 1891, Fidelity, etc., Co. v. West. Pa. R., 138 Pa. St. 494; 1893, First Nat'l Bank v. K. M. Co., 95 Ky. 97; 1893, Merchants' Nat'l Bank v. C. G. L. Co., 159 Mass. 505; 1895, Kraniger v. People's B'ld'g Soc., 60 Minn. 94; 1896, Oswald v. Minn. T. Co., 65 Minn. 249; 1897, Sioux City, etc., Co. v. Trust Co., 82 Fed. Rep. 124.

And it seems that one who, in good faith, loans money to a corporation after the corporation has already borrowed up to the limit, can recover if he had no knowledge that the limit had been reached. 1845, Stoney v. Am., etc., Co., 11 Paige Ch. (N. Y.) 635; 1874, Osippee, etc., Co. v. Canney, 54 N. H. 295; 1881, Auerbach v. Le Seuer M. Co., 28 Minn. 291, 41 Am. Rep. 461; 1886, Garrett v. Burlington, etc., Co., 70 Iowa 697, 59 Am. Rep. 461; 1890, Allis v. Jones, 45 Fed. Rep. 148.

Sec. 269. (3) Negotiable instruments.

BRADBURY v. BOSTON CANOE CLUB.

1891. In the Supreme Judicial Court of Massachusetts. 153 Mass. Rep. 77–8.

Holmes, J. This is an action upon a promissory note for $150 and interest, given by the defendant to the plaintiff for money lent to it by the plaintiff to be used in building a club-house. There is a second count for money lent. At a meeting duly called the corporation passed a vote authorizing its treasurer to borrow money in terms sufficiently broad to cover the loan in question. The suggestion that no sufficient notice of the business to be transacted was given, does not seem to us fairly open on the agreed facts. Moreover, it would be impossible to argue that the defendant had not recognized and ratified the act of its treasurer in borrowing from the plaintiff. The money was received by the corporation, and was used by it for the purpose mentioned. The only question for us is, whether the corporation acted illegally in borrowing money for the purpose of erecting a club-house upon land of which it held a lease.

The defendant is a corporation formed under the Public Statutes, ch. 115, § 2, for encouraging athletic exercises. By section 7 it "may hold real and personal estate, and may hire, purchase, or erect suitable buildings for its accommodations, to an amount not exceeding $500,000," etc. We are of opinion that under these words the defendant had power to take a lease of land and to erect a suitable club-house upon it. Having this power it was entitled to raise money for the purpose. No argument is needed to show that the power at the end of section 7 to receive and hold in trust funds received by gift or bequest does not confine the corporations to that mode of raising it. Borrowing money is a usual and proper means of accomplishing what the statute expressly permits. See Fay v. Noble, 12 Cush. 1, 18; Morville v. American Tract Society, 123 Mass. 129, 136; Davis v. Old Colony Railroad, 131 Mass. 258, 271, 275. As this is a suffi-

cient reason for giving the plaintiff judgment, it is unnecessary to consider whether there are not others.

Judgment for the plaintiff.

Note. See note at the end of next case.

Sec. 270. Same.

UNION BANK v. JACOBS.[1]

1845. In the Supreme Court of Tennessee. 25 Tenn. (6 Humph.) 515, Cooper's Ed., 389.

[On the 28th day of September, 1841, Jacobs, as president of the Hiwassee Railroad Company, executed a note, binding that company to pay to said Jacobs the sum of $5,641, negotiable and payable at the branch of the Union Bank at Knoxville, four months after date. The note was indorsed by Jacobs to Trautwine, and by Trautwine to the Union Bank, and delivered to the president and directors of the bank, and discounted by the bank for the benefit of the Hiwassee company. At maturity, the note was protested, and suit brought by the bank against Jacobs, as indorser, in the circuit court of Knox county.

It was tried by Judge Lucky and a jury at the February term, 1845. He charged the jury that the Hiwassee company had no power to borrow money, and that the note given in execution of a void contract was null and void also.

The jury returned a verdict for the defendant, and plaintiff appealed.

The railroad company was created with all the rights "necessary to the well ordering and conducting the affairs of said company; and capable in law of purchasing, accepting, selling and conveying estates, real, personal and mixed, to the end, and for the purpose of facilitating the intercourse and transportation" designated; and was "invested with all the powers and rights necessary for the building, constructing, and keeping in repair of a railroad;" and the directors "may cause to be made, or contract with others for making of said road or any part thereof."]

Turley, J. * * * It is contended against the plaintiff's right to recover that there is no power given, either expressly or by necessary implication, by the charter to the Hiwassee Railroad Company, to borrow money or to execute promissory notes; and that, therefore, the note executed and indorsed to the bank is void, both as against the maker and indorsers, and that no action can be maintained against them thereon.

[1] Statement abridged. Arguments and part of opinion omitted.

The construction of the powers of corporations has been a fruitful source of litigation, both in the courts of Great Britain and the United States. In the earlier cases they were construed with great strictness, and a stringent rule as to the mode of exercising them enforced. Mr. Story, in the case of Bank of Columbia v. Patterson, 7 Cranch 305, says: "Anciently it seems to have been held that corporations could not do anything without deed. 13 Hen. VIII, 12; 4 Hen. VII, 6; 7 Hen. VII, 7, 9. Afterwards, the rule seems to have been relaxed, and they were for convenience sake permitted to act in ordinary matters without deed, as to retain a servant, cook, or butler (Plow. 91; 2 Saund. 395); and gradually this relaxation widened to embrace other objects (Bro. Corp., 51; 3 Salk. 191; 3 Lev. 107). At length, it seems to have been established, that though they could not contract directly except under their corporate seal, yet they might, by mere vote or other corporate act, not under their corporate seal, appoint an agent whose acts and contracts within the scope of his authority would be binding on the corporation. 3 P. Wms. 419. And courts of equity, in this respect, seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal. 1 Fonbl. Eq. 305. This technical doctrine has in more modern times been entirely broken down." The same judge, in continuation in the same case, observes: "The doctrine that a corporation could not contract except under its seal, or, in other words, could not make a promise, if it had ever been fully settled, must have been productive of great mischief. Indeed, as soon as the doctrine was established, that its regularly appointed agents could contract in their name without seal, it was impossible to support it; for, otherwise, the party who trusted such contract would be without remedy against the corporation. Accordingly, it would seem to be a sound rule of law, that whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts, made by its authorized agents, are express promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie. 3 Brown Ch. 262; Doug., 524; 3 Mass. 364; 5 Mass. 89, 491; 6 Mass. 50." Whatever of strictness may have existed in the earlier cases, in restricting their power of contracting to the express grant of authority, has been also greatly relaxed, and the doctrine upon the subject been made more conformable to reason and necessity, the powers granted to corporations being now construed like all other grants of power, not according to the letter, but the spirit and meaning. In Ang. & A. Corp., p. 192, § 12, it is said: "A corporation having been created for a specific purpose, can not only make no contracts forbidden by its charter, which is, as it were, the law of its nature, but in general can make no contract which is not necessary, either directly or incidentally, to enable it to answer that purpose. In deciding, therefore, whether a corporation can make a particular contract, we are to consider, in the first place,

whether its charter, or some statute binding upon it, forbids or permits it to make such a contract; and, if the charter and valid statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation, as directly or incidentally necessary to enable it to fulfill the purpose of its existence, or whether the contract is entirely foreign to that purpose. *In general, an express authority is not indispensable to confer upon a corporation the right to become drawer, indorser, or acceptor of a bill of exchange, or to become a party to any other negotiable paper. It is sufficient if it be implied as the usual and proper means to accomplish the purposes of the charter.* Chit. Bills (5th ed.), 17–21; Baily Bills (5th ed.), p. 69, ch. 2, § 7; Story Bills Exch., p. 94, § 79. In the case of Mum v. Commission Co., 15 Johns. 52, Spencer, J., who delivered the opinion of the court, says: "It has been strongly urged that, under the act of incorporating this company, they could neither draw nor accept bills of exchange. Their power is undoubtedly limited; they are required to employ their stock solely in advancing money, when required, on goods and articles manufactured in the United States, and the sale of such goods and articles on commission. The acceptance of a bill is an engagement to pay money; and the company may agree to pay or advance money at a future day, and they may engage to do this by the acceptance of a bill. When a charter or act of incorporation and valid statutory law are silent as to what contracts a corporation may make, as a general rule it has power to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created, and none other. The creation of a corporation for a specific purpose implies a power to use the necessary and usual means to effectuate that purpose." Ang. & A. Corp., p. 200, § 3.

Mr. Story, in his treatise on Bills of Exchange (page 95), speaking of the power of corporations to draw, indorse and accept bills of exchange, says: "It is sufficient if it be implied as a usual and appropriate means to accomplish the objects and purposes of the charter. But when the drawing, indorsing, or accepting such bills is obviously foreign to the purposes of the charter, or repugnant thereto, then the act becomes a nullity, and not binding on the corporation."

In the case of People v. Utica Ins. Co., 15 Johns., Thompson, C. J., who delivered the opinion of the court, says, at page 383, "An incorporated company has no rights but such as are specially granted, and those that are necessary to carry into effect the powers so granted."

In the case of Mott v. Hicks, a quantity of wood was purchased for the president and directors of the Woodstock Glass Company by Whitehead Hicks, the president thereof, for which he executed the promissory note of the company at six months. It appears, from a reference in argument to the charter of the company, that there was no clause authorizing it to issue bills or notes, or making such, if issued, binding and obligatory upon the company; yet it was held by

the court that an action would lie against the corporation upon the note, it having been executed by its legally authorized agent, acting within the scope of the legitimate purposes of such corporation. 1 Cow. 513.

In the case of Hayward v. Pilgrim Soc., 21 Pick. 270, it was held that the trustees of a society incorporated for the purpose of building a monument, in virtue of their authority to manage the finances and property of the society, were held competent to bind the society by a promissory note through the agency of their treasurer.

These authorities fully establish the proposition, that, in the construction of charters of corporations, the power to contract and the mode of contracting is not limited to the express grant, but may be extended by implication to all necessary and proper means for the accomplishment of the purposes of the charter. Now, what are necessary and proper means? Mr. Story, as we have seen, says if the means are usual and appropriate, the implication of power arises. Story Bills, 95.

Chief Justice Marshall, in the case of McCulloch v. State of Maryland, 4 Wheat. 413, says: "But the argument on which most reliance is placed, is drawn from the peculiar language of this clause of the constitution. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the government, but such only as may be necessary and proper for carrying them into execution. The word 'necessary' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves congress in each case that only which is most direct and simple. Is it true that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong that one thing to which another may be termed necessary can not exist without that other? We think it does not. If reference be had to its use in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of the human mind that no word conveys to it in all situations one single definite idea, and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word 'necessary' is of this description. It has no fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words, which increase or diminish the impression the mind

receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases." In conclusion upon this subject, he says, page 421, same case: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Now if this be true doctrine in relation to the constitution of the United States, surely it will not be contended that a more stringent rule will be applied in the construction of the powers of a corporation than is applied in the construction of the powers of congress under the constitution of the United States.

To apply these principles, as established by the authorities cited, to the case under consideration. The Hiwassee Railroad Company is chartered to construct a railroad, a thing of itself necessarily involving a heavy expenditure of money; but in addition thereto it is empowered to sue and be sued, to acquire and hold, sell, lease and convey estates, real, personal and mixed, which necessarily involves the power of making contracts for the same. How shall these contracts be made, both for the construction of the road and the purchase of the property? It is argued that the capital stock of the company is the only means provided for the payment, and that no other can be resorted to for that purpose; or, in other words, that it must pay cash for every contract, for that no power is given by which it may contract upon time; for if it may create a debt of necessary consequence, it may create written evidences of that debt, and these may be either promissory notes or bills of exchange. It is true that the capital stock of the company is the source from whence an ultimate payment of the debts of the company must be made; but to hold that a sufficient amount of this stock must always be on hand to pay immediately for every contract made would be destructive of the operations of the company. By the provisions of the charter not more than one-fourth of the stock shall be called for in any one year, and this upon thirty days' notice; and if, within thirty days after such notice, the amount called for be not paid, the company is authorized to take steps against the delinquent stockholders to enforce payment. Now it is obvious that it never was intended that all the stock should be paid in before the company commenced operations. The early completion of the road was a desirable object for commercial purposes, and can it be pretended that the expenditures of the company were to be limited and restricted to the amount of capital actually paid in by the stockhold-

ers, and that under no circumstances was the company to exceed them? If, upon failure of the means on hand, the stockholders should neglect to pay upon a proper call, are the works to be suspended until such time as payments could be enforced? Are the persons who may have done work for it, and for which they have not been paid, to wait the slow process of the law before they can receive satisfaction? And shall the company not be permitted to use its credit in such emergency? It is so argued for the defendant. This construction of the charter would be ruinous in its consequences. The company might be compelled to suspend all operations at a time when great loss would result from deterioration to unfinished work, and be greatly injured also in its credit.

The restriction contended for is too refined and technical. It might have suited the days of the Year Books, when it was held that a corporation could contract for nothing except under its corporate seal; but it is strange that it should be urged at this day of enlightened jurisprudence, when the substance of things is looked to rather than forms. A corporation is, in the estimation of law, a body created for special purposes, and there is no good reason why it should not, in the execution of these purposes, resort to any means that would be necessary and proper for an individual in executing the same, unless it be prohibited by the terms of its charter or some public law from so doing.

There is no principle which prevents a corporation from contracting debts within the scope of its action; and, as has been observed, if it may contract a debt, it necessarily may make provision for its payment by drawing or indorsing or accepting notes or bills. It is not pretended that this power extends to the drawing, indorsing or accepting of bills or notes generally, and disconnected from the purposes for which the corporation was created. * * *

Judgment reversed.

Note. Power to issue negotiable instruments.

1. Corporations have such power whenever it is a necessary or convenient method of conducting their proper business: 1797, Phelps v. Livingston, 2 Root (Conn.) 495; 1838, Hayward v. Pilgrim Soc., 38 Mass. (21 Pick.) 270; 1848, Stevens v. Hill, 29 Maine 133; 1849, Butts v. Cuthbertson, 6 Ga. 166; 1860, Brown v. Donnell, 49 Maine 421, 77 Am. Dec. 266; 1871, Downer v. Read, 17 Minn. 493; 1873, *In re* Great West. Tel. Co , 5 Biss. 363, Fed. Cas. 5740; 1875, Watts' Appeal, 78 Pa. St. 370; 1877, Franklin Co. v. Lewiston Inst. for Sav., 68 Maine 43, *supra*, p. 938; 1882, Wright v. Pipe Line Company, 101 Pa. St. 204; 1889, National Bank v. German Mut., etc., Co., 116 N. Y. 281; 1892, Am. Ex. Nat'l Bank v. Oregon, etc., Co., 55 Fed. Rep. 265; 1896, Farmers' Mut. Ins. Co. v. Meese, 49 Neb. 861; 1896, Kneeland v. Braintree, 167 Mass. 161; 1899, National Loan & Inv. Co. v. Rockland Co., 94 Fed. Rep. 335; 1899, G. V. B. Min. Co. v. First Nat'l Bank, 95 Fed. Rep. 23; 1899, McGarry v. Tanner, etc., 21 Utah 16, 59 Pac. Rep. 93.

But corporations, unless expressly authorized, have no power to deal in notes or bonds: 1863, Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240; 1899, Indiana Bond Co. v. Ogle, 22 Ind. App. 593, 72 Am. St. Rep. 326.

2. As between the original parties to the negotiable instrument, the officer who acts for the corporation must have express or implied authority to bind the corporation, but generally no formal proceedings upon the part of the cor-

poration are necessary: 1897, Blake v. Domestic Mfg. Co., — N. J. Eq. —, 38 Atl. Rep. 241; 1898, Washington Times Co. v. Wilder, 12 App. D. C. 62; 1898, Dexter Savings Bank v. Friend, 90 Fed. Rep. 703; 1899, Monroe Mercantile Co. v. Arnold, 108 Ga. 449, 34 S. E. Rep. 176; 1899, Porter v. Winona & D. G. Co., 78 Minn. 210, 80 N. W. Rep. 965; 1899, G. V. B. Min. Co. v. First Nat'l Bank, 95 Fed. Rep. 23; 1900, Crawford v. Albany Ice Co., 36 Ore. 535, 60 Pac. Rep. 14.

But if the corporation has power to issue promissory notes for any purpose a *bona fide* holder for value, with no knowledge of lack of authority of the agent, or of other irregularity, or that it was in fact issued by the corporation for an *ultra vires* purpose, will be protected: 1825, Ridgway v. Bank, 12 Serg. & R. (Pa.) 256; 1848, McIntire v. Preston, 10 Ill. (5 Gil.) 48; 1869, Monument Nat'l Bank v. Globe Works, 101 Mass. 57; 1886, National Bank v. Young, 41 N. J. Eq. 531; 1889, National Park Bank v. G. A. M. W. & S. Co., 116 N. Y. 281; 1895, Jacob's Pharmacy Co. v. So. B. & T. Co., 97 Ga. 573; 1895, Marshall Nat'l Bank v. O'Neal, 11 Texas Civ. App. 640.

As in other cases, there is much uncertainty as to the extent of the power of the president to bind the corporation by notes issued without express authority. The two following cases illustrate this: 1899, G.V. B. Mining Co. v. First Nat'l Bank, 95 Fed. Rep. 23 (holding that president has implied authority); 1900, Crawford v. Albany Ice Co., 36 Ore. 535, 60 Pac. Rep. 14 (holding that express authority must be shown).

Sec. 271. Same.

BATEMAN v. THE MID WALES RAILWAY COMPANY.[1]

1866. In the Court of Common Pleas. 35 L. J. Rep. (C. P.) 205–210, 1 Com. Pleas 499.

The plaintiffs in these actions, as indorsees, sued the defendants, as acceptors of certain bills of exchange; and the defendants pleaded that they did not accept.

The defendants were a railway company, constituted under the 22 & 23 Vict., ch. lxiii. This special act was in the usual form, both as to the powers given to and the restrictions placed on the company, and as to the incorporation of general acts; and there was no difference between the cases, except that in the last case evidence was given of the defendants having actually commenced business.

The bills were directed to the Mid Wales Railway Company, and were accepted in the following form: "Accepted by order of the board of directors, and payable at the Agra & Masterman's Bank, John Wade, Secretary," with the seal of the company affixed under these words. And there was no question but that there was a resolution of the board of directors to the above effect.

At the trial a verdict was entered for the plaintiffs, with leave to the defendants to move to enter a verdict for themselves on the grounds, first, that the defendants had no power by law to accept the bills, and, secondly, that the acceptances were not binding on them, and that even if bills could be accepted by them the bills were not accepted in such a form as to be binding on them.

[1] Arguments, and opinions of Erle, C. J., Byles & Keating, JJ., omitted.

Rules *nisi* were obtained, pursuant to such leave.

MONTAGUE SMITH, J. The plaintiffs as indorsees sue the defendants as acceptors, so that the action is not between the immediate parties to the bills. I think a railway company is not competent to accept bills of exchange. A railway company is incorporated to make and maintain a railway; its powers and resources are limited by the incorporating statutes; but if they may accept bills of exchange, they either may do so to any extent, or there would have to be an inquiry whether the purposes for which the bills were accepted were within their powers in each particular case. I think the legislature did not intend to give them the power. It is admitted that there is no authority in favor of it; and there is a great abundance of authority to show that in the analogous cases of mining, water-works, gas, and other companies, the companies can not draw bills of exchange, though they are more trading companies than a railway company. The first object in the constitution of a railway company is to make a railway, though, it is true, they may, and practically always do become carriers. Corporations for the purposes of trade have the power of issuing bills of exchange as incidental to such trading; but this doctrine only applies where the primary object is trade, buying and selling. In addition to the authorities referred to, there is the distinct authority of various eminent text-writers that such a company as this can not accept a bill of exchange. Amongst others, Mr. J. W. Smith, in his treatise on Mercantile Law, says: "However, it has been considered that a trading corporation may differ from others as to its powers of contracting and its remedies on contracts relating to the purposes for which it was formed. Thus, such a corporation may in some cases bind itself by promissory notes and bills of exchange; and it was even held that the Bank of England might without deed appoint an agent for such purposes. But a corporation will not have these extraordinary powers unless the nature of the business in which it is engaged raises a necessary implication of their existence." Now clearly, here there is no express power, nor is there any necessary implication. For these reasons, I am of opinion that the defendants were not competent to accept a bill of exchange; and on the other point I also agree with the rest of the court.

Note.—The above case gives the general doctrine in England, but the power to give notes or accept bills of exchange exists "where upon a fair construction of the memorandum and articles of association it appears that it was intended to be conferred." 1866, Peruvian R. v. Thames & M. M. I. Co., 36 L. J. Ch. 864, L. R. 2 Ch. 617. Or where "it is necessary to carry on the business under ordinary circumstances and in the usual way." 1887, In re Cunningham & Co., 36 Ch. Div. 538, 57 L. J. Ch. 169; 1889, Atkin v. Wardle, 61 L. T. 23. This power seems to be implied in purely trading companies. 1869, In re Land Credit Co., L. R. 4 Ch. App. 460; but not in railway (Bateman & Mid Wales, etc., *supra*), gas (1837, Bramah v. Roberts, 3 Bing. N. C. 963, 32 E. C. L. 404), water-works (1819, Broughton v. Manchester, etc., Co., 3 B. & Ald. 1, 5 E. C. L. 11), or mining companies (1829, Dickinson v. Valpy, 10 B. & C. 128, 21 E. C. L. 63).

Sec. 272. Same. Accommodation paper.

MONUMENT NATIONAL BANK v. GLOBE WORKS.[1]

1869. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 101 Mass. Rep. 57–59.

HOAR, J. The single question presented for our decision in this cause, all others which arise upon the report having been waived, is, whether the note of a manufacturing corporation, in the hands of a holder in good faith for value, who took it before maturity, and without any knowledge that the makers had not received the full consideration, can not be enforced against them, because it was in fact made as an accommodation note.

The argument for the defendants takes the ground that to issue an accommodation note is not within the powers conferred upon the corporation; and that, as any persons taking it had notice that it was the note of the corporation, they had notice that it was of no validity unless issued for a purpose within the scope of the corporate powers, and were, therefore, bound to ascertain not only that it was executed by the officer of the corporation who had the general authority to sign the notes which they might lawfully make, but that the purpose for which it was issued was such as the charter authorized them to entertain and execute.

The court are all of opinion that this position is not tenable, and that the defense can not be maintained.

It has long been settled in this commonwealth that a manufacturing corporation has the power to make a negotiable promissory note. Narragansett Bank v. Atlantic Silk Co., 3 Met. 282. And it was held in Bird v. Daggett, 97 Mass. 494, as a just corrollary to that proposition, that such note in the hands of a holder in good faith for value is binding upon the maker, although made as an accommodation note. The question was not discussed, nor the reasons for the decision fully stated in Bird v. Daggett; but it was assumed that the doctrine announced was clear and undoubted law.

The doctrine of *ultra vires* has been carried much farther in England than the courts in this country have been disposed to extend it; but, with just limitations, the principle can not be questioned, that the limitations to the authority, powers, and liability of a corporation are to be found in the act creating it. And it no doubt follows, as claimed by the learned counsel for the defendants, that when powers are conferred and defined by statute, every one dealing with the corporation is presumed to know the extent of those powers.

But when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply. As was said by Selden, J.,

[1] Part of opinion omitted.

in Bissell v. Michigan Southern and Northern Indiana Railroad Company, 22 N. Y. 289, 290: "There are no doubt cases in which a corporation would be estopped from setting up this defense, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation, absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. When the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of *ultra vires* is available against him. But such a defense would not be permitted to prevail against a party who can not be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract, it had virtually affirmed."

This doctrine seems to us sound and reasonable; and in conformity with it, it was held, in Farmers' and Mechanics' Bank v. Empire Stone Dressing Company, 5 Bosw. 275, that an accommodation acceptance by an officer of a manufacturing corporation, on behalf of the company, was not binding, unless the consideration had been advanced upon the faith of the acceptance; but that if the consideration was paid in good faith after the acceptance, and upon the credit of it, it could be enforced. * * *

Judgment for plaintiffs.

Note. Accord: 1858, Smead v. R. Co., 11 Ind. 104; 1865, Hall v. Auburn Tp. Co., 27 Cal. 255, 87 Am. Dec. 75; 1886, National Bank v. Young, 41 N. J. Eq. 531; 1889, National Park Bank v. G. A. M. W. & S. Co., 116 N. Y. 281; 1895, Jacob's Pharmacy Co. v. So. Bank & T. Co., 97 Ga. 573; 1898, Steiner v. Steiner L. & L. Co., 120 Ala. 128, 26 So. Rep. 494. But see next case.

Sec. 273. Same.

MURPHY ET AL. v. ARKANSAS & L. LAND IMPROVEMENT COMPANY.[1]

1899. IN THE UNITED STATES CIRCUIT COURT, N. D. ARKANSAS.
97 Fed. Rep. 723–730.

[Bill to foreclose a trust deed. P. F. B. owned one-third of a

[1] Statement abridged, and only part of opinion given.

$30,000 judgment in favor of the A. & L. R. Co. against J. D. B. In order to discharge this third, J. D. B. paid P. F. B. $6,000, and delivered to him a note for $4,000, secured by a deed of trust, executed by the Land Company, and made payable to J. D. B. or his assignee, for the purpose of enabling him to pay his claim. The note and deed were executed with the full consent of all the directors and shareholders of the Land Company, composed of J. D. B., who owned all the stock except shares necessary to qualify a son of J. D. B. and his attorney to be directors; also at a time when the corporation had ample property to pay all its debts including this claim. P. F. B. assigned the note and deed of trust in the ordinary course of business to Murphy, who brings the suit.]

ROGERS, District Judge. * * * It is urged that the land company had no authority to execute accommodation paper, and hence the execution of the note was *ultra vires*. I incline to think that the charter of the land company is broad enough to authorize it to execute accommodation paper, but it makes no difference as to that. The land company is a private corporation. It owed no debts. The paper was issued by the consent of all the stockholders, and it has been accepted, and the consideration parted with by P. F. B. for it. Can it now be permitted to take shelter under the plea of *ultra vires?* I think not. In 1 Cook Corp., § 3, the author says:

"A private corporation may become an accommodation indorser, distribute its assets, issue its notes, stock, or bonds below par, or, for no consideration whatever, give away its assets, or may mortgage its property for the personal benefit of a part or all of its stockholders or officers; provided, always, that all the stockholders assent, and provided that corporate creditors are not injured, and provided that no statute forbids such acts. The doctrine of *ultra vires* is no longer held to forbid such acts by a private corporation under such circumstances. * * * The theory of a corporation is that it has no powers except those expressly given or necessarily implied. But this theory is no longer strictly applied to private corporations. A private corporation may exercise many extraordinary powers, provided all of its stockholders assent, and none of its creditors are injured. There is no one to complain except the state, and, the business being entirely private, the state does not interfere. Thus, fifty years ago the courts would have summarily declared it illegal for a business corporation to become an accommodation indorser of commercial paper, but today there is no rule of public policy which prohibits a private corporation having a capital stock from becoming the accommodation indorser of commercial paper, providing such indorsement is made with the knowledge and assent of all the directors and stockholders, and provided corporate creditors are paid."

In the subsequent discussion of the author it is shown that whatever is done by a private corporation with the assent of all of its stockholders, and where no creditor is injured, although it may be *ultra vires*, is lawful, and will be enforced by the courts. The principle does not

apply to railroad corporations or *quasi*-public corporations. * * *
Decree for plaintiff.

Note. Accord: 1890, Martin v. Niagara Falls Paper Co., 122 N. Y. 165; 1895, Bensiek v. Thomas, 66 Fed. Rep. 104; 1897, Solomon Solar S. Co. v. Barber, 58 Kan. 419, 49 Pac. Rep. 524; 1898, Central Trust Co. v. C. H. V. & T. R. Co., 87 Fed. Rep. 815.

Sec. 274. (4) Surety or guarantor.

TOD ET AL. v. KENTUCKY UNION LAND COMPANY ET AL.[1]

1893. IN THE UNITED STATES CIRCUIT COURT, DISTRICT OF KENTUCKY. 57 Fed. Rep. 47–66.

[Bill in equity against the land company and others for the appointment of a receiver, and declaring an assignment under the Kentucky laws, on account of the debtor land company having made preferences which, as alleged, operated as an assignment. Decree for complainants, with a reference to a commissioner, to report as to priority of claims. The land company had guaranteed the first mortgage bonds to the extent of $2,625,000, $800,000 second mortgage bonds, and a 5 per cent. dividend upon $500,000 of the capital stock, of the Kentucky Union Railway Company; the validity of these guaranties, being assailed by other creditors, was submitted by the commissioner to the court.]

LURTON, C. J. * * * Did the Kentucky Union Land Company have the power to bind itself by its contract guarantying the principal and interest of the first mortgage bonds issued by the Kentucky Union Railway Company?

The question, as presented on this record, is a question pure and simple as to how far the authority to execute these contracts is sustained by the corporate powers which the law has vested in this company. No question arises as to the rights of *bona fide* holders of these bonds for value and without notice of the facts that the bonds had not been indorsed upon their sale and transfer by the guarantying corporation. The general doctrine may be taken to be well settled in the courts of the United States that the powers of the corporation are such, and such only, as are conferred by the law under which it is incorporated. The charter is the measure of the power of every corporation, and by this test must every corporate act be tried. This rule, however, concedes the usual propositions applicable to every legislative act—that what is fairly implied is as much granted as if expressly enumerated. * * *

The power to execute accommodation paper or to guaranty for accommodation the obligations of another corporation is not expressly conferred by the charter of the land company. Ordinarily, such

[1] Statement abridged, and only part of opinion given.

power is not implied from the powers conferred upon corporations, and such contracts are generally in excess of the powers of corporations, and therefore void as *ultra vires*, in the true sense of the term.

This proposition rests upon two or more very evident reasons:

(1) The corporate funds belong to its shareholders and, by the very terms of the law creating it, can not be devoted to any other purpose than those indicated by its charter and constitution. Such obligations would violate the fundamental terms of the agreement between the corporators themselves.

(2) To do so would be to exercise a power not conferred by the state, either expressly or impliedly. The state's grant of the corporate franchises is for the purpose prescribed, and the execution of such obligations would be beyond the power conferred, and therefore a diversion of the corporate purposes, as well as of the corporate funds.

(3) Such obligations rest upon no consideration, and would not, therefore, be valid. They would amount to a donation of the corporate funds, and therefore an unlawful diversion. Mor. Priv. Corp., 423; Davis v. Railroad Co., 131 Mass. 258; Madison Plank-Road Co. v. Watertown Plank-Road Co., 7 Wis. 59; McClellan v. File Works, 56 Mich. 579, 23 N. W. Rep. 321; National Park Bank v. German-American Mutual Warehouse & Security Co., 116 N. Y. 292, 22 N. E. Rep. 567; Ætna Nat'l Bank v. Charter Oak Life Ins. Co., 50 Conn. 167.

But there is no inherent want of power in a business corporation, having the power to execute negotiable paper, to obligate itself as a surety or guarantor. If such a corporation receives commercial paper or bonds in due course of business we see no reason why, upon transferring such paper, it may not be lawful to obligate itself as indorser or guarantor. Such a contract would be a new and independent contract, and would rest upon a sufficient consideration, if entered into as a legitimate means of increasing the value of the security to be disposed of in ordinary course of business. In Railroad v. Howard the question arose as to the liability of a railroad company upon its guaranty of certain bonds issued by various counties and cities, and received by the railroad company in payment of subscription to its stock.

Upon full consideration it was held that, inasmuch as the company had received the bonds in payment of stock, it had a right to obligate itself by its own bonds for the purpose of building its road; it might lawfully, and in furtherance of its authorized purpose, guaranty such bonds as a means of augmenting their value on the market, thus producing funds to build its road. 7 Wall. 411, 412. The power of a corporation to bind itself by a guaranty, when it does so for its own benefit and as a means of selling at an augmented value, is generally conceded by the authorities. "In such cases," says Mr. Randolph in his work upon Commercial Paper (vol. 1, sec. 334), "the guaranty is an original contract of the corporation for its own benefit; the consideration moving to itself, and not to the person whose debt is guarantied." * * *

In the light of these principles let us look at the facts connected with the contract under consideration.

The Kentucky Union Land Company was incorporated under a special charter granted by the legislature of Kentucky in 1880. Its original corporate title was, "The Central Kentucky Lumber, Mining, Manufacturing and Transportation Company." This name was by amendment of charter in 1890, and after these bonds had been guarantied, changed to "The Kentucky Union Land Company." The original title indicated very thoroughly the large power conferred by the charter, and the composite character of the business contemplated thereunder. * * *

The Kentucky Union Railway Company was organized under a special charter granted by Kentucky in 1854. Under its charter the stock might be subscribed for by "any individual or corporation." * * *

Without undertaking to state the details as to how and under what circumstances, and upon what consideration, it is sufficient for the purpose of this case to say that, at the date of the contract of guaranty in question, shares of stock in the railway company to the amount of $1,800,000 were held and owned by the land company. This constituted the whole of the shares issued by that company except, perhaps, nine, which were held by the directors of the railway company in order that they might be qualified to act. The land company at the same time had acquired the title to between 300,000 and 500,000 acres of mountain lands on the line of the projected continuation of this railway. In order to the development of these lands, and to the utilization of the timber and mines thereon, it became most essential that this railway should be completed. Did the land company have power to aid in the extension and completion of this railway? * * *

[The charter provided *inter alia*, that the land company might "acquire by purchase or condemnation the necessary rights of way for exporting the products of the mines and timber," and might "effect a temporary or permanent consolidation with any railroad or transportation company," and "the consolidated companies may have and exercise the powers of both companies."]

Now, the case, as it was presented to the land company, was this: "We have purchased, as authorized by our charter, a vast body of timbered and mineral lands. We are authorized, expressly, to utilize these lands by developing their timber and mineral interest. The intention of the legislature was that this buried natural wealth shall be utilized by the erection of sawmills, iron works, rolling mills, furniture factories, iron furnaces, and by the opening and operating of iron and coal mines. It contemplated that transportation of the products of these mines, mills and factories would be a matter of great concern. The right to condemn rights of way is conferred."

That railroad transportation would be essential to get to market these products, and for the necessary development of the towns which must spring up around enterprises so numerous, was also in contem-

plation of the state when the charter was granted, is evident from several considerations:

(1) The coal, iron and timber, and the manufactured products of the contemplated mills and factories could not be profitably utilized without cheap transportation.

(2) That the company should engage in transportation is indicated by the original title of the corporation. It was to be a transportation company as well as a mining and manufacturing company.

(3) The power to consolidate with any railroad company, chartered or to be chartered, is expressly conferred.

(4) In case of such consolidation the companies were to exercise the powers of both, and act in the name of either, or in an agreed name. The power did not stop here. There might be a "temporary consolidation" with a railroad company. * * *

There is nothing in this charter to indicate that only a technical consolidation was authorized. On the contrary, the power to make a "temporary consolidation," looking to all the four corners of this charter, clearly implies the power to make such an alliance or bring about such a union and co-operation of interests between the land company and the railway company as shall be to the mutual interest of each, and place both under the same control and management. This could be done by the plan suggested by Mr. Morawetz in section 942, whereby the shares of one company should be held by the other, or by the same persons. This meaning seems reasonable and proper, looking to the objects and purposes of this corporation, and any steps which brought about unity of interest and co-operation in purpose as being legitimate and authorized. Under the power we are of opinion that the Kentucky Union Land Company had the power to acquire the shares in the railway company, and the right to exercise control over the railway company through the ownership and control of those shares. * * *

Having authority to acquire this stock the land company became the sole stockholder in the railway company. Each had express authority to borrow money and issue bonds to carry out the purposes of the organization. The completion of this railway was an object within the scope of its charter powers. It could do so by its own name, or by aiding the railway company to negotiate its securities by guarantying their payment. The guaranty was not for the accommodation of the railway company. The guarantor being the sole shareholder of the railway company, it was a contract for its own benefit, and therefore rested upon a sufficient security. In addition, the land company was a creditor of the railway company, and was to, and did receive the proceeds arising from sale of one-half million of these bonds. The remainder of the money thus raised was to be applied to the building of the railway line. The consideration was sufficient to fully support the contract. * * *

One railway company, under authority of law, leased the line of another for a term of years. The consideration of the lease was an annual rental, and that the lessee company should guaranty the principal

and interest of bonds to be issued by the lessor company. The contract of guaranty was challenged as *ultra vires*. The lessee company had no express authority to make such contract of guaranty, but did have power to make all such contracts as were usual and proper in the building and operation of the railway, and it likewise had power to lease the line of the lessor company. It was held that the consideration was sufficient and the guaranty valid. The court was of opinion that it was as competent for the company to promise to pay conditionally as to promise to pay absolutely; that the validity of the agreement depended upon the sufficiency of the consideration. The right to take the lease being express, it was a good consideration for the conditional promise involved by a contract guaranty. Low v. Railroad Co., 52 Cal. 53. See, also, Smead v. Railroad Co., 11 Ind. 104, and Zabriskie v. Railroad Co., 23 How. 381, where a general authority to aid a connecting railroad company was held sufficient to authorize the guarantying of the bonds of such road. Also, Mor. Priv. Corp., § 423. * * *

Guaranties held valid.

Note. Power to be surety or guarantor.

1. The general rule is that a corporation has no implied power to become surety or guarantor in a matter not clearly authorized: 1846, Coleman v. R. Co., 10 Beav. 1; 1858, Smead v. R. Co., 11 Ind. 104; 1865, Hall v. Auburn T. P. Co., 27 Cal. 255, 87 Am. Dec. 75; 1895, Northside R. Co. v. Worthington, 88 Texas 562, 53 Am. St. Rep. 778; 1899, Gilbert v. Seatco Mfg. Co., 98 Fed Rep. 208; 1899, M. V. Monarch Co. v. Farmers' & D. Bank, 20 Ky. L. Rep. 1351, 49 S. W. Rep. 317. But it seems that a guaranty may be binding if all the shareholders agree, and no *bona fide* creditor's rights are affected, though the purpose may be *ultra vires*. 1898, First National Bank, etc., v. Winchester, 119 Ala. 168, 72 Am. St. Rep. 904, and Murphy v. Ark. & L. L. Imp. Co., *supra*, p. 950, and note.

2. There are, however, some well-defined exceptions to the general rule: e. g., A corporation holding the securities of another party has the right to dispose of them, and guarantee their payment in the ordinary course of business: 1868, Railroad v. Howard, 7 Wall (74 U. S.) 392; 1876, Arnot v. Erie R. Co., 67 N. Y. 315; 1891, Ellerman v. Chicago J. R. Co., 49 N. J. Eq. 217; 1898, National Bank of Com. v. Allen, 90 Fed. Rep. 545.

A railroad company may guarantee the payment of the bonds and interest of a company whose road it is authorized to lease: 1877, Low v. Railroad Co., 52 Cal. 53, 28 Am. Rep. 629; or the bonds of cities that are lawfully issued to aid in its construction, 1868, Railroad v. Howard, 7 Wall. (74 U. S.) 392; or a note given by a party for its right of way, 1900, Lake St. El. R. Co. v. Carmichael, 184 Ill. 348, 56 N. E. Rep. 372; but a railroad company can not guarantee the profits of a connecting steamship company, 1846, Colman v. Railroad Co., 10 Beav. 1.

A land company—with power to do whatever is necessary to the development of the land—may guarantee the bonds of a railroad company necessary to the success of the land company: 1870, Vandall v. Dock Co., 40 Cal. 83; 1893, Mercantile Trust Co. v. Kizer, 91 Ga. 636; 1894, Marbury v. Kentucky Union Land Co., 62 Fed. Rep. 335. But see, 1895, Northside R. Co. v. Worthington, 88 Texas 562, 53 Am. St. Rep. 778. Such company may also build, or help another corporation build, a saw-mill, 1875, Watts's Appeal, 78 Pa. St. 370; or a bridge, 1894, Fort Worth City Co. v. Smith Bridge Co., 151 U. S. 294, 14 Sup. Ct. Rep. 539.

So a lumber company may be a guarantor for a railroad necessary for its success: 1893, Mercantile Co. v. Kizer, 91 Ga. 636; or for a builder who gets his material from such company, 1896, Wheeler, Osgood, etc., Co. v. Ever-

ett, etc., Co., 14 Wash. 630; 1900, Wittmer Lumber Co. v. Rice, 23 Ind. App. 586, 55 N. E. Rep. 868.

Sec. 275. (5) Partnership.

MALLORY v. HANAUR OIL WORKS.[1]

1888. In the Supreme Court of Tennessee. 86 Tenn. Rep. 598–609, 20 Am. & E. C. C. 478.

Appeal in error from circuit court of Shelby county.

Lurton, J. This is an action of unlawful detainer, brought by the Hanaur Oil Works, a corporation created under the General Incorporation Act of 1875, and engaged in the manufacture of cotton-seed oil at Memphis, Tenn.

The facts which raise the question to be determined are these: In July, 1884, a contract was entered into by and between four corporations engaged in manufacturing cotton-seed oil at Memphis for the formation of what is designated in the agreement as a "combination," "syndicate," and "partnership." The contracting mills agreed to select a committee, composed of representatives from each corporation, and to turn over to this committee the properties and machinery of each mill, to be managed and operated by this committee, through officers, agents and employes selected by them, for the common benefit, the profits and losses of such operations to be shared in proportions agreed upon. This arrangement was to last one year, but, with consent of all, might be renewed for two additional years, and, as appears, was at the end of first year renewed for two other years, terminating August 1, 1887. * * *

The argument here has largely turned upon the correctness of the charge of the circuit judge, who distinctly instructed the jury that the contract between the Hanaur Company and the other four corporations was a contract for a partnership between corporations, and that under the charter of the Hanaur Oil Works it had no power to make such a contract, and that it was, therefore, void, and that it had a right to recover possession of its property, it being withheld solely under and by virtue of an agreement *ultra vires*.

"A partnership," says Judge Story, "is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them."

Pothier says that "a partnership is a contract whereby two or more persons put, or contract to put, something in common to make a lawful profit in common, and reciprocally engage with each other to render an account thereof." Story Part., § 2.

A careful examination of this agreement discloses every material element to a contract of partnership. The absolute ownership of the

[1] Only part of opinion given.

corporate property, the mills, machinery, etc., is not conveyed to the partnership, nor is this necessary. The beneficial use of all such property is surrendered to the common purpose. The provisions for the complete possession, control and use of the properties of the several corporations by the partnership or syndicate is perfect. Nothing is left to the several corporations but the right to receive a share of the profits and participate in the management and control of the consolidated interests as one of the new association. The contract is, both technically and in its essential character, a partnership in so far as it is possible for corporations to form such an association.

It is, however, argued by the learned counsel for appellants that if it be a partnership, that it does not, therefore, follow that it is *ultra vires*; that such a contract, not being prohibited by law or the charter of the defendant in error, or against public policy, is not void, even if in excess of power expressly conferred; that the business proposed by the contract, being within the purposes of the charter, is, therefore, within the implied powers of the corporation, and not *ultra vires*. In other words, "that the question is not whether the corporation had, by virtue of the act of incorporation, authority to make the contract, but whether they are by those statutes forbidden to do it." In this doctrine we do not concur. There is, however, respectable authority for the position. A corporation, being an artificial creation, is the very thing it is made by the statute which brings it into being, and nothing more. The extent of its powers are those enumerated in its charter, or implied by fair and natural construction of powers expressly conferred.

The charter is the measure of its powers, and the enumeration thereof implies the exclusion of all others. We are not to look to the charter to see whether the thing done be prohibited, but whether there is authority to do it. These principles we understand to have the support of the great weight of authority in this country, and to have the sanction of the supreme court of the United States. Thomas v. Railroad Co., 101 U. S. 71.

This view of the law has been the one entertained by this court, and clearly and distinctly enforced in an opinion by the present chief justice in the case of Elevator Company v. Memphis and Charleston R. Co., 1 Pick. 703. The power to enter into a partnership is not expressly or impliedly conferred by our act of 1875, under which the Hanaur Oil Works is incorporated. Neither is such authority within the implied powers of corporations. A partnership and a corporation are incongruous. Such a contract is wholly inconsistent with the scope and tenor of the powers expressly conferred and the duties expressly enjoined upon a corporation, whether it be a strictly business and private corporation or one owing duties to the public, such as a common carrier. In a partnership each member binds the firm when acting within the scope of the business. A corporation must act through its directors or authorized agents, and no individual member can, as such member, bind the corporation.

Now, if a corporation be a member of a partnership it may be bound by any other member of the association, and in so doing he would act, not as an officer or agent of the corporation, and by virtue of authority received from it, but as a principal in an association in which all are equal, and each capable of binding the society by his acts. The whole policy of the law creating and regulating corporations looks to the exclusive management of the affairs of each corporation by the officers provided for or authorized by its charter. This management must be separate and exclusive, and any arrangement by which the control of the affairs of the corporation should be taken from its stockholders and the authorized officers and agents of the corporation would be hostile to the policy of our general incorporation acts. The decided weight of authority is that a corporation has not the power to enter a partnership, either with other corporations or with individuals. Says Mr. Morawetz: "It seems clear that corporations are not impliedly authorized to enter into partnership with other corporations or individuals. The existence of a partnership not only would interfere with the management of the corporation by its regularly appointed officers, but would impair the authority of the shareholders themselves, and involve the company in new responsibilities through agents over whom it had no control." 1 Morawetz Corp., § 421; Whittenton Mills v. Upton, 10 Gray 528 (s. c. 71 Am. Dec. 681); Angell & Ames Corp., § 272.

It is unnecessary to consider this contract as constituting a mere traffic arrangement; for the conclusion already announced that it was an effort to form a partnership, determines that in its scope and effect it sought to accomplish much more than would be understood by the phrase "traffic arrangement." * * *

Affirmed.

Note. Power to enter into partnership.

1. The general rule is that a corporation has no such power, unless expressly authorized: 1831, Sharon Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412; 1858, Whittenton Mills v. Upton, 10 Gray (Mass.) 582, 71 Am. Dec. 681; 1862, Marine Bank v. Ogden, 29 Ill. 248; 1885, Gunn v. Central R. Co., 74 Ga. 509; 1890, People v. North River Sug. R. Co., 121 N. Y. 582, 18 Am. St. Rep. 843, *supra*, p. 100; 1895, Aurora Bank v. Oliver, 62 Mo. App. 390; 1897, Sabine Tram Co. v. Bancroft, 16 Texas Civ. App. 170, 40 S. W. Rep. 837; 1899, Merchants' Nat'l Bank v. Standard W. Co., 6 Ohio N. P. 264.

2. Exceptions.—Some exceptions have been recognized by the courts. Of course, if expressly authorized there can be no question: 1878, Butler v. Am. Toy Co., 46 Conn. 136. In, 1851, Catskill Bank v. Gray, 14 Barb. (N. Y.) 471, it was held that an iron manufacturing company had implied power to become a partner with an individual. In, 1876, Allen v. Woonsocket Co., 11 R. I. 288, it was held that a corporation with undefined powers and a single shareholder could become a member of a partnership strictly at will. And in 1895, Bates v. Coronado Beach Co., 109 Cal. 160, it was held that a corporation could be a partner, if the management was left entirely to the corporation.

3. Although the corporation exceeds its powers by becoming a partner, it will be liable to the extent of benefits received upon joint contracts: 1851, Catskill Bank v. Gray, 14 Barb. (N. Y.) 471; 1862, Marine Bank v. Ogden, 29 Ill. 248; 1880, Clarkson v. Erie & N. S. D., 6 Ill. App. 284; 1887, Swift, etc., v. Pacific Mail Steamship Co., 106 N. Y. 206; 1895, Northside R. Co. v. Worth-

ington, 88 Texas 562, 53 Am. St. Rep. 778. And also may recover for its share of benefits conferred: 1831, N. Y. & S. Canal Co. v. Fulton Bank, 7 Wend. 412; 1899, Wilson v. Carter Oil Co., 46 W. Va. 469, 33 S. E. Rep. 249. See, *infra*, corporations as joint tenants and tenants in common, §§ 292, 293.

Sec. 276. (6) Trade combinations.
(*a*) Pools.

THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY COMPANY v. CLOSSER ET AL.[1]

1890. IN THE SUPREME COURT OF INDIANA. 126 Ind. Rep. 348–369, 22 Am. St. Rep. 593.

ELLIOTT, J. The appellees were partners, under the name of Closser & Co., and as such prosecute this action against the appellant. They base their right of action upon contracts made with the appellant wherein it undertook to transport grain from Indianapolis to the seaboard, and they charge that the appellant agreed to receive, at the time of the shipment, a designated sum as compensation for the transportation of the grain, and to refund to them a certain part of the sum received. They demand that the appellant be compelled to respond in damages for a breach of the agreement to refund part of the money paid to it as freight on the grain carried under the contracts. * * *

The second paragraph of the complaint alleges that the defendant is, and long has been, a common carrier of goods, and that its custom of long standing is to make contracts for carrying grain from Indianapolis to the eastern cities; that the plaintiffs have long been engaged in the business of buying, selling and shipping grain; that on the first day of November, 1884, the plaintiffs, under the firm name of Closser & Co., entered into a contract with the defendant whereby it undertook to transport grain from a station on its road, known as Union City, to the city of New York; that at the time this contract was made "there was no open and established rate of freight charges for carrying such grain, except a certain rate agreed upon between the defendant and other railway companies owning competing lines; the rate so fixed by the competing companies was established by an agreement made by them for the purpose of preventing competition," and was enforced and maintained, in so far as it was enforced and maintained, by an agency of such companies established for that purpose, and called a "pool"; that the "pool" was managed by a person selected by the companies for that purpose, and called a "pool commissioner"; that at the time mentioned all the railway companies that "were so located or situated as to be competitors for such freight were parties to said arrangement and "pool"; that the rate established by the combination of common carriers was 21½ cents per hundredweight; that the defendant, "notwithstanding such combination and pool, offered and gave to Closser & Co. an inducement for shipping

[1] Statement abridged; only part of opinion given.

freight over its lines at a rate lower than that fixed by the combination and 'pool', but, in order to do this and be able to report to the pool commissioner that such pool rate had been charged," the defendant "requested Closser & Co., when shipping freight over its lines, to pay the pool rate, and agreed at the same time with Closser & Co. to pay a certain portion of the pool rate so charged, as a rebate, in order that the shippers might, in the end, be only required to pay the rate fixed by the defendant"; that "in this manner and for this purpose the defendant did, on the same day, agree with Closser & Co., in respect to the shipment of grain, that Closser & Co. should pay the pool rate of 21½ cents per hundred-weight, and that the defendant would thereupon repay to them 4½ cents on every hundred-weight of grain so shipped as a rebate, so that they should, in the end, pay as freight upon such shipment but 17 cents per hundred-weight, which was then, in fact, the rate of defendant for such freight between said points as then agreed upon, which rebate the defendant agreed to pay promptly after such shipment." It is also alleged that grain was shipped by Closser & Co., under the contract, and that they paid the "pool" rate. * * * Decision below for plaintiff.

The central question is as to the validity of the contracts between the rival railroad companies. * * *

We preface our discussion of the central question by saying that we are not, at this point, dealing with the case where a combination is formed for the purpose of preventing ruinous competition, and in which there is no design to stifle fair competition. We are not required to decide, nor do we decide, that combinations fair to the public, untainted by any sinister design, and formed solely to prevent the destruction of business by unregulated competition, may not be valid. There are, we know, cases sanctioning the doctrine that combinations may be formed where the purpose is lawful, and the means employed not forbidden by positive law or high considerations of public policy. Central Trust, etc., Co. v. Ohio Central R. Co., 23 Am. & Eng. R. Cases 666; Boston Chamber of Commerce v. Lake Shore, etc., R. Co., 32 Am. & Eng. R. Cases 618; Hare v. London, etc., R. Co., 2 J. & H. 80; Leslie v. Lorillard, 110 N. Y. 519; Manchester, etc., R. Co. v. Concord R., 8 R. & Corp. Law Journal 443. The doctrine of these cases we neither affirm nor deny; we do, however, declare that they are not relevant to the matter here in dispute. It is, however, both appropriate and necessary to adjudge that a combination between common carriers to prevent competition is, at least, *prima facie* illegal. The doubt is as to whether any ultimate purpose can save it from the condemnation of the law; there can be no doubt that, unexplained, such a combination for such a purpose is condemned by public policy. If such a combination can, in any event, be admitted to be legal, it can only be so where it is affirmatively shown that its object was to prevent ruinous competition, and that it does not establish unreasonable rates, unjust discriminations or oppressive regulations. If such a contract can stand it must be upon an affirmative showing, and one so full, complete and clear, as to remove the pre-

sumption (to which its existence, in itself, gives rise) that it was formed to do mischief to the public by repressing fair competition. The burden is on the carrier to remove the presumption, and until it is removed the agreement providing for the combination gives way before this presumption, and the agreement must be held to be within the condemnation directed against all contracts which violate public policy.

Coming to the question which awaits our judgment, and to which we have cleared our path, we affirm that a contract between corporations charged with a public duty, such as is that of common carriers, providing for the formation of a combination having no other purpose than that of stifling competition, and providing means to accomplish that object, is illegal. The purpose to break down competition poisons the whole contract, and there is here no antidote which will rescue it from legal death. The element which destroys the contract is the purpose to stifle competition, for a combination of rival carriers, moved and controlled by that purpose alone, is destructive of public interest, and, to the last degree, antagonistic to sound public policy. The principle on which this rule rests is a very old one, and its place in the law is very firm. The overshadowing element in this case, and in kindred cases, is the purpose which influences the parties in uniting themselves in a combination, and concerting means to make its purpose effective, for the law abhors a combination which has for its principal object the suppression of competition in matters of commerce in which the public have an interest. * * *

Relevant and striking illustrations of the scope and force of the general principle are supplied by what are known as "The Sugar Trust Cases," decided by the courts of New York—cases rich in argument and authority. People v. North River Sugar Refining Co., 22 Abbott N. Cases 164; see, also, Law Literature of Trust Combinations, etc., 23 Abbott N. Cases 317; People v. North River Sugar Refining Co., 121 N. Y. 582.[1] The authorities collected in those cases demonstrate the proposition that a trust, or combination, having for its purpose the suppression of free competition, can not live where the common law prevails. There are, however, cases which, on their facts, bear a closer resemblance to the present than the sugar trust cases; but, after all, it may be said with propriety the important thing to be secured is a sound and salutary general principle, and not merely cases with closely resembling facts. There is no difficulty in securing the principle we seek, for cases almost without number assert and enforce it in an almost endless variety of forms and phases.

One of the cases near akin to the one before us is that of Hooker v. Vandewater, 4 Denio 349. In that case competing canal companies combined, and agreed to fix an established rate of freight, and to divide profits. The agreement was adjudged illegal, the court saying, among other things, that "It is a general proposition that an agreement to do an unlawful act can not be supported at law—that no right of action can spring out of an illegal contract; and this rule applies

[1] *Supra*, p. 100.

not only when the contract is expressly illegal, but whenever it is opposed to public policy." Still closer is the resemblance between this case and that of Texas, etc., R. Co. v. Southern Pacific R. Co., 41 La. Ann. 970. The court there held a "pooling contract" substantially the same as the one described in the appellees' complaint to be void, and in support of its ruling referred to the cases of Gibbs v. Consolidated Gas Co., 130 U. S. 396; Woodstock Iron Co. v. Richmond, etc., Extension Co., 129 U. S. 643; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Arnot v. Pittson, etc., Coal Co., 68 N. Y. 558; Craft v. McConoughy, 79 Ill. 346; Morrill v. Boston, etc., R., 55 N. H. 531; Jackson v. McLean, 36 Fed. Rep. 213; Santa Clara Valley, etc., Co. v. Hayes, 18 Pac. Rep. 391; Fireman's Charitable Association v. Berghaus, 13 La. Ann. 209; Indiana Bagging Association v. Kock, 14 La. Ann. 168; Glasscock v. Wells, 23 La. Ann. 517, and Cummings v. Saux, 30 La. Ann. 267.

The authorities found on every hand not only fully support our conclusion that a contract between competing carriers, forming a combination for the purpose of stifling competition, is *prima facie* illegal, but many of them carry the principle to a much greater length; it is enough for us, however, that the law, as it has long existed, sustains the conclusion we here affirm, since it is neither necessary nor proper for us to go beyond the case before us for judgment. * * *

Judgment affirmed.

Note. The following cases hold pooling contracts void: 1848, Stanton v. Allen, 5 Denio (N. Y.) 434; 1871, Morris Run, etc., Co. v. Barclay Coal Co., 68 Pa. St. 173; 1875, Morrill v. Railroad Co., 55 N. H. 531; 1877, Wilson v. Harlem & N. Y. Nav. Co., 52 How. Pr. (N. Y.) 348; 1881, Burke, etc., v. Concord, etc., R., 61 N. H. 161; 1883, Denver & N. O. R. Co. v. A., T. & S. F. R. Co., 15 Fed. Rep. 650, 110 U. S. 667; 1883, State v. Concord, etc., R., 13 Am. & Eng. R. Cas. (N. H.) 94; 1888, Gibbs v. Gas Co., 130 U. S. 396; 1889, Anderson v. Jett, 11 Ky. L. Rep. 570, 12 S. W. Rep. 670; 1889, Texas & Pac. R. v. Southern Pac., etc., R., 41 La. Ann. 970; 1894, C. M. & St. Paul R. v. Wabash, St. L. & P. R., 61 Fed. Rep. 993; 1896, United States v. Trans-Missouri Frt. Assn., 166 U. S. 290; 1898, United States v. Joint Traffic Assn., 171 U. S. 505, 19 Sup. Ct. 25, reverses 76 Fed. Rep. 895 (C. C.), and 89 Fed. Rep. 1020 (C. C. A.); 1899, State v. Fireman's Fund Ins. Co., 152 Mo. 1, 52 S. W. Rep. 595.

See note at end of the next case.

Sec. 277. Same.

MANCHESTER AND LAWRENCE RAILROAD v. CONCORD RAILROAD.[1]

1889. IN THE SUPREME COURT OF NEW HAMPSHIRE. 66 New Hampshire Rep. 100–134.

[Bill in equity for a discovery and an accounting. Defendants filed special pleas, to which the plaintiffs demurred. Defendants demurred to the parts of the bill not covered by the pleas.]

[1] Only part of opinion given.

BLODGETT, J. * * * The second plea avers, and the demurrer admits, that at the time of the making of the contracts between the parties and of the dealings thereunder, their respective roads "were rival and competing railroads, by the competition of which the prices of transportation thereon were, and but for said supposed contracts, dealings, transactions, operations and business, would have continued to be, materially reduced, and said alleged contracts, dealings, transactions and business were made and had for the purpose of destroying and preventing such competition, and did destroy and prevent it."

It will be noticed that there is no averment in the plea that the purpose of the contracts was to raise the prices of transportation above a reasonable standard, or that they did have this effect, or that the public were prejudiced by their operation in any manner; and the naked question presented then is, whether all contracts between rival railway corporations which prevent competition are necessarily contrary to public policy, and therefore *mala prohibita* and illegal in themselves.

To state this question is to answer it in the negative, because it is obvious that the answer depends upon circumstances. While, without doubt, contracts which have a direct tendency to prevent a healthy competition are detrimental to the public and consequently against public policy, it is equally free from doubt that when such contracts prevent an unhealthy competition and yet furnish the public with adequate facilities at fixed and reasonable rates, they are beneficial and in accord with sound principles of public policy. For the lessons of experience, as well as the deductions of reason, amply demonstrate that the public interest is not subserved by competition which reduces the rate of transportation below the standard of fair compensation; and the theory which formerly obtained, that the public is benefited by unrestricted competition between railroads has been so emphatically disproved by the results which have generally followed its adoption in practice, that the hope of any permanent relief from excessive rates through the competition of a parallel or rival road may, as a rule, be justly characterized as illusory and fallacious.

Upon authority, also, arrangements and contracts between competing railroads, by which unrestrained competition is prevented, do not contravene public policy. Hare v. Railway Co., 2 Johns. & H. 80, is directly in point. In that case a bill in chancery had been brought by a stockholder in the defendant company to annul an agreement between two railway companies to divide the profits of the traffic in fixed proportions; and it was admitted there, as it is here, that the purpose of the agreement was to prevent competition. In dismissing the bill, Vice-Chancellor Wood said, page 103, "With regard to the argument against the validity of the agreement, I may clear the ground of one objection by saying that I see nothing in the alleged injury to the public arising from the prevention of competition. * * * It is a mistaken notion that the public is benefited by pitting two railway companies against each other till one is ruined, the result being at last to raise the fares to the highest possible standard." So, also,

in 1 Red. Railroads, § 146, 2, it is said,. "There is no principle of public policy which renders void a traffic arrangement between two lines of railway for the purpose of avoiding competition." And Mr. Morawetz says, in his admirable treatise on corporations, "Public policy clearly does not demand that railroad companies operating competing lines shall engage in strife, causing their financial ruin; and, so far as agreements among companies are designed to effect this result, their purpose is not injurious to the public or illegal. Moreover, such agreements are positively beneficial to the public so far as they prevent the fluctuation of rates and unjust discriminations among shippers, which invariably attend the unrestricted competition of rival companies. It is therefore impossible to support the proposition that all agreements among railroad companies which restrict competition are condemned by law. Some such agreements may be contrary to public policy and unlawful; but if an agreement of this character is a reasonable business arrangement to protect the shareholders and creditors of the companies from loss, and does not cause unreasonably high charges or violate any duty which the companies owe to the public, it should be sustained and enforced by the courts." Mor. Corp. (2d ed.), § 1131. In the same section, in speaking of contracts in restraint of trade (to which many of the authorities and much of the argument for the defendants relate) he says: "Even if there were such a rule as has been claimed applicable to competition in trade, the principle and policy of the rule would not be applicable to traffic arrangements designed merely to prevent ruinous competition and 'wars' among railroad companies. The main objection which has been urged against combinations restraining competition in trade, namely, that such combinations tend to produce monopolies and cause extortion, has no application to combinations among railroad companies, for railroad companies are prohibited by law to charge more than reasonable rates. It should be observed, also, that competition among railroad companies has not the same safeguards as competition in trade. Persons will ordinarily do business only when they think they see a fair chance of profit; and if press of competition renders a particular trade unprofitable, those engaged in that trade will suspend or reduce their operations, and apply their capital and labor to other uses until a reasonable margin of profit has been reached. But the capital invested in the construction of a railroad can not be withdrawn when competition renders the operation of the road unprofitable. A railroad is of no use except for railroad purposes, and if the operation of the road were stopped, the capital invested in its construction would be wholly lost. Hence it is for the interest of a railroad company to operate its road, though the earnings are barely sufficient to pay the operating expenses. The ownership of the road may pass from the shareholders to the bondholders and be of no benefit to the latter; but the struggle for traffic will continue so long as the means of paying operating expenses can be raised. Unrestricted competition will thus render the competitive traffic wholly unremunerative, and will cause the ultimate bankruptcy of the company

unless the portion of their traffic which is not the subject of competition can be made to bear the entire burden of the interest and fixed charges."

The application of these principles to the plea under consideration is patent and decisive. The geographical location and relative resources of the two roads were such as to render it obvious that the plaintiffs could not reasonably hope successfully to compete with their more powerful rival. The alternatives presented, it may be safely assumed, were combination or ruinous competition. They accepted the former; and as the combination did not, so far as appears by the pleadings, raise the rate of transportation above the standard of fair compensation, or violate any duty that is owing to the public from roads which are non-competing, there is nothing averred in the plea which bars the right of the plaintiffs to an accounting with the defendants.

Numerous cases have been cited in behalf of the defendants in support of their proposition that the combination between the parties must be regarded as void at common law because against public policy. It is quite impossible, without extending this opinion beyond all reasonable limits, to go through and comment upon these cases in detail, as has been done in the last brief for the plaintiffs; but it is sufficient to say, in general terms, as is there said, that they are cases of contracts in restraint of mercantile business; or cases of contracts which attempt to derogate from the right of eminent domain inherent in the state; or cases where contracts between railroad companies were held contrary to public policy because one of the parties attempted to bind itself not to perform duties incident to the legal character of common carriers or public servants; or cases where contracts between railroad companies were held contrary to public policy because one of the parties agreed not to build, or to cease to operate, a road which they were chartered to build or operate; or cases where contracts between railroad companies have been held illegal merely on the ground that they were *ultra vires;* in short, they do not establish a rule which fairly includes a case like the one at bar. The demurrer to the second plea is sustained. * * *

Plaintiffs' demurrers sustained, and defendants' overruled.

Note. The following cases hold pools to be valid, or at least not void under all circumstances: 1861, Hare v. London & N. W. R. Co., 2 J. & H. 80; 1865. Hartford, etc., R. v. N. Y., etc., R., 3 Rob. (N. Y.) 411; 1868, Sussex R. Co, v. Morris and Essex R., 19 N. J. Eq. 13; 1882, Elkins v. Camden & A. R., 36 N. J. Eq. 234, 244; 1885, Central T. Co. v. Ohio Cent. R. Co., 23 Fed. Rep. 306; 1886, Dolph v. Troy Laundry M. Co., 28 Fed. Rep. 553; 1888, Ives v. Smith, 3 N. Y. Supp. 645; 1892, Mogul Steamship v. McGregor, App. Cas. 25; 1892, U. S. v. Trans-Mo. Frt. Assn., 53 Fed. Rep. 440; 1893, U. S. v. Trans-Mo. Frt. Assn., 58 Fed. Rep. 58, 19 U. S. App. 36, 7 C. C. A. 15 (these being overruled by the supreme court, 166 U. S. 290); 1899, Post v. Southern R. Co., 103 Tenn. 184, 16 Am. & E. R. Cas. (N. S.) 201.

Sec. 278. Same. (*b*) Contracts restraining trade and competition.

UNITED STATES v. ADDYSTON PIPE AND STEEL COMPANY ET AL.[1]

1898. IN THE U. S. CIRCUIT COURT OF APPEALS, E. D. TENNESSEE. 85 Fed. Rep. 271.

[Appeal from the circuit court. Suit in equity by the attorney-general of the United States against six corporations engaged in manufacturing cast iron pipe, charging them with a combination and conspiracy in restraint of inter-state commerce, contrary to the anti-trust law passed by congress July 2, 1890.[2] The defendants were the Addyston Co., of Cincinnati, Ohio, Long & Co., of Louisville, Ky., Howard-Harrison & Co., of Bessemer, Ala., Anniston Co., of Anniston, Ala., South Pittsburgh Co., of South Pittsburgh, Tenn., and the Chattanooga Co., of Chattanooga, Tenn. The petition prayed for a seizure and confiscation of the pipe, a dissolution of the conspiracy and a perpetual injunction against the same. Defendants admitted the existence of an association for the purpose of avoiding ruinous competition, but denied that it was in restraint of trade, created a monopoly or violated the anti-trust law. The circuit court dismissed the petition. The evidence showed that the association had divided up the United States into "pay" and "free" territory; the capacity of the mills in the pay territory was 392,500 tons, 220,000 tons being represented by the association, the other mills in the pay territory being located in Colorado, Texas, Oregon and St. Louis, with an aggregate capacity of 57,500 tons, and at Columbus, Cleveland and New Comerstown, Ohio, and Detroit, Mich., with an aggregate capacity of 113,000 tons; the capacity of mills in the "free" territory was 348,000 tons, and they were located in eastern Virginia (14,000 tons), four in eastern Pennsylvania (87,000 tons), three in New Jersey (210,000 tons), and two in New York (35,000 tons); from these "free" mills to the "pay" territory the freight rates varied from $2 to $6 per ton. Within the "pay" territory of thirty-four states certain cities were reserved to be supplied exclusively by a certain company, as, *e. g.*, the Addyston Company was to have the exclusive right to handle the business of Cincinnati, Ohio, Covington and Newport, Ky. The plan contemplated was as follows: "All competition or pipe lettings shall take place among the various pipe shops prior to said letting. To accomplish this purpose it is proposed that the six competitive shops have a representative board located at some central city, to whom all inquiries for pipe shall be referred, and said board shall fix the price at which said pipe shall be sold, and bids taken from the respective shops for the privilege of handling the order, and the party securing

[1] Statement abridged and much of opinion omitted. This opinion should be read in full, and carefully studied. It was affirmed, though the decree was slightly modified by the United States Supreme Court. See 175 U. S. 211.

[2] See note, *infra* p. 977.

the order shall have the protection of all the other shops." This board proceeded as follows: "It was moved to sell the 519 pieces of 20-inch pipe for Omaha, Neb., for $23.40 delivered. Carried. It was moved that Anniston participate in the bonus, and the job be sold over the table. Carried. Pursuant to the motion, the 519 pieces 20-inch pipe for Omaha was sold to Bessemer at a premium of $8.20." In a case of a letting at St. Louis, this city being reserved to the Bessemer (Ala.) Company, the price was fixed by the association at $24 per ton on 2,800 tons, and the bonus at $6.50. Before the letting, the vice-president of the Bessemer Company wrote to the other members of the association saying, "I prefer that if any of you find it necessary to put in a bid without going to St. Louis, please bid not less than $27 for the pipe. * * * I would also like to know as to which of you would find it convenient to have a representative at the letting. It will be necessary to have two outside bidders." At the letting the Addyston Company bid $24.37 and the Louisville Company $24.57. The contract being let to the Bessemer Company at $24; the evidence showed that the Chattanooga Company could have furnished the same at from $17 to $18 per ton at a profit. The bonus or premium bid was to be paid to the other companies in proportion to the capacities of the various mills. There was much other evidence of a similar and confirmatory character.]

TAFT, C. J. * * * Two questions are presented in this case for our decision: 1. Was the association of the defendants a contract, combination, or conspiracy in restraint of trade, as the terms are to be understood in the act? 2. Was the trade thus restrained between the states?

The contention on behalf of defendants is that the association would have been valid at common law, and that the federal anti-trust law was not intended to reach any agreements that were not void and unenforcible at common law. It might be a sufficient answer to this contention to point to the decision of the supreme court of the United States in the United States v. Trans-Missouri Freight Assn., 166 U. S. 290, 17 Sup. Ct. 540, in which it was held that contracts in restraint of interstate transportation were within the statute, whether the restraints would be regarded as reasonable at common law or not. It is suggested, however, that that case related to a *quasi*-public employment, necessarily under public control and affecting public interests, and that a less stringent rule of construction applies to contracts restricting parties in sales of merchandise, which is purely a private business, having in it no element of a public or *quasi*-public character. Whether or not there is substance in such a distinction—a question we do not decide—it is certain that, if the contract of association which bound the defendants was void and unenforcible at the common law because in restraint of trade, it is within the inhibition of the statute if the trade it restrained was interstate. Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply

void, and were not enforced by the courts. Mogul Steamship Co. v. McGregor, Gow & Co. (1892), App. Cas. 25; Hornby v. Close, L. R. 2 Q. B. 153; Lord Campbell, C. J., in Hilton v. Eckersley, 6 El. & Bl. 47, 66; Hannen, J., in Farrer v. Close, L. R. 4 Q. B. 602, 612. The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints.

The argument for defendants is that their contract of association was not, and could not be, a monopoly, because their aggregate tonnage capacity did not exceed 30 per cent. of the total tonnage capacity of the country; that the restraints upon the members of the association, if restraints they could be called, did not embrace all the states, and were not unlimited in space; that such partial restraints were justified and upheld at common law if reasonable, and only proportioned to the necessary protection of the parties; that in this case the partial restraints were reasonable, because without them each member would be subjected to ruinous competition by the other, and did not exceed in degree of stringency or scope what was necessary to protect the parties in securing prices for their product that were fair and reasonable to themselves and the public; that competition was not stifled by the association, because the prices fixed by it had to be fixed with reference to the very active competition of pipe companies which were not members of the association, and which had more than double the defendant's capacity; that in this way the association only modified and restrained the evils of ruinous competition, while the public had all the benefit from competition which public policy demanded.

From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contracts. Courts recognized this public policy by refusing to enforce stipulations of this character. The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood, with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others. * * *

The inhibition against restraints of trade at common law seems at first to have had no exception. See language of Justice Hull, Year Book, 2 Hen. V., folio 5, pl. 26. After a time it became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced. It was of importance, as an incentive to industry and honest dealing in trade, that, after a man had built up a business with an extensive good-will, he should be able to sell his business and good-will to the best of advantage, and he could not do so unless he could bind himself by an

enforcible contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell. It was equally for the good of the public and trade, when partners dissolved, and one took the business, or they divided the business, that each partner might bind himself not to do anything in trade thereafter which would derogate from his grant of the interest conveyed to his former partner. Again, when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged. Again, when one in business sold property with which the buyer might set up a rival business, it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict. This was not reducing competition, but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property. Again, it was of importance that business men and professional men should have every motive to employ the ablest assistants, and to instruct them thoroughly; but they would naturally be reluctant to do so unless such assistants were able to bind themselves not to set up a rival business in the vicinity after learning the details and secrets of the business of their employers. * * *

For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2 and 3) to the enjoyment by the buyer of the property, good-will or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employe of the confidential knowledge acquired in such business. Under the first class come the cases of Mitchel v. Reynolds, 1 P. Wms. 181; Fowle v. Parke, 131 U. S. 88, 9 Sup. Ct. 658; Nordenfeldt v. Maxim-Nordenfeldt Co. (1894), App. Cas. 534; Rousillon v. Rousillon, 14 Ch. Div. 351; Cloth Co. v. Lorsont, L. R. 9 Eq. 345; Whittaker v.

Howe, 3 Beav. 383; Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. Rep. 419; Tode v. Gross, 127 N. Y. 480, 28 N. E. Rep. 469; Beal v. Chase, 31 Mich. 490; Hubbard v. Miller, 27 Mich. 15; National Ben. Co. v. Union Hospital Co., 45 Minn. 272, 47 N. W. Rep. 806; Whitney v. Slayton, 40 Maine 224; Pierce v. Fuller, 8 Mass. 223; Richards v. Seating Co., 87 Wis. 503, 58 N. W. Rep. 787. In the second class are Tallis v. Tallis, 1 El. & Bl. 391, and Lange v. Werk, 2 Ohio St. 520. In the third class are Machinery Co. v. Dolph, 138 U. S. 617, 11 Sup. Ct. 412, Machinery Co. v. Dolph, 28 Fed. Rep. 553; and Matthews v. Associated Press, 136 N. Y. 333, 32 N. E. Rep. 981. In the fourth class are American Strawboard Co. v. Haldeman Paper Co., 83 Fed. Rep. 619; and Hitchcock v. Anthony, 83 Fed. Rep. 779, both decisions of this court; Navigation Co. v. Winsor, 20 Wall. 64; Dunlop v. Gregory, 10 N. Y. 241; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. Rep. 335. While in the fifth class are the cases of Homer v. Ashford, 3 Bing. 322; Horner v. Graves, 7 Bing. 735; Hitchcock v. Coker, 6 Adol. & E. 438; Ward v. Byrne, 5 Mees. & W. 547; Dubowski v. Goldstein (1896), 1 Q. B. 478; Peels v. Saalfeld (1892), 2 Ch. 149; Taylor v. Blanchard, 13 Allen 370; Keeler v. Taylor, 53 Pa. St. 467; Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. Rep. 712.

It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. In Horner v. Graves, 7 Bing. 735, Chief Justice Tindal, who seems to be regarded as the highest English judicial authority on this branch of the law (see Lord Macnaghten's judgment in Nordenfeldt v. Maxim Nordenfeldt Co. (1894), App. Cas. 535, 567), used the following language:

"We do not see how a better test can be applied to the question, whether this is or not a reasonable restraint of trade, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose

of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.

[Reviewing many cases.] * * * * * * * * * *

Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly. But the facts of the case do not require us to go so far as this, for they show that the attempted justification of this association on the grounds stated is without foundation.

Another aspect of this contract of association brings it within the term used in the statute, "a conspiracy in restraint of trade." A conspiracy is a combination of two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful means. In the answer of the defendants, it is averred that the chief way in which cast-iron pipe is sold is by contracts let after competitive bidding invited by the intending purchaser. It would have much interfered with the smooth working of defendants' association had its existence and purposes become known to the public. A part of the plan was a deliberate attempt to create in the minds of the members of the public inviting bids the belief that competition existed between the defendants. Several of the defendants were required to bid at every letting, and to make their bids at such prices that the one already selected to obtain the contract should have the lowest bid.

It is well settled that an agreement between intending bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition, is a fraud upon the intending vendor or contractor, and the ensuing sale or contract will be set aside. Breslin v. Brown, 24 Ohio St. 565; Atcheson v. Mallon, 43 N. Y. 147; Loyd v. Malone, 23 Ill. 41; Wooten v. Hinkle, 20 Mo. 290; Phip-

pen v. Stickney, 3 Metc. (Mass.) 384; Kearney v. Taylor, 15 How. 494, 519; Wilbur v. How, 8 Johns. 444; Hannah v. Fife, 27 Mich. 172; Gibbs v. Smith, 115 Mass. 592; Swan v. Chorpenning, 20 Cal. 182; Gardiner v. Morse, 25 Maine 140; Ingram v. Ingram, 49 N. C. 188; Brisbane v. Adams, 3 N. Y. 129; Woodruff v. Berry, 40 Ark. 251; Wald Pol. Cont., 310, note by Mr. Wald, and cases cited. The case of Jones v. North, L. R. 19 Eq. 426, to the contrary, can not be supported. The largest purchasers of pipe are municipal corporations, and they are by law required to solicit bids for the sale of pipe in order that the public may get the benefit of competition. One of the means adopted by the defendants in their plan of combination was this illegal and fraudulent effort to evade such laws, and to deceive intending purchasers. No matter what the excuse for the combination by defendants in restraint of trade, the illegality of the means stamps it as a conspiracy, and so brings it within that term of the federal statute.

The second question is whether the trade restrained by the combination of the defendants was interstate trade. * * *

In Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, a law of Tennessee, which imposed a tax on all "drummers" who solicited orders on samples, was held unconstitutional in so far as it applied to the drummer of an Ohio firm, who was soliciting orders for goods to be sent from Ohio to the purchasers in Tennessee, on the ground that it was a tax on interstate commerce. In delivering the opinion of the court in that case, Mr. Justice Bradley said (page 497, 120 U. S., and page 596, 7 Sup. Ct.) that a tax on the sale of goods, or the offer to sell them before they are brought into the state, was clearly a tax on interstate commerce. He further said:

"The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." * * *

If then, the soliciting of orders for, and the sale of, goods in one state, to be delivered from another state, is interstate commerce in its strictest and highest sense—such that the states are excluded by the federal constitution from a right to regulate or tax the same,—it seems clear that contracts in restraint of such solicitations, negotiations, and sales are contracts in restraint of interstate commerce. The anti-trust law is an effort by congress to regulate interstate commerce. Such commerce as the states are excluded from burdening or regulating in any way by tax or otherwise, because of the power of congress to regulate interstate commerce, must, of necessity, be the commerce which congress may regulate, and which, by the terms of the anti-trust law, it has regulated. We can see no escape from the conclusion, therefore, that the contract of the defendants was in restraint of interstate commerce. * * *

Reversed.

Corporate Combinations.

Note: See decision in supreme court of U. S., 175 U. S. 211, *infra*, p. 1535.

1. *In general.* In the discussion of this topic two principles should be kept

constantly in mind,—*one* based upon the nature of a corporation is, that the grant of corporate power is a *franchise* granted by the state for a definite purpose, to be exercised in a way prescribed, and subject to forfeiture by the state if it is not carried out in accordance with the grant; the *second* is based upon public policy, viz., that combination agreements of individuals, partnerships, or corporations, with the purpose and effect (with certain exceptions) of restraining trade, destroying competition, and resulting in monopoly, are unenforcible, and under some circumstances wrongful,—tortious or criminal.

2. *The first principle, that a corporation must not abdicate its purpose or prescribed method of management*, is well expressed in Whittenton Mills v. Upton, 10 Gray (Mass.) 582 (1858), by Thomas, J., where the question involved was whether a corporation could be a member of a partnership. He said: "An act of the corporation, done either by direct vote or by agents authorized for the purpose, is the manifestation of the collected will of the society. No member of the corporation, as such, can bind the society. In a partnership each member binds the society as a principal. If, then, this corporation may enter into partnership with an individual, there would be two principals, the legal person and the natural person, each having, within the scope of the society's business, full authority to manage its concerns, including even the disposition of its property. * * * The partner may manage and conduct the business of the corporation, and bind it by his acts. In doing so he does not act as an officer or agent of the corporation by authority received from it, but as a principal in a society in which all are equals, and each capable of binding the society by the act of its individual will." This agreement was held void. Such agreements, if valid, would have the effect, as Judge Finch says, in People v. North River Sugar Ref. Co., 121 N. Y. 582 (1890), *supra*, p. 100, to permit a corporation "to accept from the state the gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; *and to give away to an irresponsible board (or person) its entire independence and self-control.*" So, too, it would have the effect of conferring upon the partner the capacity of wielding or enjoying corporate power without the states' grant being made to him. The same doctrines are stated in Mallory v. Hanaur Oil Works, 86 Tenn. 598, *supra*, p. 957.

The above were all cases of purely private business corporations, not those owing any special duty to the public. The rule applies, of course, with more reason and more strictness to *quasi-public* corporations, or those owing particular duties to the public. As stated by Justice Miller in Thomas v. West Jersey R. Co., 101 U. S. 71 (1879), *supra*, p. 915; "Where a corporation, like a railroad company, has granted to it by charter a franchise intended, in large measure, to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy." While Justice Miller says such contract is void *as against public policy*, he evidently means that it is void because it is in conflict with a definite rule of law, viz., that corporations are accountable to the state for non-user or mis-user of the franchises granted, and not that only *quasi*-public corporations are so accountable. (See *infra*, this note, class *d*.)

From these principles, therefore, it follows that all contracts of a corporation, either private or *quasi*-public, to enter into combinations, whether of partnership, pool, restraint of trade, trust, lease, consolidation, sale or otherwise, the necessary effect of which is to destroy its autonomy in the performance of its duty to the state, are, or ought to be, held to be void and unenforcible, and this so, regardless of any other quality of the contract. And it is generally held so, although there are holdings to the contrary (erroneously we think), in the case of leases and sales by purely private corporations. See cases cited in notes to §§ 275, 276, 277, 279–282, and below, class *d* in this note.

While a contract by a corporation violating this principle alone is not criminal or wrongful, it is *ultra vires* in the true sense, and the state undoubtedly has a technical right to complain. The state, however, does not, and will not, complain of such a transaction unless the contract made, or things done under it, injuriously affect or threaten public interests; then the state may interfere by *quo warranto* to prevent or enjoin its consummation, either by ousting the corporation of the power usurped or annulling the charter. As Judge Finch says, People v. Sugar Ref. Co., 121 N. Y. 582, 608: "The state, as prosecutor, must show on the part of the corporation accused some sin against the law of its being which has produced, or tends to produce, injury to the public. The transgression must not be merely formal or incidental, but material and serious; and such as to harm or menace the public welfare." See, 1890, People v. North River S. R. Co., 121 N. Y. 582; 1892, State v. Standard Oil Co., 49 Ohio St. 137; 1899, State v. Portland Natural Gas & Oil Co., 153 Ind. 483, 53 N. E. Rep. 1089.

3. *The second principle—that contracts in restraint of trade* (with certain exceptions) *are void and unenforcible*—has alone no peculiar application to corporations, but applies to individuals and partnerships also; but this principle together with the first one above gives the state a power over corporations in regard to such contracts that it does not have over individuals, viz., that the state can actively and of its own accord take the life of the offending corporation for engaging in such a contract, though no punishment, aside from refusing to enforce the contract, could be meted out to an offending individual or partnership.

What contracts restraining trade are void is a difficult matter, in the present state of the law, to determine. It seems to me that Judge Taft, in the Addyston Pipe case, *supra*, p. 967, has struck the true basis of classification by dividing contracts in restraint of trade and competition into three classes:

a. Those in which the restraining contract is wholly incidental and ancillary to another main or principal contract that is lawful; and,

b. Those in which the restraining contract is the main or principal contract, to which others are only incidental, ancillary, or preliminary to this purpose; and,

c. Those in which the restraining contract is the only contract made.

As to class *a*, it was formerly held, perhaps, that all restraints upon trade were invalid: 1415, Y. B., 2 Hen. V. 5, 26; 1613, Darcy v. Allein, 11 Co. 84; 1711, Mitchel v. Reynolds, 1 P. Wms. 181; 1837, Alger v. Thacher, 19 Pick. (Mass.) 51; but the rule has been settled that such restraints as are reasonably necessary for the protection of the rights acquired by the main contract are valid: 1621, Broad v. Jollyfe, Cro. Jac. 596; 1711, Mitchel v. Reynolds, 1 P. Wms. 181; 1793, Davis v. Mason, 5 T. R. 118; 1803, Bunn v. Guy, 4 East 190; 1806, Gale v. Reed, 8 East 80; 1811, Pierce v. Fuller, 8 Mass. 223; 1813, Perkins v. Lyman, 9 Mass. 522; 1818, Hayward v. Young, 2 Chitty 407; 1822, Bryson v. Whitehead, 1 Simons & S. 74; 1827, Nobles v. Bates, 7 Cowen 307; 1831, Horner v. Graves, 7 Bing. 735; 1837, Alger v. Thacher, 19 Pick. (Mass.) 51; 1839, Chappel v. Brockway, 21 Wend. 157; 1851, Dunlop v. Gregory, 10 N. Y. 241, 61 Am. Dec. 746; 1856, Cal. Steam Nav. Co. v. Wright, 6 Cal. 259, 65 Am. Dec. 511; 1869, Jenkins v. Templs, 39 Ga. 655, 99 Am. Dec. 482; 1869, Morse T. D. Co. v. Morse, 103 Mass. 73, 4 Am. Rep. 513; 1872, Hoyt v. Holly, 39 Conn. 326, 12 Am. Rep. 390; 1887, Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464; 1890, Newell v. Meyendorff, 9 Mont. 254, 18 Am. St. Rep. 738; 1891, Chapin v. Brown, 83 Iowa 156, 32 Am. St. Rep. 297; 1894, Nordenfeldt v. Maxim N. Co., App. Cas. 535; 1895, McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177; 1896, Kramer v. Old, 119 N. C. 1, 56 Am. St. Rep. 650; 1898, Lufkin R. Co. v. Fringeli, 57 Ohio St. 596, 63 Am. St. Rep. 736; 1898, Stride v. Martin, 77 L. T. (N. S.) 600; 1900, Jackson v. Byrnes, 103 Tenn. 698, 54 S. W. Rep 984.

What is reasonable or unreasonable depends upon the circumstances of each case, and different courts take different views of similar circumstances, but total restraints in both space and time are generally held void; with improved machinery and communication, what are now reasonable for protection (Dia-

mond Match Co. v. Roeber, 106 N. Y. 473; Nordenfeldt v. Maxim N. Co., App. Cas. (1894) 535) would formerly have been held to be unreasonable (Mitchel v. Reynolds, 1 P. Wms. 181).

The subdivisions of class *a* are given in the report of the Addyston case, *supra*, p. 970.

Under class *b*, when the main contract is to restrain trade, and this does so unreasonably as to affect public interests, such main and ancillary contracts are not enforcible. The following late cases illustrate this: 1877, Arnot v. Coal Co., 68 N. Y. 558; 1888, Santa Clara Lumber Co. v. Hayes, 76 Cal. 387, 18 Pac. Rep. 391; 1889, Richardson v. Buhl, 77 Mich. 632, 43 N. W. Rep. 1102; 1890, People v. Refining Co., 121 N. Y. 582, *supra*, p. 100; 1890, State v. Neb. Dis. Co., 29 Neb. 700, 46 N. W. Rep. 155; 1890, Pittsburgh Carbon Co. v. McMillin, 119 N. Y. 46, 23 N. E. Rep. 530; 1891, Am. Biscuit Mfg. Co. v. Klotz, 44 Fed. Rep. 721; 1891, Pacific Factor Co. v. Adler, 90 Cal. 110; 1892, State v. Standard Oil Co., 49 Ohio St. 137; 1895, People v. Milk Exchange, 145 N. Y. 267; 1895, Distilling and Cattle Feeding Co. v. People, 156 Ill. 448, *infra*, p. 978; 1897, National Harrow Co. v. Hench, 83 Fed. Rep. 36; 1898, United States v. Coal Dealers' Assn., 85 Fed. Rep. 252; 1899, Harding v. Am. Glucose Co., 182 Ill. 551, 55 N. E. Rep. 577.

Under class *c*, there being no lawful purpose to forward, no rule to measure the necessity of restriction, but a purpose to avoid competition which the law favors, such contracts should be held void. The following are cases of this kind: 1837, Alger v. Thacher, 19 Pick. 51; 1855, Hilton v. Eckersley, 6 El. & Bl. (88 E. C. L.) 47; 1859, India Bagging Assn. v. Kock, 14 La. Ann. 168; 1871, Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; 1875, Craft v. McConoughy, 79 Ill. 346; 1880, Salt Co. v. Guthrie, 35 Ohio St. 666; 1889, Leonard v. Poole, 114 N. Y. 371; 1889, Anderson v. Jett, 89 Ky. 375; 1890, Emery v. Candle Co., 47 Ohio St. 320; 1890, Urmston v. Whitelegg Bros., 63 L. T. (N. S.) 455; 1891, Chapin v. Brown, 83 Iowa 156; 1892, Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510; 1892, Oil Co. v. Adoue, 83 Tex. 650; 1892, More v. Bennett, 140 Ill. 69; 1892, Mogul Steamship Co. v. McGregor, App. Cas. 25; 1893, People v. Sheldon, 139 N. Y. 251; 1893, Judd v. Harrington, 139 N. Y. 105; 1894, Nester v. Brewing Co., 161 Pa. St. 473; 1895, Ford v. Milk Association, 155 Ill. 166; 1895, Bishop v. Preservers' Co., 157 Ill. 284; 1897, Milwaukee M. & B. Assoc. v. Niezerowski, 95 Wis. 129; 1898, United States v. Trans-Missouri Ft. Assoc., 166 U. S. 290; 1898, United States v. Joint Traffic Association, 171 U. S. 505; 1899, State v. Fireman's F. Ins. Co., 152 Mo. 1, 52 S. W. Rep. 595; 1899, Bailey v. Association of Plumbers, 103 Tenn. 99, 52 S. W. Rep. 853; 1899, Harding v. Am. Glucose Co., 182 Ill. 551, 55 N. E. Rep. 577; 1900, Gatzow v. Buening, 106 Wis. 1, 81 N. W. Rep. 1003.

With these cases, however, should be compared the following: Wickens v. Evans, 3 Y. & J. 318; Collins v. Locke, 4 App. Cas. 674; Ontario Salt Co. v. Merchants' S. Co., 18 Grant (U. C.) 540; and Leslie v. Lorrillard, 110 N. Y. 519.

Perhaps there should be added to the above classes another that we may call class *d—public service companies or occupations*—in which any restraints that prevent the performance of their whole duty to the public are held to be invalid: 1847, Hooker v. Vandewater, 4 Denio 349; 1848, Stanton v. Allen, 5 Denio 434; 1869, Railroad Co. v. Collins, 40 Ga. 582; 1871, Hazelhurst v. R. Co., 43 Ga. 13; 1883, West Va. Transp. Co. v. Ohio Riv., etc., Co., 22 W. Va. 600; 1888, Gibbs v. Gas Co., 130 U. S. 396; 1889, People v. Chicago Gas T. Co., 130 Ill. 268, *infra*, p. 1054; 1892, Stockton v. Central R. Co., 50 N. J. Eq. 52; 1899, State v. Portland Nat. Gas Co., 153 Ind. 483, 53 N. E. Rep. 1069; and see cases cited under section 276.

Whether contracts in undue restraint of trade are anything more than unenforcible, that is, illegal as being tortious or wrongful, so as to be the basis of a suit for damages, or a criminal prosecution, in the absence of any statute regulating the matter, is in controversy; but the weight of authority certainly is that if there is no fraud, coercion, intimidation, or something of the kind practiced upon some one, there is no civil or criminal liability.

The following cases hold there is a civil or criminal liability: King v.

Journeyman Tailors, 8 Mod. 10; 1835, People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501; 1867, Master Stevedore's Assn. v. Walsh, 2 Daly 1; 1871, Morris Run Coal Co. v. Barclay, etc., Co., 68 Pa. St. 173; 1888, Crump v. Commw., 84 Va. 927, 10 Am. St. Rep. 895; 1893, People v. Sheldon, 139 N. Y. 251, 36 Am. St. Rep. 690; 1898, United States v. Trans-Mo. Ft. Assn., 166 U. S. 290; 1898, Doremus v. Hennesy, 176 Ill. 608, 68 Am. St. Rep. 208; 1900, Ertz v. Produce Ex. Co., 82 Minn. 173, 81 N. W. Rep. 346.

The following hold otherwise: 1842, Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; 1892, Mogul Steamship Co. v. McGregor, App. Cas. 25; 1895, Macauley v. Tierney, 19 R. I. 255, 61 Am. St. R. 770; 1897, Beechley v. Mulville, 102 Iowa 602, 63 Am. St. Rep. 479; 1897, Allen v. Flood, 77 L. T. R. 717; 1899, Ætna Ins. Co. v. Commw., 21 Ky. L. Rep. 503, 45 L. R. A. 355, 51 S. W. Rep. 624.

4. **Anti-Trust Acts:** Most of the states have enacted anti-trust acts, making a civil and criminal liability for creating or attempting to create a monopoly. Some of these, especially the late Michigan, act 255, 1899, Missouri, R. S. 1899, §§ 8978–85, and Texas, ch. 146, 1899, acts, are peculiarly stringent.

The United States act of 1890 (26 Stat. 209) created seven different crimes relating to interstate, foreign, or territorial trade or commerce, punishable by a penalty not exceeding $5,000, or one year's imprisonment, or both, by providing that every person (including corporations or associations) who shall make (1) a contract in restraint of such trade, or (2) engage in a combination in form of a trust or otherwise, or (3) engage in a conspiracy in restraint of such trade, or (4) monopolize, or (5) attempt to monopolize, or (6) combine, or (7) conspire, to monopolize such trade, shall be guilty of a misdemeanor punishable as stated; and an injured party may recover damages, and the combination can be enjoined at the suit of United States attorneys.

This applies not to the making or manufacture of goods (United States v. E. C. Knight Co., 156 U. S. 1), but allows an injunction against a combination of railway employes to obstruct railroad commerce. *In re* Debs, 158 U. S. 564. It also prevents the formation of pools and traffic combinations among railroads, the direct tendency of which is to limit competition, whether reasonable or unreasonable (United States v. Trans-Mo. Freight Assn., 1896, 166 U. S. 290; United States v. Joint Traffic Association, 1898, 171 U. S. 505; also such combinations as directly affect the sale of products that are to cross state lines, 1899, United States v. Addyston Pipe & S. Co., 175 U. S. 211, *infra*, p. 1535; 1899, Lowry v. Tile M. & G. Assn., 98 Fed. Rep. 817; 1902, Bement v. National Harrow Co., — U. S. —, Adv. June 16, 1902, p. 747.

As to constitutionality of the anti-trust acts: That they are constitutional, see, 1900, State v. Schlitz Brewing Co., 104 Tenn. 715, 78 Am. St. Rep. 941; 1901, *In re* Davis, 168 N. Y. 89, 61 N. E. 118.

That they are unconstitutional, see, 1901, Niagara Fire Ins. Co. v. Cornell (C. C. Neb.), 110 Fed. 816; 1902, Connolly v. Union Sewer Pipe Co., — U. S. —, 22 Sup. Ct. Rep. 431; 1902, Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553; 1902, State v. Shippers Compress Co., — Tex. Civ. App. —, 67 S. W. 1049; 1902, State v. Waters-Pierce Oil Co., — Tex. Civ. App. —, 67 S. W. 1057.

5. *Bibliography:* See "The Bibliography of Commercial Trusts, Law Literature of Trust Combinations, Monopolies, etc.," by Wm. H. Winters, 7 Ry. & Corp. L. J. 236 (1890); 2 Beach on Private Corporations, § 856, note 1; note, 23 Abb. N. C. 317. See also, especially, Cook Corporations, §§ 503*a*–503*d*; Elliott Corporations, §§ 172–179.

Sec. 279. (*c*) Unincorporated trusts.

See People v. N. R. Sugar Ref. Co., 121 N. Y. 582, 18 Am. St. R. 843, *supra*, p. 100.

Note.—See note to preceding case, and also note, *supra*, pp. 109, 963, 966.

Sec. 280. (*d*) Incorporated trusts.

DISTILLING AND CATTLE FEEDING COMPANY v. PEOPLE.[1]

1895. IN THE SUPREME COURT OF ILLINOIS. 156 Ill. Rep. 448–492, 47 Am. St. R. 200.

[*Quo warranto* against the distilling company. Defendant filed a number of pleas, to all of which demurrers were sustained, and the defendant electing to abide by its pleas judgment of ouster was rendered against it, from which this appeal is taken. The people alleged that in 1887, five corporations of Illinois, one of Missouri, one of Ohio, with a partnership and an individual of that state, all engaged in distilling, executed an agreement "to form a trust to be known as the Distillers' and Cattle Feeders' Trust, for the purpose of securing intelligent co-operation in the business of distilling spirits, etc.," by creating nine trustees (named for the first year, to be elected annually, by the certificate holders), who were required to prepare trust certificates of $100 each, to be issued to shareholders in the various corporations in lieu of all their shares of stock which (except enough to qualify a minority of the directors in each company) was to be assigned absolutely to the trustees (but without power of sale), thereby enabling them to exercise supervision over the various corporations entering into the trust, with power to elect themselves directors of such companies if found desirable; also with power to purchase stock in other distilling companies and issue trust certificates therefor; to receive and distribute all dividends declared, in proportion to trust certificates held; that each corporation conveyed its real estate to some person to be held in trust for its shareholders, which trustee leased the property back to the corporation for twenty-five years, the period for which the trust was to exist; that within a year after this agreement was entered into, eighty-one distilleries (including twenty-two in Illinois), had been drawn into the trust, and the trustees held, owned and controlled the capital stock, business and franchises of all of such corporations; that in 1890 it was determined to change the organization from a trust to a corporation, and the trustees were directed to incorporate the Distilling and Cattle Feeding Company in Illinois, with $35,000,000 capital stock, the shares to be of $100 each, and to be exchanged share for share for trust certificates, and the latter canceled; that the trustees were also directed to transfer all their rights as trustees to the new corporation, and also cause the various separate companies (of each of which the trustees formed a majority of the directors) to convey all their property of every kind to the new corporation; that all of this was done by organizing the company under the Illinois law, "to carry on a general business of distilling, redistilling and rectifying high wines, alcohol, spirits, gins and whiskies of every kind and description, and deal in the same in the state of Illinois and elsewhere, and owning

[1] Statement of facts much abridged; only part of opinion given.

the property necessary for that purpose;" also to deal in cattle, to malt and deal in malt, and "do any other business incident to the main purpose of this corporation," the principal office to be located at Peoria; that the nine trustees subscribed for all the stock, elected themselves directors and then caused the stock to be exchanged and conveyances to be made as directed and thereby continued to retain control of said corporations; that other distilleries had been acquired, many of them dismantled and discontinued so that in 1892 it owned and controlled over 95 per cent. of the distilling business of the United States, and by a system of rebates of 7 cents per gallon, payable at the end of six months to every purchaser who had in the meantime purchased of no other seller, and otherwise, had destroyed all competition in its products; and that all the foregoing had been done for the purpose, with the intent, and with the effect of raising prices, preventing competition and creating a monopoly in the production and sale of its products.

The pleas admitted substantially all the allegations relating to the formation of the trust and the corporation, the dismantling of distilleries and the allowance of rebates, except such as charged a scheme for the purpose or with the effect of preventing competition and creating a monopoly, all of which were denied in detail, as was also denied all allegations of the continued existence and control of the former corporations by the defendant. On the other hand the pleas alleged that the defendant used its franchises and powers by virtue of its charter alone, and that after its incorporation it purchased the various plants for a valuable consideration for the purpose of utilizing them in its authorized business; that each corporation had by the unanimous direction of its shareholders sold all of its property of every kind to the defendant, and had directed that all of its stock be canceled by its directors, and the charter be surrendered to the state, all of which was alleged to have been done; that at the time when the purchases were made the producing capacity of all plants was at least four times the demand, and forty-eight of the plants had long been idle, and portions of their machinery useless, but that such as could be was used in fitting up such distilleries as were necessary; and that the sole purpose of the defendant was to meet the demand of the public and secure only fair remuneration, and not to enhance prices, nor create a monopoly, nor prevent other parties from engaging in the business, and that in fact it never had produced more than 65 per cent. of the demand, and there were then eighteen distilleries capable of producing two-thirds of the entire demand, with which the defendant was then in active competition.]

MR. JUSTICE BAILEY [after holding the "trust" preceding the corporation had been illegal upon the authority of State v. Neb. Dist. Co., 29 Neb. 700; State v. Standard Oil Co., 49 Ohio St. 137; People v. N. R. S. R. Co., 54 Hun 354, 121 N. Y. 578, *supra*, p. 100; Richardson v. Buhl, 77 Mich. 632; People v. Chicago Gas Trust Co., 130 Ill. 268, *infra*, p. 1054] proceeds: * * *

But the defendant contends that, while this may all be so, the change

in organization from an unincorporated association to a corporation, and the change in the mode of holding the distillery properties of the various corporations formerly belonging to the trust, by surrendering the stock of the corporations, by means of which the control of those properties was formerly maintained, and having the properties themselves transferred and conveyed directly to the defendant corporation, have purged the combination of its illegality. It must be admitted that these changes, so far as they have any effect upon the rights or interests of the former stockholders in those corporations or of the public, are formal rather than substantial. The same interests are controlled in substantially the same way and by the same agencies as before. The nine trustees of the trust who, as the holders of all the capital stock of the corporations and as a majority of the directors of each, controlled such corporate property, became the subscribers for all the stock of the new corporation, and its board of directors. The conveyance and transfer of the properties of the constituent companies to the new corporation was merely a transfer by the trustees to themselves, though in a slightly different capacity, and the former stockholders in the constituent companies simply exchanged their trust certificates, share for share, for stock in the new corporation. That corporation thus succeeds to the trust, and its operations are to be carried on in the same way, for the same purposes and by the same agencies as before. The trust, then, being repugnant to public policy and illegal, it is impossible to see why the same is not true of the corporation which succeeds to it and takes its place. The control exercised over the distillery business of the country—over production and prices—and the virtual monopoly formerly held by the trust, are in no degree changed or relaxed, but the methods and purposes of the trust are perpetuated and carried out with the same persistence and vigor as before the organization of the corporation. There is no magic in a corporate organization which can purge the trust scheme of its illegality, and it remains as essentially opposed to the principles of sound public policy as when the trust was in existence. It was illegal before and is illegal still, and for the same reasons.

But it is urged that the defendant, by its charter, is authorized to purchase and own distillery property and that there is no limit placed upon the amount of property which it may thus acquire. By its certificate of organization it is authorized to engage in a general distillery business in Illinois and elsewhere, and to own the property necessary for that purpose. It should be remembered that grants of power in corporate charters are to be construed strictly, and that what is not clearly given is, by implication, denied. The defendant is authorized to own such property as is necessary for carrying on its distillery business, and no more. Its power to acquire and hold property is limited to that purpose, and it has no power, by its charter, to enter upon a scheme of getting into its hands and under its control all, or substantially all, the distillery plants and the distillery business of the country, for the purpose of controlling production and prices, of crushing out competition, and of establishing a virtual monopoly in that

business. Such purposes are foreign to the powers granted by the charter. Acquisitions of property to such extent and for such purpose do not come within the authority to own the property necessary for the purpose of carrying on a general distillery business. In acquiring distillery properties in the manner and for the purposes shown by the information, the defendant has not only misused and abused the powers granted by its charter, but has usurped and exercised powers not conferred by, but which are wholly foreign to, that instrument. It has thus rendered itself liable to prosecution by the state by *quo warranto*, and we are of the opinion that, upon the facts shown by the information, the judgment of ouster is clearly warranted. It will accordingly be affirmed.

Judgment affirmed.

Note. See next case, and note to People v. N. R. Sugar Ref. Co., *supra*, p. 109; also, note to section 278, *supra*; 1903, State v. Armour Packing Co., — Mo. —, 61 L. R. A. 464; 1904, Northern Securities Co. v. U. S., 193 U. S. 197.

Sec. 281. Same.

TRENTON POTTERIES COMPANY v. OLIPHANT ET AL.[1]

1899. IN THE NEW JERSEY COURT OF ERRORS AND APPEALS. 58 N. J. Eq. 507, 78 Am. St. R. 612, 43 Atl. Rep. 723–730, 46 L. R. A. 255.

[Bill by the Potteries Company, a New Jersey corporation, against the defendants, the owners of the Delaware Potteries, to enjoin them from engaging directly or indirectly in the business of manufacturing pottery within any state of the United States (except Arizona and Nevada) for fifty years. In 1890, there were nine pottery factories engaged in manufacturing of sanitary pottery in the United States,—seven in Trenton, N. J., one in Baltimore, Md., and one at Tiffin, O. The eight eastern potteries had formed the American Sanitary Potteries Association, for the purpose of securing uniform prices of their wares, to be fixed by the vote of a majority (each having one vote), and by which all were bound to sell. About this time a New York promoter "undertook" to organize them into a corporation to control the manufacture of sanitary pottery. He sought and obtained options from five of the Trenton potteries, including the defendant, whereby each of them agreed to sell all of its property and processes of every kind to the promoter or his assignee, and covenanted that it would not, for the period of fifty years, either directly or indirectly, engage in the pottery business, within any state of the United States (except Arizona and Nevada). These five options were those of the potteries manufacturing about seventy-five per cent. of the product, and by their vote they were able to control the fixing of prices by the association. After these options were obtained, they were assigned by the promoter to the Trenton Potteries Company, organized in New Jersey with a capital of $1,750,000 common, and $1,250,000, preferred

[1] Statement greatly abridged, and only that part of the opinion as to the validity of the corporate existence and ownership is given.

stock, "to manufacture, sell, and trade in pottery and earthenware, and other like products, and in all materials commonly or conveniently used, manufactured, bought and sold in connection therewith, or necessary, or convenient in and about the transaction of the said business." This company was formed after the options were secured, and in pursuance thereof the property of these potteries was conveyed to it, together with the covenants not to engage in business, and payment therefor was made partly in cash and partly in stock in the new company. After coming into possession of the five potteries, this new company continued to operate them as separate concerns, and kept its right to five votes in the American Sanitary Potteries Association, thereby controlling it for several years, although at the time this suit was brought, the association had broken up.

The defendants herein—the partnership owning the Delaware potteries—afterward organized a corporation to be located in New Jersey, and to engage in the manufacture and sale of sanitary pottery, in active competition with the complainants. The defense made was that the contract "not to engage in business was in unlawful restraint of trade, that the complainant company was formed for the purpose of obtaining a monopoly of the manufacture and sale of sanitary ware, a necessity of life, and that the contracts not to engage in business were in aid of this unlawful purpose, and therefore void." Vice-Chancellor Grey so held, and dismissed the bill (39 Atl. Rep. 923). From this decision an appeal was taken.]

MAGIE, C. J., * * * [after holding that, though a contract in general restraint of trade was void, the words "within any state of the United States except Arizona and Nevada," were a short way of enumerating the states, and the contract was valid in those states where reasonably necessary to protect the purchaser, though it might be void elsewhere; that the Sanitary Potteries Association, with its power of fixing prices was unlawful as against public policy] proceeds: * * *

It is further urged that the simultaneous contracts procured by appellant create or tend to create a monopoly, because they stipulate for the removal of many competitors in the business of manufacturing sanitary pottery ware. The owners of five of the eight potteries in Trenton manufacturing that kind of ware (and there were but few, if more than one, elsewhere) thereby agreed not to engage in that business for a long period of time, and over a great extent of country. The engagement of respondents in that respect has been found not to be an improper restraint of trade, nor inimical to public policy on that ground, but a contract partially enforceable upon respondents, if not otherwise objectionable. The engagements of the other vendors who sold their properties and business to appellant are similar in terms to that entered into by respondents, and furnish a reasonable protection to appellant of the business and good will purchased by it of each of them. Each sale and each incidental contract against competition are, for reason before given, unobjectionable. Are they rendered objectionable by the fact that, being simultaneously made,

they excluded from engaging in the business of manufacturing sanitary pottery ware so large a proportion of those previously engaged in that manufacture? It is to be observed that the contracts of respondents and the other vendors, to appellant, restricted them from engaging in the business of manufacturing, not sanitary pottery ware alone, but all pottery ware. The proofs show that a large number of persons are engaged in manufacturing pottery ware in various parts of the country, and that the contracts in question would exclude from competition a very small proportion of them. But as the proofs also show that the main purpose of appellant was to engage in the manufacture of sanitary pottery ware, I have stated the proposition in a more restricted form. Whether sanitary pottery ware has become a necessity of life, is open to question. It is certain that many persons manage to exist without using it. But if its use is of importance to health and comfort, and a considerable and increasing number of persons desire to acquire and use it, the public may have such an interest in its manufacture and sale that public policy will justify judicial interference and refusal to enforce illegal combinations to enhance its price. The elimination of competition may produce that result. The contracts in question were not intended to withdraw, and do not appear to have withdrawn, from work a single workman in that industry. They restrain a comparatively small number of capitalists, who had previously employed their capital in such manufacture, from continuing so to do. The entire capital of the country except theirs is free to be employed in the manufacture.

There seems no ground for the claim that we should refuse to enforce respondents' contracts by injunction, when the proofs furnish no reason for the belief that the public will suffer if they are held to their bargains. The contemporaneous contracts were all made as incidental to the sale and purchase of competing concerns engaged in the manufacture of sanitary pottery ware. They were, as we have seen, reasonably appropriate to the protection of the purchaser in each case. While contracts to restrain or limit competition in the production of that ware may be repugnant to the public interest, such a restraint or limit may result from contracts which the courts are bound to enforce. A person engaged in any manufacture or trade, having the right to acquire and possess property, and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition, at least for a time. But in the absence of legislative restrictions, if such could be imposed, upon the acquisition of such property, and its use when so acquired, courts could impose no limitation. They would be obliged to enforce such contracts, notwithstanding the effect was to diminish, or even to exclude, competition. But appellant is a corporation, and not an individual. Corporations, however, may lawfully do any acts within the corporate powers

conferred on them by legislative grant. Under our liberal corporation laws, corporate authority may be acquired by aggregation of individuals, organized as prescribed, to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold, and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The legislature might have withheld such powers, or imposed limitations upon their use. In the absence of prohibition or limitations on their powers in this respect, it is impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy. The grant of the legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in that regard. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish or for a time, at least, destroy competition. Contracts for such purchases can not be refused enforcement. Since contracts by individuals, and by corporations having legislative authority, for the purchase of competing plants and business, may be made, and are enforcible, although, as a result thereof, competition is diminished or temporarily destroyed, it further follows that contracts reasonably required to make such purchases effective by protecting the purchaser in the use and enjoyment of the thing purchased can not be declared by the courts to be repugnant to public policy. The interference with competition resulting from such purchases under legislative permission being found not to invalidate contracts for such purchases, the like interference by contracts reasonably required for the protection of the purchaser can not be held to invalidate them.

Decree modified. Lippincott and Hendrickson, JJ., dissent.

Note. See, preceding case, and cases cited in note to People v. N. R. Sugar Ref. Co., *supra*, p. 109.

Sec. 282. (7) Consolidation.

(*a*) Power to consolidate.

CLEARWATER v. MEREDITH ET AL.[1]

1863. IN THE UNITED STATES SUPREME COURT. 1 Wallace's (68 U. S.) Rep. 25–43.

[Clearwater, in 1853, sold a tract of land to Meredith and others for $10,000, taking in pay therefor 200 shares in the S. L. R. Co., which Meredith and his associates guaranteed would be worth $50 per share (*i. e.*, the par value), in Cincinnati, O., on Oct. 1, 1855. In 1854, the S. L. R. Co., by authority of law, and with the consent

[1] Statement of facts abridged. Arguments and part of opinion omitted.

of its stockholders and directors, was consolidated with another railroad company. Oct. 1, 1855, having arrived and passed, and Clearwater considering his stock was not worth $50 per share, sued on the guaranty. The defendants pleaded that the consolidation of the companies necessarily destroyed and rendered worthless the stock, that plaintiff consented to this and so could not now complain. Judgment below for defendants.]

MR. JUSTICE DAVIS. * * * If Clearwater was a consenting party to a proceeding which, of itself, put it out of the power of the defendants to perform their contract, he can not recover, for "promisors will be discharged from all liability when the non-performance of their obligation is caused by the act or the fault of the other contracting party."

The Cincinnati, Cambridge and Chicago Short Line Railway Company, whose stock was guaranteed, was, as stated in the pleadings, organized under a general act of the state of Indiana, providing for the incorporation of railroad companies. This act was passed May 11, 1852, and contained no provision permitting railroad corporations to consolidate their stock. It can readily be seen that the interests of the public, as well as the perfection of the railway system, called for the exercise of a power by which different lines of road could be united. Accordingly on the 23d of February, 1853, the general assembly of Indiana passed an act allowing any railway company that had been organized to intersect and unite their road with any other road constructed or in progress of construction, and to merge and consolidate their stock, and on the 4th of March, 1853, the privileges of the act were extended to railroad companies that should afterwards be organized.

The power of the legislature to confer such authority can not be questioned, and without the authority railroad corporations organized separately could not merge and consolidate their interests. But in conferring the authority, the legislature never intended to compel a dissenting stockholder to transfer his interest because a majority of the stockholders consented to the consolidation. Even if the legislature had manifested an obvious purpose to do so, the act would have been illegal, for it would have impaired the obligation of a contract. There was no reservation of power in the act under which the Cincinnati, Cambridge and Chicago Short Line Railway was organized, which gave authority to make material changes in the purposes for which the corporation was created, and without such a reservation in no event could a dissenting stockholder be bound.

When any person takes stock in a railroad corporation, he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in its purposes and character, at the will and pleasure of a majority of the stockholders, so that new responsibilities, and it may be new hazards, are added to the original under-

taking. He may be very willing to embark in one enterprise, and unwilling to engage in another; to assist in building a short line railway, and averse to risking his money in one having a longer line of transit.

But it is not every unimportant change which would work a dissolution of the contract. It must be such a change that a new and different business is superadded to the original undertaking. The act of the legislature of Indiana allowing railroad corporations to merge and consolidate their stock, was an enabling act—was permissive, not mandatory. It simply gave the consent of the legislature to whatever could lawfully be done and which without that consent could not be done at all. By virtue of this act the consolidations in the plea stated were made. Clearwater, before the consolidation, was a stockholder in one corporation created for a given purpose. After it he was a stockholder in another and different corporation, with other privileges, powers, franchises and stockholders. *The effect of the consolidation "was a dissolution of the three corporations, and at the same instant the creation of a new corporation with property, liabilities and stockholders, derived from those passing out of existence."* McMahon v. Morrison.[1] And the act of consolidation was not void because the state assented to it, but a non-consenting stockholder was discharged. Clearwater could have prevented this consolidation had he chosen to do so; instead of that he gave his assent to it, and merged his own stock in the new adventure. If a majority of the stockholders of the corporation of which he was a member had undertaken to transfer his interest against his wish, they would have been enjoined. There was no power to force him to join the new corporation, and to receive stock in it on the surrender of his stock in the old company. By his own act he has destroyed the stock to which the guaranty attached, and made it impossible for the defendants to perform their agreement. After the act of consolidation the stock could not have any separate, distinct market value. There was, in fact, no longer any stock of the Cincinnati, Cambridge and Chicago Short Line Railway.

Meredith and his co-defendants undertook that the stock should be at par in Cincinnati, if it maintained the same separate and independent existence that it had when they gave their guaranty. Their undertaking did not extend to another stock, created afterwards, with which they had no concern and which might be better or worse than the one guaranteed. It is not material whether the new stock was worth more or less than the old. It is sufficient that it is another stock, and represented other interests. * * *

Affirmed.

[1] 16 Ind. 172.

Sec. 283. Same.

IN THE MATTER OF THE PROSPECT PARK & C. I. RAILROAD CO.[1]

1876. In the Court of Appeals of NewYork. 67 N. Y. Rep. 371–379.

[Appeal from order of lower court appointing commissioners to appraise land taken by the railroad company under the railroad act. Objection was made to the application upon the ground, *inter alia*, that the company had been formed by the consolidation of two companies, one of which had the power "to consolidate with any other company and form a new company," but the company consolidated with had no charter authority to so consolidate.]

Folger, J. * * * The act of 1874 (Laws of 1874, chap. 448, pp. 591–592, § 3) gave power to one of the corporations, which now together form the corporation which is the petitioner in this case, to consolidate with any other like corporation. The point of the appellants, that no power to consolidate is given to the other of those corporations, is without effect. Power is given to one corporation by statute to form a consolidation with *any other*. It can not form a consolidation unless it finds another with which to unite and which is capable of union with it; hence, whatever other company it selects for a union, and finds willing to join it, that other company, though not named in the statute, gets power from the statute to unite with that company which the statute names.

Affirmed.

Note. See next case.

Sec. 284. Same.

GAINES, C. J., in MORRILL v. SMITH COUNTY.

1896. In the Supreme Court of Texas. 89 Texas 529, on 552.

It has been held that the power given to one railroad company to consolidate with any other like company, without naming any, authorizes any other company to consolidate with it. (Matter of P. P. & C. I. R. Co., 67 N. Y. 371.) But a contrary rule is recognized in this state. Railway v. Rushing, 69 Texas 306. See, also, Railway v. Morris, 67 Texas 692. It does not follow that because the charter of a railway company empowers it in general language "to consolidate with any other railroad company," these words should be construed as conferring the power upon any other company to consolidate with it. They reasonably admit of the construction that the company named is empowered only to unite with any other company which has a like power, and it would seem that, under the general rule previously announced, the construction least favorable to the corpora-

[1] Statement abridged, and only the part of the opinion relating to the single point given.

tion should control; at all events, when we attempt to adopt the construction insisted upon on behalf of Smith county, in respect to the grant in the charter of the Houston Tap and Brazoria Railroad Company, we encounter a grave constitutional difficulty. The contention is that the special charter of the company not only confers power upon the company to consolidate with any other railroad company, but also upon any other such company to consolidate with it. The title of the act is clearly sufficient to embrace the grant of any powers to the company incorporated which were appropriate to its purpose. But is there anything in the title that indicated that it was one of the objects of the act to confer power upon all the railroads of the state to consolidate with that company? That involved a distinct grant and enlargement of power to every other railroad company in the state, and it seems to us that, if such was the intent of the legislature, it comes within the scope of the very evil which was intended to be suppressed by that section of the constitution which required that the object of every act be expressed in its title. Giddings v. San Antonio, 47 Texas 548; Peck v. San Antonio, 51 Texas 490.

Note. See preceding case.

Sec. 285. (*b*) Interstate consolidation.

QUINCY RAILROAD BRIDGE COMPANY v. ADAMS COUNTY.[1]

1878. In the Supreme Court of Illinois. 88 Ill. Rep. 615–622.

[Action by the county to collect a tax upon the capital stock of the bridge company. The first section of the tax law provided for a tax upon "the capital stock of the companies and associations incorporated under the laws of this state." In 1865, the Railroad Bridge Company was incorporated in Illinois,—and about this time the Quincy Bridge Company was incorporated in Missouri,—the purpose of both companies being to build a bridge across the Mississippi river at Quincy; in order to do this successfully it became necessary to consolidate, and this was done by agreement duly filed in the office of the secretary of state in each state, and the consolidation was legalized by the respective legislatures, under the name of the Quincy Railroad Bridge Company. The corporation claimed it was not "a company incorporated under the laws of Illinois." A demurrer to this claim was sustained, and judgment rendered for the county. The company appealed.]

Breese, J. * * * But it is said by appellants, this corporation, although it derived some of its powers and in part its corporate existence from this state, derived an equal part from the sovereign

[1] Statement abridged, and only part of opinion given.

state of Missouri, and therefore they are not a corporation created under the laws of either state. To this it is answered, and we think satisfactorily, that the legislatures of this state and of Missouri can not act jointly, nor can any legislation of the last named state have the least effect in creating a corporation in this state. Hence, the corporate existence of appellants, considered as a corporation of this state, must spring from the legislation of this state, which, by its own vigor, performs the act. The states of Illinois and Missouri have no power to unite in passing any legislative act. It is impossible, in the very nature of their organizations, that they can do so. They can not so fuse themselves into a single sovereignty, and as such create a body politic which shall be a corporation of the two states, without being a corporation of each state or of either state. As argued by appellee, the only possible status of a company acting under charters from two states is, that it is an association incorporated in and by each of the states, and when acting as a corporation in either of the states it acts under the authority of the charter of the state in which it is then acting, and that only, the legislation of the other state having no operation beyond its territorial limits. We do not, and can not, understand that appellants derive any of its corporate powers from the legislature of the state of Missouri, but wholly and entirely derived from the general assembly of this state. Consequently they are embraced in the first section of the revenue act, above cited. * * *

Affirmed.

Note: Compare, 1892, People v. N. Y. C. & S. L. R. Co., 129 N. Y. 474; 1898, State v. Lesueur, 145 Mo. 322; 1892, Ashley v. Ryan, 49 Ohio St. 504; and cases in note at end of section 288, 4*a* and 5*a*.

Sec. 286. (*c*) Consolidation or merger.

KEOKUK AND WESTERN RAILROAD COMPANY v. MISSOURI.[1]

1894. In the Supreme Court of the United States. 152 United States Rep. 301–317.

[Action in Missouri state court for collection of taxes. Defendant, a consolidated company, relied on a charter exemption from taxation, appearing in the charter of one of the original Missouri companies out of which the consolidated company had been formed. Before the consolidation, the new Missouri constitution had expressly provided that such property should not be exempt. The tax was levied after the consolidation, and the state court gave judgment for the tax. This was affirmed by the supreme court of the state, and the defendant sued out this writ of error.]

Mr. Justice Brown. * * * The question in this case is whether the defendant, the Keokuk and Western Railroad Company, was entitled to the exemption of its property from taxation contained

[1] Statement abridged and part of opinion omitted.

in the original charter to the Alexandria and Bloomfield Railroad Company, of which road it is the successor in interest.

(1) It will be observed that the constitutional provision upon which the state relies for the enforcement of this tax for the year 1886 was adopted in 1865, before the consolidation of the Alexandria and Bloomfield Company, under its changed name of the Alexandria and Nebraska City Railroad Company, with the Iowa Southern Company, which took place in 1870, and before the completion of the road in 1872. That the exemption from taxation contained in the original charter to the Alexandria and Bloomfield Company would have continued the full twenty years from the completion of the road in 1872, had such consolidation not taken place, is, for the purpose of this case, conceded. Indeed, it was so held by the supreme court of the state, in State v. Macon County, 41 Mo. 453. The court, construing sections 3 and 14 of article 11 of the constitution, held the provisions of section 14 to be a limitation upon the future power of the general assembly, and not intended to retroact so as to have any controlling application to laws in existence when the constitution was adopted. See also, State v. Cape Girardeau Railway, 48 Mo. 468; State v. Coffee, 59 Mo. 59; Atlantic, etc., Railroad v. St. Louis, 66 Mo. 228.

The question then arises whether the Alexandria and Bloomfield Railroad Company, whose charter contained the exemption, is still in existence, or was dissolved by the consolidation, and a new corporation was thereby called into being, which held its property subject to the constitutional provisions of 1865, denying the power of the general assembly to exempt property from taxation. In the numerous cases which have arisen in this court as to the effect of a consolidation upon the existence and status of the constituent corporations, it has been held that the question of the dissolution of such corporations depended upon the language of the statute under which the consolidation took place—the presumption in each case being that each of the two lines of road will be held respectively to the privileges and burdens originally attaching thereto. Tomlinson v. Branch, 15 Wall. 460. If, upon the one hand, the identity of the prior corporations is preserved, an exemption from taxation which one of them possessed, falls to that portion of the new corporation to which, under its former name, it had been attached. If, upon the other hand, the consolidation worked a dissolution of the prior corporations, their former privileges and franchises also ceased to exist. Thus, in the earliest of these cases, Philadelphia, etc., R. Co. v. Maryland, 10 How. 376, it was held that the Baltimore and Port Deposit Railroad Company, whose charter contained no exemption from taxation, did not acquire such exemption by consolidation with the Delaware and Maryland Railroad Company, whose charter exempted the road from taxation, "except upon that portion of the permanent and fixed works which might be in the state of Maryland." A general rule was laid down in this case to which this court has steadily adhered, that the taxing power of the state should never be presumed to be relinquished, unless the intention to do so be declared in clear and unambiguous terms

This case was subsequently reaffirmed in the Delaware Railroad Tax, 18 Wall. 206.

In Tomlinson v. Branch, 15 Wall. 460, it was held that when a railroad company to which, by its charter, an exemption from taxation was granted, for a limited period, was by act of the legislature "merged" in another company, which thereby became invested with all its rights, property and privileges, the exemption applied to the property with its limitation of time, and, although the company in which it was merged had been granted a perpetual exemption from taxation in its charter, this perpetual exemption would not be extended to property so acquired, without express words, or necessary intendment to that effect. In Central Railroad v. Georgia, 92 U. S. 665, the act of the legislature authorized the Central Railroad and the Macon Railroad "to unite and consolidate" their "stocks" and all their "rights, privileges, immunities, property and franchises" under the name and charter of the Central Railroad in such manner that each owner of shares of stock of the Macon road should be entitled to receive an equal number of shares of the consolidated companies. It was held this consolidation was not a surrender of the existing charters of the two companies, and did not work the extinction of the Central Company nor the creation of a new company, and also that the consolidated company continued to possess all the rights and immunities which were conferred upon each company by its original charter. The Central Company having been exempted from taxation beyond a limited amount by its original charter, it was held not to be within the power of the legislature to impose an increased tax after the consolidation was effected; but as the Macon Company had no provision in its charter limiting its liability to taxation, the power of the legislature remained unimpaired to tax its franchises, property and income after its consolidation with the Central. It was said in the opinion of the court that "if in the statute there be no words of grant of corporate powers, it is difficult to see how a new corporation is created. If it is, it must be by implication; and it is an unbending rule that a grant of corporate existence is never implied." It was held that the act did not work the dissolution of the existing corporations, and at the same time the creation of a new company, the court giving among other reasons that there was no provision for the surrender of the certificates of stock of the shareholders of the Central, and none for the issue of other certificates to them. It will be observed in this case that the road whose charter contained the exemption from taxation was preserved intact by the consolidation; and it was held that its exemption continued, while the other road was undoubtedly intended to go out of existence; and as the Macon road held its property and franchise subject to taxation, the Central, succeeding to the franchises and property, held them alike subject. Other cases to the same effect, and holding that the act of consolidation did not operate as a dissolution of the constituent companies are, Chesapeake and Ohio Railroad v. Virginia, 94 U. S. 718; Green County v. Conness, 109 U. S. 104; and Tennessee v. Whitworth, 117 U. S. 139.

Upon the other hand, we have held that the consolidation acts of Ohio and Maine worked a dissolution of the constituent companies and the incorporation of a new company, and that such company was subject to intermediate acts declaring the charters of corporations subject to be altered, amended, or repealed by the legislature. Shields v. Ohio, 95 U. S. 319; Railroad Company v. Maine, 96 U. S. 499. A leading case is that of a Railroad Company v. Georgia, 98 U. S. 359, 362, wherein two railroad companies, each of which enjoyed by its charter a limited exemption from taxation, were consolidated by an act of the legislature passed April 18, 1863, which authorized a consolidation of their stocks, conferred upon the consolidated companies full corporate powers, and continued to it the franchises, privileges, and immunities which the companies had held by their original charters. It was held that by the consolidation the original companies were dissolved and a new corporation created, which became subject to the provisions of a statutory code, adopted January 1, 1863, permitting the charters of private corporations to be changed, modified, or destroyed at the will of the legislature. It was further held that a subsequent legislative act taxing the property of such new corporation as other property in the state was taxed was not a law impairing the obligation of a contract. It was said that the consolidation provided for was not a merger of one company into another, and the case of Railroad Company v. Georgia, 92 U. S. 665, was distinguished from it in this particular.

"Nor was it," says Mr. Justice Strong, "a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence as well as its corporate name. But the act authorized the consolidation of the stocks of the two companies, thus making one capital in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company." In St. Louis, Iron Mountain, etc., Railway v. Berry, 113 U. S. 465, a like effect was given to the consolidation of two roads by an agreement which provided that all the property of each company should be taken and deemed to be transferred to the consolidated company "as such new corporation without further act or deed." It was held that this created a new corporation, with an existence dating from the time the consolidation took effect, and that it was subject to constitutional provisions with reference to taxation in force at that time. See, also, McMahan v. Morrison, 16 Ind. 172.

Looking at the act in question in this case, we find that, by section 1, any Missouri railroad company whose tracks should connect with the road of an adjoining state was authorized to make and enter into an agreement with such connecting company for the consolidation of the stock of the respective companies whose tracks should be so connected, making one company of the two, whose stock should be so consolidated upon such terms, conditions, and stipulations as might be mutually agreed between them; that, by section 2, "such consolidation shall not be made, unless the terms and provisions thereof shall be approved by a majority of the stock, or the holders of a majority

of the capital stock in each of said companies whose stock shall be consolidated;" that, by section 3, the board of directors were authorized to adopt by resolution a new corporate name for the consolidated company, and call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company; and providing that a copy of the consolidation agreement, and the name adopted for the new company, "shall be filed with the secretary of state, and shall be conclusive evidence of such consolidation, and of the corporate name of the consolidated company." It is difficult to see how the legislature could provide more clearly for the extinguishment of the prior companies, and the formation of a new one, than by providing that the two companies shall become one; that new certificates of stock shall be issued in exchange for the stock of the constituent companies; and that the consolidation agreement shall be recorded with the secretary of state as the charter of a new company. In our opinion this was the effect of the act in question.

It is impossible to conceive of a corporation existing without stock, or certificates representing the interests of the corporators in the organization. Now if the act provides that these certificates shall be surrendered, and certificates in another company issued in their place, what becomes of the prior companies? Who are their stockholders, who their officers? If the stock in the new company is sold, what interest in the prior companies passes by the sale? There can be but one answer to these questions. The property and franchises of the prior companies are gone as much as if they had formally surrendered their charters. The new company may doubtless receive by transmission from its constituent companies their property, rights, privileges and franchises, including any immunity from taxation, but it receives them as an heir receives the estate of his ancestor, or as a grantee receives the estate of his grantor, by inheritance, succession, or purchase. The result is not a mere union or partnership of two companies, nor the merger of the franchises of one in another, but the extinguishment of one and the creation of another in its place. Speaking of a similar act of Ohio, which declared that the consolidated companies "shall be deemed and taken to be one corporation, possessing within the state all the rights, privileges and franchises, and subject to all the restrictions, liabilities and duties of such corporations of this state so consolidated," Mr. Justice Swayne observed in Shields v. Ohio, 95 U. S. 319, 322,323: "It (the consolidation) could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. All—the old and the new—could not co-exist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution. This being done, *eo instanti* the new corporation came into existence."

It follows from this that when the new corporation came into existence, it came precisely as if it had been organized under a charter granted at the date of the consolidation, and subject to the constitu-

tional provisions then existing, which required (art. 11, § 16) that no property, real or personal, should be exempted from taxation, except such as was used exclusively for public purposes; in other words, that the exemption from taxation contained in section 9 of the original charter of the Alexandria and Bloomfield Railway Company did not pass to the Missouri, Iowa and Nebraska Company. As was said of an Arkansas corporation, in St. Louis, Iron Mountain, etc., Railway v. Berry, 113 U. S. 465, 475, "it came into existence as a corporation of the state of Arkansas, in pursuance of its constitution and laws, and subject in all respects to their restrictions and limitations. Among these was that one which declared that 'the property of corporations now existing, or hereafter created, shall be forever subject to taxation the same as property of individuals.' This rendered it impossible in law for the consolidated corporation to receive by transfer from the Cairo and Fulton Railroad Company, or otherwise, the exemption sought to be enforced in this suit." See also, Memphis and Little Rock Railroad v. Commissioners, 112 U. S. 609; Shields v. Ohio, 95 U. S. 319; Louisville and Nashville Railroad v. Palmes, 109 U. S. 244.

Nor was the exemption saved by section 3 of article 11, providing that "all statute laws of this state now in force, not inconsistent with this constitution, shall continue in force until they shall expire by their own limitation, or be amended or repealed by the general assembly." This referred to statutes in force at the time the constitution was adopted, the operation of which continued, notwithstanding the constitution. In this case, however, the exemption contained in section 9 of the charter of the Alexandria and Bloomfield Railway Company ceased to exist, not by the operation of the constitution, but by the dissolution of the corporation to which it was attached.

It is further insisted, however, that under section 4 of the act of March 2, 1869, there was a further provision that the consolidated company should be "subject to all the liabilities, and bound by all the obligations of the company within this state," and "be entitled to the same franchises and privileges under the laws of this state as if the consolidation had not taken place." Whether, under the name "franchises and privileges," an immunity from taxation would pass to the new company may admit of some doubt, in view of the decisions of this court, which, upon this point, are not easy to be reconciled. In the Chesapeake and Ohio Railway v. Miller, 114 U. S. 176, it was held that an immunity from taxation enjoyed by the Covington and Ohio Railway Company did not pass to a purchaser of such road under foreclosure of a mortgage, although the act provided that "said purchaser shall forthwith be a corporation," and "shall succeed to all such franchises, rights and privileges * * * as would have been had * * * by the first company but for such sale and conveyance." It was held, following in this particular, Morgan v. Louisiana, 93 U. S. 217, that the words "franchises, rights and privileges" did not necessarily embrace a grant of an ex-

emption or immunity. See also Picard v. Tennessee, etc., Railroad, 130 U. S. 637.

Upon the other hand, it was held in Tennessee v. Whitworth, 117 U. S. 139, that the right to have shares in its capital stock exempted from taxation within the state is conferred upon a railroad corporation by state statutes granting to it "all the rights, powers and privileges" conferred upon another corporation named, if the latter corporation possesses by law such right of exemption, citing in support of this principle a number of prior cases. See also Wilmington and Weldon Railroad v. Alsbrook, 146 U. S. 279, 297.

But the decisive answer to this objection is that the legislature had no power, in 1869, to extend to a new corporation created by the consolidation an exemption contained in an act passed in 1857, before the constitution was adopted, and hence that, under the terms of this act, we can not hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of 1869. * * *

Affirmed. Harlan and Brewer, JJ., dissent.

Note. See note at end of section 288, *infra*, Nos. 1, 4 and 5; 1901, Vicksburg, etc., Tel. Co. v. Citizens' Tel. Co., 79 Miss. 341, 89 Am. St. R. 656, 30 So. 725.

Sec. 287. (*d*) Effect of consolidation upon creditor's rights.

COMPTON v. RAILWAY COMPANY.[1]

1888. In the Supreme Court of Ohio. 45 Ohio State Reports 592–625.

[In 1862 the Toledo and Wabash Railway Company, formed by the consolidation of a road in this state with one in the state of Indiana, issued $600,000 of what were termed convertible equipment bonds, payable in 1883, and bearing interest at the rate of seven per cent., payable annually. It operated its road until 1865, when it was consolidated with certain roads in the state of Illinois, the new company being called the Toledo, Wabash and Western Railway Company. It was stipulated in the agreement forming the basis of the consolidation that these equipment bonds should be "protected" by the new company at their maturity. In 1873 the last-named company, continuing to own and operate its road, issued certain bonds amounting to $5,000,000, and secured the same by a mortgage upon all its

[1] Statement of facts abridged, arguments and part of opinion omitted.

property. Under proceedings begun in 1875 for the foreclosure of this mortgage in the courts of Ohio, Indiana and Illinois, the road was sold in 1877 to one Ellis and two others associated with him, it being specially provided in the decree rendered in the court of this state, the common pleas of Lucas county, that the sale should be made "without prejudice to any claim which may be made by the holders" of the above-named equipment bonds. The owner of the road at the commencement of this suit, The Wabash, St. Louis and Pacific Railway Company, derives its title from Ellis and his associates.

The case, after judgment for plaintiff in the common pleas court, was appealed by the defendants to the district court, where it was reserved for decision to the supreme court upon an agreed statement of facts.]

MINSHALL, J. The principal grounds upon which the plaintiff asserts his right to relief are (1) the provisions of the statute under which the proceedings in consolidation were had; (2) the stipulation in the agreement forming the basis of the consolidation; and (3) the mortgage executed by the new company in 1867, known as the consolidated mortgage.

(1) The bonds owned by the plaintiff, amounting at their face value to $150,000, were issued by the Toledo and Wabash Railway Company in 1862, were unsecured by mortgage on the property of the company, and the entire series, of which they were part, were denominated convertible equipment bonds, and amounted to $600,000, payable in 1883, bearing interest at the rate of 7 per cent., payable semi-annually, with the usual coupons attached. The company had been formed by the consolidation of the road of a company in Ohio with one of a company in Indiana, under the laws of these states, and its road extended from Toledo in the former, to State Line city in the latter, state. It operated its road until in 1865, when it was consolidated with certain other roads in the state of Illinois, the new company thus formed taking the name of the Toledo, Wabash and Western Railway Company.

The consolidation was had under the laws of the several states in which the constituent roads were located, the statute in this state applicable to the transaction being the act of April 10, 1856 (1 S. & C. 327). The act required that an agreement forming the basis of the consolidation should be presented to the stockholders of the respective companies at separate meetings called for that purpose upon due notice; and then provided that upon its adoption by a vote of two-thirds of the stockholders, the filing of the agreement with the requisite certificate of its adoption, by the secretary of each company, in the office of the secretary of state, and the election of directors by the stockholders of the new company, the consolidation should be deemed complete, and that all the rights, privileges and franchises and all the property of every description "of each of the corporations, parties to the same * * * shall be deemed to be transferred and vested in such new corporation without further act or deed," with this express

proviso, "that all rights of creditors, and all liens upon the property of either of said corporations, shall be preserved unimpaired, and the respective corporations may be deemed to be in existence to preserve the same; and all debts, liabilities and duties of either of said companies shall thenceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities and duties, had been contracted by it." Whilst the Indiana statute is not so definite in its provisions as to the rights of creditors of the constituent companies as our own, yet an effect has been given it by the construction of its courts that is substantially the same. McMahan v. Morrison, 16 Ind. 172; Indianapolis, C. & L. R. Co. v. Jones, 29 Ind. 465.

What, then, is the sum of the rights of creditors that, as against proceedings had under it, are to be preserved unimpaired? It is true that, ordinarily, a creditor has no right that will interfere with that of his debtor to sell and dispose of his property for a valuable consideration, unless he has taken the precaution to acquire some lien upon it, by mortgage or otherwise, as a security in his own behalf. As a rule the right of an unsecured creditor is confined to the personal obligation and the undisposed of property of his debtor; still it is not strictly accurate to say that such creditor has no claim upon the property of his debtor, for in one sense all the property owned by a debtor, unless exempt by statute from sale on execution, is subject to the claims of his creditors, and he can not dispose of it, unless for a valuable consideration, so as to defeat this right. It is upon this principle that relief is constantly afforded creditors in equity against conveyances in fraud of their rights. Hence the right of a creditor, though unsecured, to maintain an action for a personal judgment, is not the sum of his rights. These may arise from a variety of circumstances, conferring not merely a right to a personal judgment for money, but to have it satisfied from certain specific property formerly owned by the debtor, irrespective of its acquisition by others. The decease of the debtor, assignments made by him, his bankruptcy, loss of the power to own and acquire property, as, for example, the dissolution of a corporation, or the civil death of the debtor, are some of the most frequent instances in which this right of the creditor has been recognized.

But the question presented here is not general, but special: It is, what are the rights of unsecured creditors of an incorporated railway company whose entire road and property have been transferred to a new company, formed by its consolidation with other roads, under the laws of this state? The general doctrine that all the property of a corporation is a trust fund for its creditors, and that upon its dissolution they have the right to require that it be applied in payment of their claims, is not controverted by the defendants. There seems to be no conflict in the authorities as to this, and that the right gives rise to an equitable lien upon the property in favor of the creditor that is superior to the claims of every one but purchasers for value without notice. Story Eq. Juris., § 1252; 2 Kent Com., 307, and note *b;* Mor.

Priv. Cor., §§ 780, 1035; Mont. and West Point R. Co. v. Branch, 59 Ala. 153.

Nor can there be much question but that by consolidation the prior companies are extinguished for all purposes except to preserve the rights of their creditors, for which purpose they "may," in the language of the law, "be deemed to be in existence." The observation of Mr. Justice Swayne, in construing this statute in Shields v. Ohio, 95 U. S. 319, that "it was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution" is quite accurate.

It is, however, claimed by the defendants that no new rights are conferred by the statute upon creditors; that if they were unsecured before, they remain such after, the consolidation; and that the new company may deal with the property—may sell or mortgage it—as could have been done, and with like effect, by the former company had it continued the owner thereof. This argument is placed upon two grounds, (1) the assumption that the transaction is analogous to a sale, and (2) that such is the effect of the statute upon all contracts made subsequent to its passage. We will consider them *seriatim*.

1. The first is, as we think, certainly erroneous. Whilst the transaction has some of the features, it is wanting in the essential elements of a sale. A sale implies a vendor and a vendee, and by it the former sells and transfers a thing that he owns to the latter for a price paid or to be paid to himself. The vendor parts with nothing but his property, and for it receives a *quid pro quo*. Such is not the case where companies are consolidated under this statute. It is true that the owner of each constituent road parts with its property. But it does much more; it not only parts with its property, but ceases to be a juristical entity, capable of owning or acquiring property. It does not, and could not, receive any consideration for the transfer, because it is extinguished and dissolved by the act of its stockholders in assenting to the proposed agreement. It is futile to urge that the consideration is received by the stockholders. They are not the corporation, nor do they represent it in its relation to its creditors. "An essential incident of corporations is that their rights are not vested in the aggregate of individuals, but in the ideal whole, regarded as distinct from the members of which it is composed." Per Mr. Poste in his edition of Gaius, 154. And see Bank of Augusta v. Earle, 13 Pet. 519, 587. There has been no relaxation of this principle in its application to the relation of an incorporated company to its creditors. It is the owner in law and equity of all its corporate property, and it, and not the stockholders, is the debtor in all corporate obligations. Mor. Priv. Corp., 2 ed., § 227. Moreover, in a consolidation of companies, the stockholders receive no part of the property or assets of their respective companies; these pass to the ownership of the new company. All that the stockholders of either of the old companies receive is stock in the new company in exchange for what they held in the former company. We must look elsewhere for the analogies

to the transactions whereby, through consolidation, a new company acquires the property of certain old ones. We are not without such analogies. They are to be found in the numerous instances in ancient and modern law, where, to use the terminology of the Roman civil law, a *universitas juris* is transferred. The term expresses the legal conception of a university or bundle of rights and liabilities, belonging to one person and constituting, as it were, his legal personality; and where these are transferred by one and the same act to another, the latter is said to acquire *per universitatem*, that is, he becomes clothed with the rights and legal duties of the individual to whose personality he succeeds. Among some of the leading instances of such acquisition are—(1) a succession to an inheritance by an heir—somewhat obscured in the common law by its division between the heir and the personal representative of the deceased (Maine Anc. Law, 180); (2) where, by adrogation, one not under power became the son of another, and the adrogator by the diminution of the *status* of the *adrogatus*, or adopted son, acquired his property and, by prætorian law, became liable for his debts to the extent of the property so acquired; (3) co-emption, where the husband acquired, by the marriage, the property of the wife, and by a remedy furnished by the prætor, was made liable for her debts in the same manner as in the case of adrogation. And in the common law may be suggested, not merely the case of an inheritance transmitted by the death of the ancestor, but also the estate of one regarded as *civiliter mortus*, which was transmitted and administered upon as that of a person in fact deceased. And the succession of an assignee in bankruptcy to the entire property of a bankrupt is, as observed by Sir Henry Sumner Maine, a modified form of a universal succession. And, he says: "Were it common among us for persons to take assignments of *all* a man's property on condition of paying *all* his debts, such examples would exactly resemble the universal successions known to the oldest Roman law." Maine Anc. Law, 180.

In all these cases the point most to be observed, is the extreme care of the law to secure the rights of creditors. The case of an inheritance is familiar and needs little or no comment—the creditors of the deceased are regarded as having a lien upon the property of the deceased, and this is secured to them through the methods of administration, and so in the case of those regarded as being civilly dead, for example in the case of a monk, the individual, in anticipation of becoming a "monk professed," could make a will and appoint his own executor, but if he did not, administration was awarded by the ordinary as upon the estate of one in fact deceased. 1 Bl. Com., 132. For some reason, not well understood, neither the adrogator nor the husband in a marriage by co-emption was, by the ancient civil law, liable to creditors for the debts of the person thus reduced to his power. But a remedy was provided at an early period through an action given by the prætor, in which, by a fiction, the former *status* of the debtor was deemed to continue, and this, like all fictions introduced to favor the remedy, could not be disputed, and preserved the

rights of the creditor as against the property of his debtor. Poste's Gaius Inst., bk. 3, § 84; Poste's Gaius Inst., bk. 4, § 38, and comments by Poste, p. 521; Just. Inst., bk. 3, tit. 10, §§ 1–3; and Hunter Rom. Law (2d ed.), 741. And it is worthy of note in this connection that our statute regulating proceedings in consolidation, provides that, to preserve the rights of creditors, "the respective corporations may be deemed to be in existence." It thus appears to be a principle of universal law that the death, real or supposed, of an individual, possessed of property and owing debts, gives to his creditors a right to have his property applied to the satisfaction of their claims. It is a misapprehension of the doctrine to say that its application to the consolidation of railway companies would make every consolidation an assignment for the benefit of creditors. The new company does not take the property as assignee, but in its own right, subject only to the payment of the debts of the constituent companies. This liability is created by statute and the lien results as a consequence. It is not a *jus in re*, nor a *jus ad rem*, but a charge in the nature of an equitable lien upon the property available against all purchasers with notice. 3 Pom. Eq. Jur., § 1233, and note 3. The reason underlying the principle upon which the law proceeds in all this class of cases is, that the debtor does not merely part with his property and rights, but also loses his capacity to own and acquire property; and all that is left the creditor upon which he trusted his debtor—property constituting the principal ground of credit in all cases—is the property that his debtor owned, and to that he has the right to look for the satisfaction of his claim, the person whom he trusted having ceased to be. It is no answer to this to say that the new company is required to assume the payment of the debts of the old companies. I am aware that the convenience of trade and commerce has so changed the ancient doctrines of the common law that a debtor may be required in a variety of instances to accept as a creditor one with whom he did not in fact contract; but I know of no instance in which it can be said that a creditor can be compelled to accept a new debtor in the place of the one to whom he extended credit. It is impossible to perceive how this could be done without impairing the obligation of the contract. The company with which he dealt may have possessed ample means to discharge all its debts; the new one may, by reason of the debts of the other companies, be hopelessly insolvent, and to compel him to accept it as a general creditor, might be but another mode of robbing him of his credits.

2. The claim is, however, that such is the effect of the statute under which the consolidation was had, and having been in force at the time the equipment bonds were issued, entered into the contract and became a part of it. It is difficult to perceive how this claim can be maintained in the face of the language of the statute heretofore quoted, "that all rights of creditors * * * of either of said corporations shall be preserved unimpaired." There is no question but that every statute enters into and forms part of any contract to which it is applicable as a part of the law of the land, but it is not perceived

how, in the application of this rule, a contract may be impaired or in any way affected by proceedings had under a statute which by its terms excludes any such effect. The proposition involves a contradiction in terms. The only question that can be raised in such a case is, whether a particular effect claimed for a proceeding had under the statute will or will not impair the contract of a creditor, and an answer to the question in the affirmative must be fatal to the claim. No reason is perceived why a different intention should be imputed to the legislature in the enactment of this law. The object of the legislature in authorizing the consolidation of railway companies was, as we apprehend, not to enable the new company to obtain credit by impairing the security of existing creditors of either of the former roads, but to enable existing companies to unite and form a continuous line of railway under one corporate management between widely separated points of trade and commerce; and as this may be attained without impairing the rights of creditors of the constituent roads, a court might well hesitate to so construe the statute if its provisions were silent on the subject. It would seem to be quite as consistent with a wise public policy to preserve the foundations of commercial credit as to promote the formation of great lines of interstate commerce; both may be necessary to the interests of commerce, but the one not more than the other.

This view is much strengthened by the further provision as to the rights of creditors, that "the respective corporations shall be deemed to be in existence to preserve the same." How, for this purpose, shall they be deemed to be in existence—as legal entities with or without property? Manifestly in the former sense, for the existence of a corporate entity without property wherewith to answer claims against it would be of no avail to a creditor; a judgment against it would be without fruit. The clause was inserted in the interest of creditors, and the only interpretation that can be of any avail to them can not be rejected without doing violence to well settled rules of construction. The statute introduces a fiction much as the prætor did in favor of the creditors of an *adrogatus*, and we see no reason why it was not intended to answer substantially the same purpose. In a suit by a creditor, the company, though in fact dissolved, is to be deemed in existence, and a judgment in his favor, whether against it or the new company, is to be satisfied from the property owned by the old company at the time of consolidation as if such proceedings had never been had; the fact of consolidation is pushed aside, and no one will be permitted to question the fiction until his rights have been satisfied. Of this no one as a creditor of the new company can in justice complain. The lien is a result of the proceedings under which the new company acquired its title to the property, and of it creditors of the new company have, in law, the same notice they have of prior mortgages upon the same property.

The former decisions of this court do not affect the question as to the rights of creditors. They are simply to the effect that the statute becomes a part of all subscriptions to the capital stock of a company

made subsequent to its passage, so that the same may be recovered in a suit by the consolidated company brought for that purpose. Mansfield, Coldw. & L. M. R. Co. v. Brown, 26 Ohio St. 223. The rights of a stockholder are preserved by giving him an election to become one in the new company, or of declining, and being paid the highest market value of his stock at any time within the six months next preceding the making of the agreement, but unless he does so previous to the consolidation, he is treated as a stockholder in the new company; and this fact accentuates the construction claimed for creditors; as no voice is given them in the transaction, it is but reasonable that their rights should be in no way affected by it.

II. The plaintiff does not, however, base his claim to relief solely upon the provisions of the statute, but likewise upon the effect of the stipulation in the agreement forming the basis upon which the consolidation was had, that the class of bonds owned by him should be protected, both as to interest and principal, as the same should mature, by the new company. The principle upon which this claim is based is, that where property is transferred upon the condition that the grantee shall pay some third person a debt or sum of money, the latter acquires an equitable lien on the property to the extent of the debt or sum of money to be paid him. This principle is well recognized and has been applied in a great variety of cases. A masterly treatment of the doctrine by Ranney, J., will be found in Clyde v. Simpson, 4 Ohio St. 445. See, also, Story Eq. Juris., §§ 1244–6; Pom. Eq. Juris., § 166 and § 1234; Montgomery and West Point R. Co. v. Branch, 59 Ala. 139; Hamilton v. Gilbert, 2 Hiesk. 680; Vanmeter v. Vanmeter, 3 Grat. 148.

It is true that most of the instances in which this lien has been recognized is where property had been devised charged with the payment of debts or legacies to others, and for the plain reason that the most frequent occasions for its application will arise in such instances, and not because the principle is in its nature inapplicable to other transfers of property; for, as is said by Ranney, J., in Clyde v. Simpson, *supra*, a "doctrine resting upon the broad foundations of justice and conscience" can not be made "to depend upon the manner in which the title is derived." No such limitation has been placed upon the doctrine by the courts or text-writers. Story Eq. Juris., § 1246. In Vanmeter v. Vanmeter, *supra*, it appears that a grantor had made a conveyance of all his real estate in consideration of $1 and the agreement of the grantees to pay his debts and a certain legacy; this was held by the court to constitute a lien upon the property in favor of the creditors. Many similar instances will be found among the cases cited; and, independent of the provisions of the statute, we are unable to see why the principle, when applied to the facts of this case, does not create a similar lien in favor of the holders of these equipment bonds. It would seem to follow as a corollary from what has been said as to the lien based upon the provisions of the statute. Whatever may be urged against the claim that the agreement to protect these bonds imposed the duty of securing them by mortgage or

otherwise, the least that can be claimed for such agreement is, that it imposed the duty of paying them, interest and principal, at maturity. And, as all the property of the company issuing them was transferred upon the basis of this agreement, the transfer was, at least, upon the stipulation to pay his claim as a part of the consideration thereof. If, for the purpose of withdrawing from the cares of business, or any other reason, a private person were to make a conveyance of all his property to another upon the agreement of the latter to pay his debts, it will not be questioned but that such transfer would create an equitable lien upon the property in favor of creditors, that would avail against all persons with notice. This case is every way analogous to such a transfer, and no reason exists why it should not be governed by the same principle so far as the rights of creditors are concerned. The only difference between the real and the supposed case strengthens the reason of its application to the real one. In the supposed case the person making the transfer may still own and acquire property, but in the real one, as heretofore shown, the debtor terminates its personality, and can no longer own or acquire anything; all that is left the creditor is the property that it owned; and, unless we disregard all the analogies of the law, this property must be charged with its debts in the hands of one that succeeded to its place in consideration of the agreement to pay them, and the lien so created must be superior to the title of all purchasers with notice. * * *

Judgment for plaintiff, finding the amount due and order of sale.

Note. This case was affirmed by the United States Supreme Court. 1897, Compton v. Jessup, 167 U. S. 1.

Note. **Consolidation.** See note, 89 Am. St. R. 604.

1. *Meaning* of: A late case defines consolidation to be "a merger, a union, or amalgamation, by which the stock of the two is made one, their property and franchises combined into one, their powers become the powers of one, their names merged into one, and the identity of the two practically, if not actually, runs into one,"—Hunt, J., in State v. Montana R., 21 Mont. 221, 45 L. R. A. 271 (1898). The fullest discussion of the meaning of consolidation is in, 1879, Meyer v. Johnson & Stewart, 64 Ala. 603, on 650–669; see also, 1898, Adams v. Yazoo & M. V. R. Co. (Miss.), 24 So. Rep. 200, not officially reported; 1899, Rafferty v. Buffalo City Gas Co., 37 App. Div. (N. Y.) 618; 1901, Vicksburg & Yazoo Tel. Co. v. Citizens' Tel. Co., 79 Miss. 341, 89 Am. St. R. 656.

In England the term used is *amalgamation*, and it there has as uncertain and undefined a meaning as *consolidation* here. See Meyer v. Johnston, 64 Ala. 603, 651, *et seq.*, and 1898, Wall v. London & N. W. Assetts Corp., 79 L. T. R. 249.

Illustrations: Power to connect or unite does not permit consolidation: 1895, Louisville & N. R. Co. v. Kentucky, 161 U. S. 677; exchange of stock by one corporation for that of another does not effect consolidation: 1899, Rafferty v. Buffalo City Gas Co., 37 App. Div. (N. Y.) 618; a short lease is not a consolidation: State v. Montana R., 21 Mont. 221, 45 L. R. A. 271; but a long lease is practically a consolidation: 1888, State v. Atchison, etc., R., 24 Neb. 143; power to consolidate does not include a power to sell or lease: 1875, Tippecanoe County v. Lafayette, etc., Co., 50 Ind. 85; 1882, State v. Vanderbilt, 37 Ohio St. 590; 1882, Archer v. Terre Haute R. Co., 102 Ill. 493; 1886, Mills v. Central R., 41 N. J. Eq. 1; 1889, East L. & R. R. Co. v. Texas, 75 Tex. 434; 1892, St. L., etc., R. Co. v. Terre Haute, etc., R. Co., 145 U. S. 393. But see, *contra*, 1875, Williamson v. N. J. So. R., 26 N. J. Eq. 398; 1882, Branch v. Jesup, 106 U. S. 468; 1895, Chicago, S. F., etc., Co. v. Ashling, 160 Ill. 373.

2. *Consent of the state* is essential; but ratification by the legislature after

an attempt at consolidation will be sufficient: 1856, Fisher v. Evansville, etc., R. Co., 7 Ind. 407; 1858, Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685; 1858, Pearce v. Madison, etc., P. R. Co., 21 How. (62 U. S.) 441; 1859, Bishop v. Brainerd, 28 Conn. 289 (ratification); 1861, State v. Bailey, 16 Ind. 46, 79 Am. Dec. 405; 1875, Warrener v. Kankakee County, Fed. Cas. 17205; 1876, In re Prospect Park, C. I. R. Co., 67 N. Y. 371, *supra;* 1877, Mead v. New York, H. & M. R. Co., 45 Conn. 199 (ratification); 1883, Missouri Pac. R. Co. v. Owens, 1 W. & W. Civ. Cas. (Tex. Ct. App.), § 385; 1885; Crawfordsville & D. T. Co. v. State, 102 Ind. 435; 1891, Home Friendly Soc. v. Tyler, 9 Pa. Co. Ct. R. 617; 1892, Cameron v. N. Y. & Mt. V. W. W., 133 N. Y. 336, 31 N. E. Rep. 104; 1893, People v. Rice, 138 N. Y. 151, 33 N. E. Rep. 846; 1893, Greenville Compress Co. v. Planters', etc., Co., 70 Miss. 669, 35 Am. St. Rep. 681; 1895, Louisville & N. R. v. Kentucky, 161 U. S. 677; 1895, American L. & T. Co. v. Minn. & N. W. R. Co., 157 Ill. 641, 42 N. E. Rep. 153; 1898, Topeka Paper Co. v. Oklahoma P. Co., 7 Okla. 220, 54 Pac. Rep. 455; 1900, Wood v. Seattle, — Wash. —, 52 L. R. A. 369, note.

The state's permission to consolidate is a license and not the grant of a franchise: 1895, Pearsall v. Great N. R. Co., 161 U. S. 646; 1898, Adams v. Yazoo & M. V. R. Co., 24 So. Rep. 200.

3. *Consent of shareholders:*

(*a*) In the absence of a reserved power to amend or repeal, or a charter or statutory provision allowing consolidation when the corporation is organized, the unanimous consent of shareholders is essential: 1853, Kean v. Johnson, 9 N. J. Eq. 401; 1856, Chapman v. Mad River, etc., R. Co., 6 Ohio St. 119; 1858, Lauman v. Lebanon Valley R., 30 Pa. St. 42, 72 Am. Dec. 685; 1863, Clearwater v. Meredith, 1 Wall. (68 U. S.) 25, *supra*, p. 984; 1866, Mowrey v. Ind. & C. R. Co., 4 Biss. 78, Fed. Cas. 9891; 1867, Zabriskie v. Hackensack, etc., R., 18 N. J. Eq. 178; 1873, Black v. Del. & R. Canal Co., 24 N. J. Eq. 455; 1882, N. O. G. L. Co. v. Louisiana L. Co., 11 Fed. Rep. 277; 1886, Mills v. Central R. Co., 41 N. J. Eq. 1; 1888, Botts v. Simpsonville & B. Co., 88 Ky. 54, 2 L. R. A. 594; 1890, Deposit Bank of Owensboro v. Barrett, 11 Ky. L. Rep. 910, 13 S. W. Rep. 337; 1891, Home Friendly Soc. v. Tyler, 9 Pa. Co. Ct. 617.

Long acquiescence is sufficient evidence of consent: 1894, Phinizy v. Augusta, K. R. Co., 62 Fed. Rep. 678.

(*b*) Under a reserved power to alter or amend a charter, a majority may be authorized to consent to a consolidation against the wishes of the minority: 1856, Railroad Co. v. Dudley, 14 N. Y. 336; 1856, Sparrow v. Evansville, etc., R., 7 Ind. 369; 1857, McCray v. Junction R. Co., 9 Ind. 358; 1859, Bishop v. Brainerd, 28 Conn. 289; 1862, Durfee v. Old Colony R. Co., 5 Allen (Mass.) 230; 1865, Gardner v. Hamilton Ins. Co., 33 N. Y. 421; 1873, Nugent v. Supervisors, 19 Wall (U. S.) 241; 1875, Mansfield, etc., R. Co. v. Brown, 26 Ohio St. 223; 1877, State v. Maine Cent. R. Co., 66 Me. 488; 1878, Wilson v. Salamanca, 99 U. S. 499; 1885, Middletown v. Boston, etc., R., 53 Conn. 351; 1894, Hale v. Cheshire R. Co., 161 Mass. 443, 37 N. E. Rep. 307; 1895, Market St. R. Co. v. Hellman, 109 Cal. 571, 42 Pac. Rep. 225.

But there are decisions holding that unanimous consent is required under the reserved power to amend: 1867, Zabriskie v. Hackensack R., 18 N. J. Eq. 178; 1893, Earle v. Seattle, etc., R., 56 Fed. Rep. 909.

4. *Effect of consolidation upon former companies:*

The intent of the consolidation statute and agreement controls, but the various views are, as to:

(*a*) *Their existence:* Theories: (1) Old companies are dissolved and go out of existence, there being a new company only after consolidation: 1861, State v. Bailey, 16 Ind. 46, 79 Am. Dec. 405; 1863, Clearwater v. Meredith, 1 Wall. 25, *supra*, p. 984; 1868, Indianapolis C. & L. Co. v. Jones, 29 Ind. 465, 95 D. 654; 1868, Tagart v. N. C. R., 29 Md. 557; 1875, Shields v. State, 26 Ohio St. 86; 1877, Shields v. Ohio, 95 U. S. 319; 1878, Railroad Co. v. Georgia, 98 U. S. 359; 1882, N. O. Gas Light & H. Co. v. L. L. & H. Co., 11 Fed. Rep. 277; 1888, St. Louis, I. M. & S. R. v. Berry, 41 Ark. 509; 1888, Kansas, O. & T. R. Co. v. Smith, 40 Kan. 192; 1894, Keokuk & W. R. Co. v. State, 152 U. S. 301, *supra*, p. 950; 1896, Council G. O. C., etc., R. Co. v. Lawrence, 3 Kan. App.

274; 1897, Rio Grande W. R. Co. v. Telluride, etc., Co., 16 Utah 125, 51 Pac. Rep. 146; 1899, Wagner v. Atchison, T. & S. F. R. Co., 9 Kan. App. 661, 58 Pac. Rep. 1018; 1901, Yazoo & Miss. V. Ry. Co. v. Adams, 180 U. S. 1.

(2) The old companies are not dissolved, the consolidated company being a *quasi*-partnership among the old companies and continuing their existence: 1830, Farnum v. Blackstone Canal Co., 1 Sumner 46; 1871, Pennsylvania College Cases, 13 Wall. (U. S.) 190; 1873, Columbus, C. & I. C. R. v. Skidmore, 69 Ill. 566; 1875, Central R., etc., Co. v. Georgia, 92 U. S. 665; 1876, Shackelford v. Mississippi C. R. Co., 52 Miss. 159; 1879, Meyer v. Johnson, 64 Ala. 603; 1880, Newport & Cin. Bridge Co. v. Wooley, 78 Ky. 523; 1888, Edison Elec. L. Co. v. N. H. El. Co., 35 Fed. Rep. 233; 1889, Hancock M. L. I. Co. v. Worcester, etc., R., 149 Mass. 214; 1890, United States v. So. Pac. R. Co., 45 Fed. Rep. 596; 1890, Day v. Worcester, N., etc., R. Co., 151 Mass. 302; 1896, Louisville Trust Co. v. L., N. A., etc., R., 75 Fed. Rep. 433.

(*b*) *Their property:* Becomes that of the succeeding company. See *infra*, this note, 5 (*b*), (3).

(*c*) *Their rights generally:* These become those of the successor company. See *infra*, this note 5 (*a*), (*b*).

(*d*) *Their liabilities:* These continue against the old company, although they are usually enforcible against the consolidated company: 1873, Prouty v. Lake S., etc., R. Co., 52 N. Y. 363; 1874, Montgomery & W. P. R. Co. v. Boring, 51 Ga. 582; 1876, Shackelford v. Miss., etc., R. Co., 52 Miss. 159; 1877, Montgomery, etc., R. v. Branch, 59 Ala. 139; 1888, Louisville, etc., R. v. Boney, 117 Ind. 501; 1888, Compton v. R. Co., 45 Ohio St. 592; 1895, Market St. R. v. Hellman, 109 Cal. 571; 1897, Compton v. Jesup, 167 U. S. 1; 1897, Santa Fe Elec. Co. v. Hitchcock, 9 N. M. 156, 50 Pac. Rep. 332; 1897, *In re* Utica Nat. Bank Co., 154 N. Y. 268. See, *infra*, this note; note, 89 Am. St. R. 604.

5. Effect as to the consolidated company:

(*a*) *A new corporation*, or at least a somewhat different corporation, comes into existence which, for most business purposes, is a distinct entity from the constituent corporations: 1868, Racine, etc., R. Co. v. F. L. & T. Co., 49 Ill. 331; 1875, Wilmer v. The Atlantic, etc., R. Co., 2 Woods 409; 1884, Burger v. Grand Rapids & I. R., 22 Fed. Rep. 561; 1885, Pullman Palace Car Co. v. Mo. Pac., etc., Co., 115 U. S. 587; 1886, Graham v. R. Co., 118 U. S. 161; 1888, O. & M. R. Co. v. People, 123 Ill. 467; 1890, Fitzgerald v. Mo. Pac. R., 45 Fed. Rep. 812; 1895, Market St. R. Co. v. Hellman, 109 Cal. 571.

However, as to *interstate* consolidations the new company is a new company existing in each state with the powers, rights and franchises that the constituent companies in that state had, but not those that one or more of the constituent companies created in another state had. And for jurisdictional purposes in the United States courts, there are as many new companies (with the name of the consolidated company) as there are states authorizing the consolidation: 1861, O. & M. R. Co. v. Wheeler, 1 Black (66 U. S.) 286; 1865, County of Allegheny v. C. & P. R. Co., 51 Pa. St. 228; 1876, Muller v. Dows, 94 U. S. 444; 1886, St. Paul & N. P. R. Co. v. Minn., 36 Minn. 85; 1890, Nashua & L. R. Co. v. B. & L. R. Co., 136 U. S. 356; 1896, St. Louis, etc., R. Co. v. James, 161 U. S. 545; 1899, Louisville, N. A., etc., R. Co. v. Louisville Trust Co., 174 U. S. 552; note, 89 Am. St. R. 604.

The new company dates its existence from the consolidation: 1875, Shields v. The State, 26 Ohio St. 86; 1875, Central R. & Banking Co. v. State, 54 Ga. 401; 1876, State v. Northern Cent. R. Co., 44 Md. 131; 1898, Adams v. Yazoo & M. V. R. Co. (Miss.), 24 So. Rep. 200.

(*b*) Rights and privileges of the consolidated company:

(1) *Special privileges and immunities:* As the consolidated company is a new company dating from the consolidation, as against the state, it is subject to all the laws existing at the date of consolidation, such as the right to repeal or amend, notwithstanding the fact that the charters of the constituent companies were not subject to repeal or amendment: 1875, Shields v. State, 26 Ohio St. 86; 1895, Mercantile Bank v. Tennessee, 161 U. S. 161; 1897, Smith v. Lake Shore & Mich. So. R., 114 Mich. 460.

Rights to use streets pass: 1895, Africa v. Knoxville, 70 Fed. Rep. 729; right

to take property under eminent domain pass also: 1882, Toledo, etc., R. Co. v. Dunlap, 47 Mich. 456; 1888, Abbott v. N. Y., etc., R. Co., 145 Mass. 450; so also an exclusive right to furnish gas: 1885, New Orleans Gas Co. v. Louisiana, 115 U. S. 650.

An unexecuted power to consolidate is not a vested right, and hence would not pass to a consolidated company: 1895, Pearsall v. Great Northern R., 161 U. S. 646; 1896, Morrill v. Smith Co., 89 Tex. 529, 551; nor does the right to fix railroad rates: 1895, St. Louis & S. F. R. Co. v. Gill, 156 U. S. 667.

As to exemptions from taxation, if the language of the consolidation statute is ample to include such privileges, and there is nothing to indicate a contrary intent, the tax exemption inures to the benefit of the new company, so far as, but no farther than, the property acquired was exempt. 1850, Philadelphia, etc., R. Co. v. Maryland, 10 How. (51 U. S.) 376; 1872, Tomlinson v. Branch, 15 Wall. (82 U. S.) 460; 1873, Delaware R. Tax, 16 Wall. (85 U. S.) 206; 1875, Central, etc., R. v. Georgia, 92 U. S. 665; 1876, Chesapeake & O. R. Co. v. Virginia, 94 U. S. 718.

The later cases apply even a stricter rule, and the tax-exemption does not pass unless the intention to do so is clearly expressed—all presumptions being against it; 1894, Keokuk & W. R. v. Missouri, 152 U. S. 301, *supra*, p. 389; 1895, Norfolk & W. R. Co. v. Pendleton, 156 U. S. 667; 1895, Mercantile Bank v. Tennessee, 161 U. S. 161; 1898, Adams v. Yazoo & M. V. R. Co., 24 So. Rep. 200 (Miss.); 1898, Citizens' Sav. Bk. v. Owensboro, 173 U. S. 636; 1899, The Kentucky Bank Cases, 174 U. S. 408, *et seq.*

(2) *Contract rights*, such as stock subscriptions, subscriptions in aid of the purposes, rights to use patents, copyrights, etc., rights under indemnity bonds, etc., held by constituent companies pass to the consolidated company:

Stock subscriptions: 1856, Sparrow v. E. & C. R., 7 Ind. 369; 1863, Bish v. Johnson, 21 Ind. 299; 1875, Mansfield, etc., R. Co. v. Stout, 26 Ohio St. 241; 1891, Hamilton v. Clarion, etc., R. Co., 144 Pa. St. 34.

Patent rights: 1869, Lightner v. B & A. R., 1 Low. 338, Fed. Cas. 8343.

Subscriptions in aid of undertaking: 1876, Scotland Co. v. Thomas, 94 U. S. 682; 1878, Edwards v. People, 88 Ill. 340; 1879, Empire Tp. v. Darlington, 101 U. S. 87; 1883, Scott v. Hausheer, 94 Ind. 1; 1885, Marion Co. v. Center Tp., 105 Ind. 422; 1888, Livingston Co. v. First Nat'l Bank, 128 U. S. 102, with cases cited there; but see *contra*, 1872, New Jersey M. R. Co. v. Strait, 35 N. J. L. 322; 1875, Harshman v. Bates Co., 92 U. S. 569; 1877, County of Bates v. Winter, 97 U. S. 83; 1878, Wagner v. Meety, 69 Mo. 150.

Indemnity bonds: 1892, Pennsylvania, etc., R. v. Harkins, 149 Pa. St. 121.

(3) *Property rights:*

Lands vest, by virtue of the act of consolidation, in the new company without further conveyance: 1861, N. Y. Cent. R. Co. v. Saratoga, etc., Co., 39 Barb. (N. Y.) 289; 1888, Georgia Pac. R. Co. v. Wilks, 86 Ala. 478; 1888, Tarpey v. Deseret Salt Co., 5 Utah 494; 1891, Cashman v, Brownlee, 128 Ind. 266; 1896, Day v. N. Y. S. & W. R. Co., 58 N. J. L. 677; 1900, Greene v. Woodland, etc., R. Co., 62 Ohio St. 67, 56 N. E. Rep. 642.

Choses in action do also: 1863, Cumberland College v. Ish, 22 Cal. 641; 1865, State University of Vermont v. Baxter, 42 Vt. 99; 1868, Miller v. Lancaster, 45 Tenn. (5 Cold.) 514.

(4) *Liabilities:*

Contracts—New company must perform those of old: 1868, Racine & M. R. Co. v. Farmers' L. & T. Co., 49 Ill. 331, 95 Am. Dec. 595; 1874, Western Union R. Co. v. Smith, 75 Ill. 496; 1881, Sapping v. Little Rock, etc., Co., 37 Ark. 23; 1889, Union Pac. R. v. McAlpine, 129 U. S. 305; 1890, Day v. Worcester, etc., R. Co., 151 Mass. 302; 1890, Jones v. Fitchburg R. Co., 123 N. Y. 502; 1890, Joy v. St. Louis, 138 U. S. 1; 1892, Chicago & Ind. Coal Co. v. Hall, 135 Ind. 91, 23 L. R. A. 231; 1896, Cumberland Valley R. Co. v. Gettysburg, etc., Co., 177 Pa. St. 519.

But see: 1868, Tagart v. Northern Cent. R. Co., 29 Md. 557; 1873, Prouty v. L. S. etc., R. Co., 52 N. Y. 363; 1874, City and County of San Francisco v. Water-Works, 48 Cal. 493; 1899, Chase v. Mich. Tel. Co., 121 Mich. 631, 80 N. W. Rep. 717; 1900, Capital Traction Co. v. Offutt, 17 App. D. C. 292, 53 L. R. A. 390.

Debts—New company are liable for, to the extent of property received, and where expressly assumed, are liable beyond the property received: 1863, Eaton, etc., R. Co. v. Hunt, 20 Ind. 457; 1868, Indianapolis, C. & St. L. R. Co. v. Jones, 29 Ind. 465, 95 Am. Dec. 654; 1869, Wright v. Milwaukee, etc., R. Co., 25 Wis. 46; 1874, Bailey v. N. Y. C. R. Co., 89 U. S. (22 Wall.) 604; 1875, Meyer v. Johnson, 53 Ala. 237; 1881, Boardman v. L. S. & M. S. R., 84 N. Y. 157; 1885, Brown v. Susquehanna Boom Co., 109 Pa. St. 57, 58 Am. Rep. 709; 1889, Louisville, N. A., etc., R. v. Snider, 117 Ind. 501, 3 L. R. A. 434; 1894, Berry v. Kansas, etc., R. Co., 52 Kan. 774, 39 Am. St. R. 381; 1895, Langhome v. Richmond R. Co., 91 Va. 369; 1897, In re Utica, etc., Co., 154 N. Y. 268; 1897, Tompkins v. Augusta So. R. Co., 102 Ga. 436; 1899, U. S. Capsule Co. v. Isaacs, 23 Ind. App. 533, 55 N. E. Rep. 832; 1899, Copp v. Colorado C. & I. Co., 60 N. Y. Supp. 293, 29 Miscl. R. 109; 1901, Morrison v. Snuff Co., 79 Miss. 330, 89 Am. St. R. 598.

Torts: New company is liable for the torts of the former constituent companies: 1860, Bissell v. Michigan So. R., 22 N. Y. 258; 1873, Warren v. Mobile, etc., R., 49 Ala. 582; 1874, Chicago, etc., R. v. Moffatt, 75 Ill. 524; 1883, St. Louis, etc., R. Co. v. Marker, 41 Ark. 542; 1892, Louisville, etc., R. Co. v. Summers, 131 Ind. 241; 1893, Berry v. Kansas C. F. & S. R., 52 Kan. 759, 39 Am. St. R. 371; 1895, Southern, etc., R. Co. v. Bourkright, 70 Fed. Rep. 442, 30 L. R. A. 823; 1895, Langhorne v. Richmond R. Co., 91 Va. 369.

But see *contra*, 1898, Von Cotzhausen v. Johns Mfg. Co., 100 Wis. 473, 76 N. W. Rep. 622; 1899, Chase v. Mich. Tel. Co., 121 Mich. 631, 80 N. W. Rep. 717.

ARTICLE IV. ACQUIRE, HOLD AND ALIENATE PROPERTY.

Sec. 288. (1) Acquire and hold real property.
(A) By purchase:
(*a*) Presumptions.

STOCKTON SAVINGS BANK v. STAPLES.[1]

1893. IN THE SUPREME COURT OF CALIFORNIA. 98 Cal. Rep. 189–193.

[Action by the bank to quiet title to land. Judgment was in favor of the plaintiff, and defendants appealed therefrom. The bank traced title through conveyances from one C., and alleged that C. had ousted the defendant, and he and his subsequent grantees had maintained an open and notorious possession for the statutory period. The immediate grantor of the bank was Mrs. Hudson.]

VANCLIEF, C. * * * Appellants contend that the court erred in overruling their objections to the introduction in evidence of the deed from Mrs. Hudson to plaintiff. The ground of the objection was that the plaintiff "was not shown to have the power to purchase, hold, or receive said land, nor that said land was conveyed to it for any of the purposes of the corporation." There was no evidence to show for what purpose the corporation had been organized, or what business it was conducting. The court found according to the allegation of the complaint, not denied in the answer, that at all the times

[1] Statement abridged, only part of opinion given.

stated the plaintiff "was a corporation duly organized and incorporated under and by virtue of the laws of the state of California, and having its office and principal place of business in the city of Stockton, county of San Joaquin, state of California."

Under these circumstances I think it must be presumed (as against the defendants, at least) that the corporation had power to purchase and hold the land. (Natoma Water & M. Co. v. Clarkin, 14 Cal. 544; Evans v. Bailey, 66 Cal. 112; Hagar v. Board of Supervisors, 47 Cal. 222; People v. La Rue, 67 Cal. 526; Spelling on Private Corporation, §§ 203, 206.) It does not appear under what statute or for what purpose the plaintiff was incorporated, nor what business it was engaged in, nor for what purpose the property was purchased or used. In answer to a similar objection in People v. La Rue, 67 Cal. 526, it was said: "If there was anything in its charter or the business in which it was engaged, or in the law under which it was organized, in any manner abridging its right to hold land, it does not appear of record, hence we deem the objection untenable." * * *

Affirmed.

Note: In the absence of any showing of any kind to the contrary there is a presumption that purchases of land by a corporation are for a valid purpose, and the contrary must be shown by the one alleging it. 1827, Ex parte Peru Iron Co., 7 Conn. (N. Y.) 540; 1859, Chautauqua Co. Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; 1863, Regents of Univ. v. Detroit Y. M. Soc., 12 Mich. 138; 1871, Myers v. Croft, 13 Wall. (80 U. S.) 291; 1874, Hagar v. Yolo Co., 47 Cal. 222; 1874, Yates v. Van De Bogert, 56 N. Y. 526; 1885, People v. La Rue, 67 Cal. 526; 1893, Connecticut, etc., Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656.

Sec. 289. Same.

(*b*) Extent of power to purchase and hold.

LEAZURE v. HILLEGAS.

1821. In the Supreme Court of Pennsylvania. 7 Serg. & R. (Pa.) 313–323.

Error to the common pleas of Bedford county.

Frederick Hillegas, the plaintiff below (the defendant in error), claimed the land in dispute, under a warrant and survey to Thomas Holt, who conveyed to George Armstrong, who conveyed to William Henry, who conveyed to the Bank of North America, who conveyed to the plaintiff. On the trial of the cause, four bills of exceptions to evidence were taken by the defendant below. * * *

The third exception was to the admission of a deed from the Bank of North America to James Ross, to which there were two objections: 1st. That there was no evidence of the seal of the corporation. 2d. That the corporation was incapable of receiving a conveyance of land otherwise than by mortgage, and therefore had no estate which could be conveyed.

[After holding the seal of the corporation had not been proved and for that reason the deed should not have been admitted, proceeds:]

TILGHMAN, C. J. * * * But the great points in this cause are, the capacity of the bank to *take* the land conveyed by William Henry's deed, and afterwards to *convey* the same to James Ross. There is no doubt that a corporation must be governed by the charter from which it derives its existence. It can do no act nor take any estate contrary to its charter. If, therefore, it can be shown, that the Bank of North America is forbidden by its charter, either to *take* or to *convey*, the land contained in William Henry's deed, the plaintiff's action can not be supported. By the third section of the act of incorporation (17th of March, 1787, 2 Sm. L. 399), the bank is made capable "to have, hold, purchase, receive, possess, enjoy and retain lands, rents, tenements, goods, chattels and effects of whatsoever kind, nature or quality, to the amount of two millions of dollars and no more, and also to sell, grant, etc., the same lands, etc. Provided, nevertheless, that such lands and tenements, which the said corporation are hereby enabled to *purchase* and *hold*, shall only extend to such lot and lots of ground, and convenient buildings, and improvements thereon erected or to be erected, which they may find necessary and proper for carrying on the business of the said bank, and shall actually occupy for that purpose, *and to such lands and tenements which are or may be bona fide mortgaged to them as securities for their debts.*" It is remarkable that with regard to the *holding* of lands, the charter of this bank is more restricted than that of any other bank in the state, for all the others are enabled to hold, not only the lands which have been *bona fide* mortgaged to them by way of security for debts, but also those "which may be conveyed to them in satisfaction of debts previously contracted in the course of their business, or purchased at sales upon judgments which shall have been obtained for such debts." This difference of restriction must have arisen from the extreme jealousy of monied corporations which pervaded the mind of the legislature when the Bank of North America was incorporated. It never could have been intended to place that bank on a worse footing than others, for it was the only one which risked its capital on a field altogether untried in America, and which had the merit of rendering essential service to the United States during the war of the revolution. It would be improper, therefore, to carry the restriction, *by construction*, farther than the words of the law plainly import. The restriction is, that the bank shall not *purchase and hold*. *Purchasing and holding* are very different things, and the consequences of each are very different. If the words had been that the bank should neither purchase nor hold, then it could have done neither one nor the other. But, although *purchasing and holding* might have been thought dangerous, because of the power which it would have given the bank to bring too much land into mortmain, yet to *purchase*, subject to the statutes of mortmain, which authorized the commonwealth to appropriate the land to its own use, could be attended with no danger.

This construction would satisfy the jealous policy of the legislature, preserve the community from the danger of too great a mass of real property held in mortmain, and at the same time put in the power of the commonwealth to act towards the bank as justice might seem to require. This is a consideration of no small importance; for when the directors of the bank accepted from William Henry a conveyance of his land at a fair price in payment of a debt *bona fide* due, it would be hard to presume that they knew they were acting in violation of their charter. But granting that the restriction in the charter did not extend to the simple act of *purchasing*, it may be asked, whence did the corporation derive the *right to purchase*, and what would be the situation of land purchased without a capacity of holding? The answer is, that a corporation has, *from its nature*, a right to *purchase* lands, though the charter contains no license to that purpose. And in this respect the statutes of mortmain have not altered the law, except in case of *superstitious uses*. But since those statutes, it is necessary, in order to enable a corporation to *retain* lands which it has purchased, to have a license for that purpose; otherwise, in England, the next lord of the fee may enter within a year after the alienation, and if he do not, then the next immediate lord, from time to time, has half a year to enter, and for default of all the mesne lords, the king takes the land so aliened, forever. That this is the law appears from the following authorities: 2 Black. Comm., 268, 269; Co. Lit., 2; 6 Vin. Ab., 265 (G. pl. 2.); 6 Vin. Ab., 266, pl. 8; Jenk. Cent., 270; 3 Com. Dig., 399 (F. 10); 3 Com. Dig., 401 (F. 15); 1 Rol. Ab., 513; 1, 35; 10 Co. 30. But in Pennsylvania, where there are no mesne lords, the right would accrue immediately to the commonwealth. It has been objected, however, that according to the report of the judges of this court, made on the 14th of December, 1808, in pursuance of an act of assembly requiring them to make a report of the English statutes which are in force in the commonwealth, etc., it appears that all conveyances of land to a corporation, without license, are absolutely void. I will consider this objection. The judges reported the following statutes of mortmain, "7 Ed. I. (Stat. 2); 13 Ed. I, ch. 32; 15 Rich. II, ch. 5, and 23 Hen. VIII, ch. 10; which are in part inapplicable to this country, and in part applicable and in force. They are so far in force, that all conveyances by deed or will, of lands, tenements or hereditaments, made to a body corporate, are void unless sanctioned by charter or act of assembly. So, also, are all such conveyances void, made either to an individual or to any number of persons associated, but not incorporated, if the said conveyances are for uses or purposes of a *superstitious nature*, and not calculated to promote objects of charity or utility."

I have quoted the words of the report, and it is evident that the judges could have no intent, nor had they power to make any addition to the statutes, or in any manner to alter them. Now by reference to the statutes it will appear that in all of them except the 23 Hen. VIII, ch. 10, the conveyance is not absolutely void, but the estate passes to the corporation, subject, as before mentioned, to the right

of the several mesne lords, and in their default, of the king, to enter and hold in fee. But by the statute of 23 Hen. VIII, ch. 10 (which has been determined to extend to *superstitious uses only*: see 2 Black Com., 273; 1 Co. Rep., 24), uses and trusts made and contrived in favor of religious persons, or any bodies corporate, for more than twenty years, shall be utterly void. Now the meaning of the report of the judges is, that, according to the statute cited by them, conveyances to *superstitious uses* are absolutely void, and conveyances to corporations, to uses *not superstitious*, are so far void that those corporations shall have no capacity to hold the estates for their own benefit, but subject to the right of the commonwealth, who may appropriate them to its own use at pleasure; in other words, that such conveyances have no validity for the purpose of enabling the corporation to hold in mortmain. But to support the plaintiff's title, it must be shown that the corporation had power, not only to take by purchase, but to aliene. In this respect I consider a corporation in the situation of an alien who has power to take but not to hold. That an alien may take by purchase (though not by descent), has been settled from the earliest times. It is so laid down in Co. Lit. 2, and I believe has never been questioned. Neither has it been questioned that the land is subject to forfeiture, and may be seized for the king after office found. But it has been questioned what is the right of the alien before office found for the king. Without reference to English cases, which leave the matter in doubt, we have the highest authority in our own country for saying that until some act done by the commonwealth according to its own laws, to vest the estate in itself, it remains in the alien, who may convey it to a purchaser, but he can convey no estate which is not defeasible by the commonwealth. This principle was asserted by Judge Story, who delivered the opinion of the supreme court of the United States in the case of Fairfax's Devisee v. Hunter's Lessee, 7 Cranch 603; and this was the opinion of the supreme court of Massachusetts, in the case of Sheaffe v. O'Neil, 1 Mass. Rep. 256, cited by Judge Story.

It is reasonable in theory, and can have no ill effect in practice, that he who has a defeasible estate may convey a defeasible estate. Provided the right of the commonwealth to defeat the estate granted by the alien remains entire, it is immaterial who holds the land until that right be prosecuted. Supposing, then, that the cases of the alien and the corporation be similar (and I see not how they can be distinguished), it follows that the deed from the Bank of North America to James Ross conveyed a fee-simple, defeasible by the commonwealth. * * *

[Reversed on the ground that the deed was admitted without proof of the corporate seal.]

Note. See note, § 291.

Sec. 290. Same.

CASE v. KELLY ET AL.[1]

1890. IN THE SUPREME COURT OF THE UNITED STATES. 133 U. S. Rep. 21.

[The Green Bay and Minnesota Railroad Company being in the hands of a receiver, namely, Timothy Case, in the circuit court of the United States, in a suit by the Farmers' Loan and Trust Company to foreclose a mortgage on said railroad, said receiver was directed by the court to take possession of all the property, real and personal, of said company, with authority to bring suits, in the name of the railroad company. Under this order, Mr. Case, as receiver, brought the present suit, stating that he sues in behalf of said railroad company, and as receiver, the defendants Kelly, Ketchum, and Hiles, who were officers of the railroad company during its period of construction, and who as alleged had procured numerous donations of land from citizens who were interested in the construction of the road, along its line, intended to be for the use and benefit of the railroad company, and to assist it in such construction. The fundamental allegation of the bill is that these defendants, representing to the persons who made the donations that they were officers of the road, and soliciting these grants for the benefit of the road, took the conveyances to themselves individually; that they did this in a fraudulent manner, by making the grantors in the conveyances believe that they, as officers of the company, could receive the conveyances for the benefit of the road, and that either the grantors did not really know to whom the conveyances were made, or were induced to believe that when made the grantees held the lands as a trust for the benefit of the road. These defendants not recognizing this trust, and the conveyances on their faces being merely conveyances to the individuals, Ketchum, Kelly, and Hiles, who now refuse to convey to the company, or to admit its right to the lands, this suit is brought to have a declaration of the trust made by the court, and a decree ordering conveyances by the defendants of the land to the corporation. It is further alleged that the mortgage in process of foreclosure in the court under which Case is acting as receiver covered all the lands of the corporation, and would cover these lands, if the title of the corporation in them was established. The defendants, Kelly, Ketchum, and Hiles, filed answers, in which they denied all fraud or deception, denied that they held the lands in trust for the railroad company, and denied the right of plaintiff to any relief. Replications were filed to the answers. The case was put at issue. The circuit court held that only such lands as were necessary and proper for the immediate use of the road could be recovered in this suit.]

MILLER, J. * * * The principal question suggested by this appeal is whether the complainant, as representing the railroad com-

[1] Statement abridged, only part of opinion given.

pany, can maintain a suit for these lands; that is to say, whether the company was endowed by the legislature of Wisconsin with a capacity to receive an indefinite quantity of lands, with no limitation upon their use, or upon their sale, or whether they were limited to the lands necessary to such uses as were appropriate to the operations of a railroad. It is not pretended that there is any general statute of the state of Wisconsin which authorizes either this company or any other corporation to purchase and hold lands indefinitely, as an individual could do, without regard to the uses to be made of such real estate. The charter of the company, approved April 12, 1866 (chapter 540), authorizes it to acquire real estate, namely, the fee-simple in lands, tenements, and easements, for their legitimate use for railroad purposes. It is thus authorized to take lands 100 feet in width for right of way, and also such as is needed for depot buildings, stopping-stages, station-houses, freight-houses, warehouses, engine-houses, machine-shops, factories, and for purposes connected with the use and management of the railroad. This enumeration of the purposes for which the corporation could acquire title to real estate must necessarily be held exclusive of all other purposes, and, as the court said at the time of making its interlocutory decree, "it was not authorized by its charter to take lands for speculative or farming purposes." It must be held, therefore, that there was no authority, under the laws of Wisconsin, for this corporation to receive an indefinite quantity of lands, whether by purchase or gift, to be converted into money or held for any other purpose than those mentioned in its act of incorporation.

To this view of the subject, counsel urges several objections. The first of these which we will notice is that the charter of the corporation is a private act, of which the court can not take judicial notice, and that, as it was not pleaded nor offered in evidence, nor otherwise brought to the attention of the court, it could not be the foundation of its judgment. To this there are two sufficient answers. The first of which is that, if the statute creating this corporation gave it no power to receive and hold lands in the manner we have mentioned, then it had no such power by virtue of any law of the state of Wisconsin; for a corporation, in order to be entitled to buy and sell, to receive and hold, the title to real estate, must have some statutory authority of the state in which such lands lie to enable it to do so, and the absence of such provision in the law of its incorporation does not create any general statute which authorizes any such right.

Another answer is that in the charter of the railroad company itself (Laws Wis. 1866, ch. 540, § 14) it is expressly enacted that "this act is hereby declared to be a public act, and shall take effect, and be in force, from and after its passage and publication." To this it is replied by counsel for appellant that the statute of Wisconsin can not make that a public law which, in its essential nature, is a private law. However this may be, we do not doubt the authority of the legislature of a state to enact that after the passage and publication of one of its statutes the courts of the state shall be bound to take judicial notice

of it, without its being pleaded or proven before them. This rule, thus prescribed for the government of the courts of the states, must be binding in proceedings in federal courts in the same state. * * *

It is next objected to the principle adopted by the court that the limitation upon the power of the corporation to receive land is one which concerns the state alone, and the title to such lands in a corporation can only be defeated by a proceeding, in the nature of a *quo warranto*, on behalf of the state. The case of Bank v. Matthews, 98 U. S. 621, is strenuously relied on to support this view. We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title, and to own such lands; and the question here is, not whether the courts would deprive it of such lands, if they had been conveyed to it, but whether they will aid it to violate the law, and obtain a title which it has no power to hold. We think the questions are very different ones, and that, while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void, on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent, in behalf of the company, in violating the law, and enabling the company to do that which the law forbids. * * *

We are urged to consider that if this decree is affirmed, dismissing the bill of the railroad company, the defendants will be left in the possession of property fraudulently acquired, of considerable value, for which they gave no consideration. The answer to this is that such question can not be raised by the plaintiff in this case, because, having no right to take the property, it is not injured by a decree of the court which fails to grant such right. The other questions must be between the defendants in this case and those from whom they took deeds of conveyance, or such other parties, public or private, as may show that they have an interest in the controversy. The decree of the circuit court is affirmed.

Note. See note, § 291.

Sec. 291. (c) Consequences of *ultra vires* purchase.

COMMONWEALTH v. NEW YORK, ETC., RAILROAD CO. ET AL.[1]

1890. IN THE SUPREME COURT OF PENNSYLVANIA. 132 Pa. St. Rep. 591–611.

PAXSON, C. J. This was an information in the nature of a *quo warranto*, filed by the attorney-general, the object of which was to

[1] Statement abridged; only that part of the opinion relating to the single point is given.

escheat to the commonwealth certain lands in Elk county, alleged to be held by or for the defendant railroad company. * * *

It was alleged, in the first place, by the commonwealth that the railroad company had violated section 5, article xvii of the constitution of this state. The said section is as follows:

"No incorporated company doing the business of a common carrier shall directly or indirectly prosecute or engage in mining or manufacturing articles for transportation over its works; nor shall such company, directly or indirectly, engage in any other business than that of common carriers, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal, not exceeding fifty miles in length."

It will be noticed that this clause in the constitution affixes no penalty for its violation. It is conceded that, for a violation of the organic law, a Pennsylvania corporation, or a foreign corporation having or exercising corporate franchises within this commonwealth, would forfeit such franchises. This, however, would not involve an escheat or confiscation of its property. * * *

[Holding also that under a statute prohibiting "the acquisition or holding by a corporation of any real estate, either directly or through a trustee or other device whatsoever," under penalty of escheat to the state, lands held by a mining company authorized to hold, were not subject to escheat because an unlicensed railroad company had purchased and owned the stock of the mining company.]

Note. **Acquisition of property by corporation:**

1. *Common law:* "To enable it to answer the purposes of its creation every corporation aggregate has incidentally, at common law, a right to take, hold and transmit in succession, property, real and personal, to an unlimited extent or amount." Angell and Ames Corporations, § 145; or "at common law corporations had the same capacity to take and hold lands as a private person prior to Magna Charta (1215). 1 Kyd Corp., 79, citing 19 Hen. VI, 44; see note 2, Elliott Corporations, § 160. See also Littleton's Reports, 49, 112, 114; Coke's Littleton, 2*a*, 44*a*, 300*b*; 10 Coke's Reports, 30*b*; Comyns' Digest, Franchise F., 11, 15, 16 and 17; First Parish in Sutton v. Cole, 3 Pick. (Mass.), 232, 239; 2 Kent's Comm., *281; 1 Kyd Corp., 76, 78, 108, 115; Lathrop v. Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481.

2. *Statutes of mortmain:* "But a corporation, sole or aggregate, ecclesiastical or lay, can not purchase or take lands and tenements, without license to take in mortmain." Comyns' Digest, Franchises F., 17. These were 9 Hen. III, c. 36 (Magna Charta); 7 Ed. I, c. 13; 13 Ed. 1, c. 32; 15 Rich. II, c. 5; 23 Hen. VIII, c. 10, and 9 Geo. II, c. 36. "By these, alienation to corporations without license in mortmain from the crown, and a license also from the lord, if any, from whom the land was held, was made a cause of forfeiture. * * Alienation in mortmain was not void, but voidable," and was good if the right of the crown or lord to re-enter was not exercised. The present law of England is contained in 51 and 52 Vict., c. 42, and 54 and 55 Vict., c. 73, and provides that "land shall not be assured to, or for the benefit of, or acquired by, or on behalf of, any corporation in mortmain otherwise than under the authority of a license from the crown, or of a statute for the time being in force; and if any land is so assured the land shall be forfeited to the crown, who may enter and hold the land." 9 Eng. Encyc. of Law, pp. 1-2. But these provisions do not apply to joint stock companies incorporated under the com-

panies acts of 1862–1890, nor to the trades-union acts of 1861. 1 Chitty's Stat. Charities, p. 61, note (*a*).

These statutes are not generally in force in the United States: 1839, Lathrop v. Com. Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481; 1846, Rivanna Nav. Co. v. Dawson's, 3 Gratt. (Va.) 19, 46 Am. Dec. 183; 1868, Page v. Heineberg, 40 Vt. 81, 94 Am. Dec. 378; 1886, Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 594; 1896, Fayette Land Co. v. L. & N. R. Co., 93 Va. 274. But they are partially so in Pennsylvania, 1821, Leazure v. Hillegas, 7 S. & R. (Pa.) 313, 320.

But many states have statutes forbidding religious and charitable corporations from holding more than a certain amount of land. See 1 Stimson's Statute Law, §§ 403, 1446, 2618.

3. But in the absence of statutory provisions, it is now generally held that *corporations have the right to purchase and hold such property, and such only*, both in kind and amount, as is necessary or convenient to carry out their legitimate corporate purposes.

Real property: 1825, First Parish in Sutton v. Cole, 20 Mass. (3 Pick.) 232; 1842, Bank of Mich. v. Niles, Walk. (Mich.) 99; 1844, Bank of Mich. v. Niles, 1 Doug. (Mich.) 401; 1847, Chautauqua Co. Bank v. Risley, 4 Denio (N. Y.) 480; 1846, Rivanna Nav. Co. v. Dawson's, 3 Gratt. (Va.) 19, 46 Am. Dec. 183; 1852, State (C. & A. R., etc., Co.) v. Commrs., 23 N. J. L. 510, 57 Am. Dec. 409; 1855, New Jersey R. & T. Co. v. Newark, 25 N. J. L. 315; 1868, Occum. Co. v. A. & W., etc., Co., 34 Conn. 529; 1870, Pac. R. v. Seeley, 45 Mo. 212, 100 Am. Dec. 369; 1872, Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243; 1873, Carroll v. City of E. St. Louis, 67 Ill. 568; 1885, Wilks v. Georgia P. R. Co., 79 Ala. 180; 1890, Case v. Kelly, 133 U. S. 21, *supra*, p. 1012; 1898, People v. Pullman Car Co., 175 Ill. 125, *supra*, p. 926; 1899, First M. E. Church v. Dixon, 178 Ill. 260.

In most of the states there are statutory provisions to the effect that corporations may own such real estate as shall be necessary, proper, convenient, or required. Others make no qualification, while still others say to any amount (Miss.), or as an individual (Iowa, Ky.). See 2 Stimson's Stat. Law, § 8204.

In Hayward v. Davidson, 41 Ind. 212 (1872), it is said: "With reference to their power to take and hold real estate, corporations may be classified as follows:

"*First.* Those whose charters or laws of creation forbid that they should acquire and hold real estate. Such corporations can not take and hold real estate; and a deed or devise to such corporation can pass no title. (But see *infra*, 4 (*e*).)

"*Second.* Those whose charters, or laws of creation, are silent as to whether they may or may not acquire and hold real estate. In such a case, if the objects for which the corporation is formed can not be accomplished without acquiring and holding real estate, the power so to do will be implied.

"*Third.* Those whose charters, or laws of creation, authorize them, in some cases, and for some purpose, to take and hold the title to real estate.

"*Fourth.* Those whose charters, or laws of creation, confer upon them a general power to acquire and hold real estate. Corporations thus empowered may take and hold real estate, as freely, and fully, and perfectly as natural persons may take and hold. As to this point see, 1895, Market St. R. v. Hellman, 109 Cal. 571."

Personal property, see note § 298, *infra*.

4. *Who can complain* of an *ultra vires* holding? (*a*) General rule, only the state can complain after the conveyance is executed: 1820, Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; 1825, Banks v. Poitiaux, 3 Rand. (Va.) 136 (purchaser from corporation); 1840, Runyan v. Coster, 14 Pet. (39 U. S.) 122 (ejectment by party tracing title through corporation); 1848, Barrow v. Turnpike Co., 9 Humph. (28 Tenn.) 304 (vendor to corporation); 1853, Riley v. Rochester, 9 N. Y. 64 (trespass upon land held by corporation); 1860, Natoma, etc., Co. v. Clarken, 14 Cal. 544 (suit for possession by corporation); 1860, Blunt v. Walker, 11 Wis. 334 (vendee of corp. gets good title); 1873,

Wash v. Barton, 24 Ohio St. 28 (vendee of corp. gets good title); 1874, Hough v. Cook Co. L., etc., Co., 73 Ill. 23, 24 Am. Rep. 230 (grantor to corporation can not complain); 1878, National Bank v. Matthews, 98 U. S. 621; 1880, Bank v. Whitney, 103 U. S. 99; 1881, Davis v. Old Colony R., 131 Mass. 258, 273; 1882, Jones v. Habersham, 107 U. S. 174; 1884, Alexander v. Tolleston Club, 110 Ill. 65; 1886, Mallett v. Simpson, 94 N. C. 37; 1889, Fritts v. Palmer, 132 U. S. 282 (vendee of corp. gets good title); 1889, Ragan v. McElroy, 98 Mo. 349 (grantor to corp. or his heirs can not complain); 1890, Long v. Georgia P. R. Co., 91 Ala. 519 (grantor to corporation can not complain); 1891, Holmes & G. Mfg. Co. v. H. & W. M. Co., 127 N. Y. 252; 1891, Gilbert v. Hole, 2 So. Dak. 164; 1892, Shelby v. Chicago, etc., R. Co., 143 Ill. 385 (grantor to corporation can not complain); 1892, Willoughby v. Chicago J., etc., Co., 50 N. J. Eq. 656; 1893, Connecticut, etc., Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656; 1894, Hanson v. Little Sisters, etc., 79 Md. 434, 32 L. R. A. 293; 1897, Farwell Co. v. Wolf, 96 Wis. 10, 65 Am. St. Rep. 22, 37 L. R. A. 138; 1897, Henderson v. Virden Coal Co., 78 Ill. App. 437; 1897, In re Stickneys' Will, 85 Md. 79, 60 Am. St. Rep. 308, 35 L. R. A. 693; 1897, Water, etc., Co. v. Tenney, 24 Colo. 344; 1897, Cooney v. Booth, 169 Ill. 370; 1898, South & N. A. R. Co. v. Highland Ave., etc., Co., 119 Ala. 105; 1898, State v. Elizabeth, 61 N. J. L. 411, 693; 39 Atl. Rep. 683, 906; 1898, Rogers v. Nashville, etc., R. Co., 91 Fed. Rep. 299 (stockholder can not complain after conveyance executed); 1899, Ray v. Foster, — Texas Civ. App. —, 53 S. W. Rep. 54; 1900, Chicago & A. R. Co. v. Keegan, 185 Ill. 70, 56 N. E. Rep. 1088.

(*b*) But if the contract or conveyance is not completed, an interested party may object, in any suit by the corporation to perfect its title: 1870, Pacific R. Co. v. Seeley, 45 Mo. 212, 100 Am. Dec. 369; 1874, United States Trust Co. v. Lee, 73 Ill. 142; 1875, Coleman v. San Rafael T. C., 49 Cal. 517; 1883, Thweatt v. Bank, 81 Ky. 1; 1890, Case v. Kelly, 133 U. S. 21, *supra*, p. 1012; 1890, Mitchell v. Cline, 84 Cal. 409; 1890, Houston Elec. Co. v. Simon, 20 Ore. 60, 10 L. R. A. 251; 1898, South & N. R. Co. v. Highland Ave., etc., 119 Ala. 105.

The courts are in conflict as to whether a corporation can maintain ejectment for lands which it is *ultra vires* for it to hold.

That it may, see 1860, Natoma, etc., Co. v. Clarkin, 14 Cal. 544; 1874, Shewalter v. Pirner, 55 Mo. 218; 1886, Bone v. Del. & H. Canal Co., 18 W. N. C. (Pa.) 125, 5 Atl. Rep. 751; 1887, East N. L., etc., Church v. Froislie, 37 Minn. 447.

That it can not, see: 1827, Quaker Soc. v. Dickenson, 1 Dev. L. (N. C.) 189; 1873, Carroll v. E. S. & L., 67 Ill. 568; 1879, Leasure v. Un. M. Co., 91 Pa. St. 491; 1882, St. Peters' Cath. C. v. German, 104 Ill. 440.

But the purchaser from the corporation can not raise the question in a suit by the corporation vender for the specific performance by the purchaser: 1825, Banks v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. D. 706; 1856, Old Colony R. Co. v. Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394.

(*c*) A non-consenting shareholder who acts promptly may enjoin the consummation of the unexecuted *ultra vires* transaction: 1826, Gray v. Chaplin, 2 Russ. (3 Eng. Ch.) 126; 1850, Bagshaw v. Eastern, etc., Ry., 19 L. J. Ch. 410; 1860, Simpson v. Westminster, etc., Co., 8 H. L. Cas. 712; 1869, Central R. Co. v. Collins, 40 Ga. 582; 1871, Stewart v. Erie, etc., Co., 17 Minn. 372; 1877, Watson v. Harlem, etc., Co., 52 How. Pr. 348; 1882, Elkins v. Camden and A. R. Co., 36 N. J. Eq. 5; 1890, Carson v. Iowa City G. L. C., 80 Iowa 638; 1891, Shaw v. Campbell Tp. Co., 12 Ky. L. Rep. 799, 15 S. W. Rep. 245; 1895, Byrne v. Schuyler, 65 Conn. 336, 28 L. R. A. 304; 1895, Pollock v. Farmers' L. & T. Co., 157 U. S. 429.

Although it is sometimes said that if the *ultra vires* transaction is completely executed, the non-consenting shareholder can not complain (and especially if he fails to act promptly): 1879, Terry v. Eagle Lock Co., 47 Conn. 141, 161; 1892, Willoughby v. Chicago J., etc., Co., 50 N. J. Eq. 565; 1896, Jefferson Co. Sav. Bank v. Francis, 115 Ala. 317; 1898, Rogers v. Nashville, etc., R. Co., 91 Fed. Rep. 299 on 317; 1900, City of Spokane v. Amsterdamsch (Wash.), 60 Pac. Rep. 141. Yet the better statement is that equity

will relieve an injured stockholder who acts promptly, from the effects of an executed *ultra vires* transaction, even to the extent of setting it aside, if in the meantime no superior equity has intervened, nor the rights of innocent third parties attached: 1862, March v. Eastern R. Co., 43 N. H. 515; 1874, Hough v. Cook Co. L. Co., 73 Ill. 23, 24 Am. R. 230; 1887, Chicago v. Cameron, 120 Ill. 447, 458; 1890, Ashton v. Dashaway Assn., 84 Cal. 61; 1899, Harding v. Glucose Co., 182 Ill. 551, 55 N. E. Rep. 577.

(*d*) Unless there is a statute making the conveyance void, and providing for an escheat to the state, or unless the mortmain statutes are in force, the state's complaint is limited to a forfeiture of the charter of the corporation, and not a forfeiture of the property obtained by the *ultra vires* transaction: 1825, The Banks v. Poitiaux, 3 Rand. (Va.) 136, 142, 15 Am. Dec. 706, 707; 1873, Walsh v. Barton, 24 Ohio St. 28, 42; 1875, Edwards v. Fairbanks, etc., 27 La. Ann. 449, 450; 1878, National Bank v. Matthews, 98 U. S. 621, on 629; 1880, Bank v. Whitney, 103 U. S. 99; 1888, In re McGraw, 111 N. Y. 66, 96; 1890, Comw. v. N. Y., etc., R., 132 Pa. St. 591, *supra*; 1894, Lancaster v. A. I. Co., 140 N. Y. 576, 586; 1896, Fayette Land Co. v. Louisville, etc., Co., 93 Va. 274, 291, 24 S. E. Rep. 1016.

It is often said, however (*obiter dictum*, we think), that the *conveyance* is "valid until assailed by the state in a direct proceeding for that purpose" (1886, Mallet v. Simpson, 94 N. C. 37; 1899, Burden v. Burden, 159 N. Y. 287, 304), or until office found (1821, Leazure v. Hillegas, 7 S. & R. 313; Runyan v. Coster, 14 Pet. (U. S.) 122, 131; 1887, Russell v. Texas, etc., R. Co., 68 Tex. 646; 1890, Long v. Georgia Pac. R., 91 Ala. 519, 522), or the corporation may hold subject to the state's right of escheat (1887, Hickory F. O. Co. v. Buffalo, etc., Co., 32 Fed. Rep. 22).

(*e*) A prohibited purchase is sometimes said to be void, and no title passes: 1844, Bank v. Niles, 1 Doug. (Mich.) 401; 1873, Carroll v. E., St. L., etc., Co., 67 Ill. 568; 1882, St. Peter's Roman Cath. Cong. v. Germain, 104 Ill. 440; 1898, State v. Hudson Land Co., 18 Wash. 664, 52 Pac. 574; yet there seems to be no good reason why the rule above, that only the state could complain as for a forfeiture of the charter, should not apply: 1875, Edwards v. Fairbanks, 27 La. Ann. 449, 450; 1890, Carlow v. Aultman, 28 Neb. 672, 44 N. W. Rep. 873; 1891, Fisk v. Patten, 7 Utah 399; 1892, St. Louis R. v. Terre H. R., 145 U. S. 393.

See particularly upon this topic, article in 8 Harv. L. R. 15 (1894–5) by A. M. Alger, upon consequences of illegal or *ultra vires* acquisition of real estate by a corporation.

Minnesota (2 G. S. 769, 770, § 41*d*), Pennsylvania (after five years, G. L. 1894, §§ 42–53, *Escheats*), Wisconsin (Stat. 1889, ch. 96, §§ 2200*a*), Illinois (after five years, R. S. 1895, ch. 32, § 5, 5), Texas (R. S. 1895, art. 749*d*,*e*), North Carolina (after thirty years, Code 1883, § 690) and perhaps others, provide for forfeitures or escheats to the state, but Texas and Illinois provide for the sale of land so escheated, and payment of the proceeds to the shareholders. Michigan Const., Art. XV, § 12, provides "No corporation shall hold any real estate, for a longer period than ten years, except such as shall be actually occupied by such corporation in the exercise of its franchise."

Sec. 292. Same.

(*d*) Estates that may be acquired.

(1) Fee simple. See Wilson v. Leary, 120 N. C. 90, *supra*, p. 903.

Note. See note, *supra*, p. 911.

1. The common law rule was that land reverted to the grantor upon dissolution of the corporation: 1848, Bingham v. Weiderwax, 1 N. Y. 509; 1875, Mercer Acad. v. Rusk, 8 W. Va. 373. See, *supra*, p. 891.

2. But at common law the corporation took a fee for purposes of alienation, though only an estate for the life of the corporation for purposes of enjoyment: 1848, People v. Mauran, 5 Denio 389; 1852, Nicoll v. New York, etc., R. Co., 12 Barb. 460; and this was true, though the corporation had only a limited duration; 1854, Nicoll v. N. Y., etc., R. Co., 12 N. Y. 121.

3. Finally it has been settled that a business corporation, though of limited duration, takes a fee for enjoyment, or rather for disposition as a part of the assets at dissolution, without reverter: 1872, Heath v. Barmore, 50 N. Y. 302; 1888, People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684, and note, *infra*, p. 1426; but the common law rule yet obtains as to mutual issurance and charitable or non-stock corporations. See, *supra*, §§ 256, 257, and note.

4. A grant of a freehold without words of inheritance, perpetuity or succession will pass a fee: 1836, Union Canal Co. v. Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212; 1839, Trustees of Caledonia, etc., v. Burt, 11 Vt. 632; 1861, Cong. Soc. v. Stark, 34 Vt. 243; 1864, Erie R. Co. v. State, 31 N. J. L. 531, 86 Am. Dec. 226; 1867, Wilcox v. Wheeler, 47 N. H. 488; 1868, Page v. Heineberg, 40 Vt. 81, 94 Am. Dec. 378; 1885, Asheville Div. v. Aston, 92 N. C. 578.

Sec. 293. Same.

(2) Estates in common and joint tenancy.

DE WITT ET AL. v. THE CITY OF SAN FRANCISCO.[1]

1852. IN THE SUPREME COURT OF CALIFORNIA. 2 California Reports 289–304.

[Appeal from district court denying a motion to dissolve an injunction restraining defendants from completing a contemplated purchase of certain land by the city of San Francisco and the county of San Francisco, for the use of both corporations.]

WELLS, Justice. * * * The next objection advanced, and which is said to be fatal to the power claimed by the appellants, is, that the corporation of the county of San Francisco and the corporation of the city of San Francisco can not hold lands as joint tenants, or tenants in common. It is not pretended that these said corporations can hold as joint tenants. Joint tenancy is a technical feudal estate, founded, like the laws of *primogeniture*, on the principle of the aggregation of landed estates in the hands of a few, and opposed to their division among many persons. For the creation of a joint tenancy, four unities are required, namely, unity of *interest*, unity of *title*, unity of *time*, unity of *possession*. 1 Cruise's Digest (by Greenleaf), 355, § 11; 2 Crabb's Real Prop., § 2303. But the distinguishing incident is a right of survivorship. 1 Cruise, 359, § 27; 2 Crabb's Real Prop., § 2306.

Two corporations can not hold as *joint tenants*, because two of the essential unities are wanting, namely, of the same capacity and title. 1 Cruise, 362, § 39. Nor can they hold as joint tenants for another reason: Being each perpetual there can be no survivorship between them; and this, as we have just seen, is the distinguishing incident of

[1] Only that part of opinion of Wells, J., relating to estates in common and joint tenancy is given.

this estate. Nor can a corporation hold lands as joint tenant with a natural person, for there is no reciprocity of survivorship between them. Angell and Ames Corporations, 150; 1 Kyd Corp., 72.

But a tenancy in common requires for its existence but one unity, namely, that of *possession*. 1 Cruise, 390, § 2; 2 Crabb's Real Prop., 627, § 2316. If, therefore, a grant should be made to two persons, which in its terms should imply a joint tenancy, but such an estate could not vest, for the reason that some of the requisite *unities* were wanting, the result would be the creation of a *tenancy* in *common*. The rule of law is, that a grant shall not fail if there is a capacity to take under it, and if the higher estate can not vest, the next estate which is possible shall vest. This is an equitable rule which is made to apply to all grants and devises. The appellants in this case propose to purchase the undivided one-half of the property known as the Jenny Lind and Parker House, and the land upon which the same stands, to be used as tenants in common with the city of San Francisco. But it is said that two incorporations can not hold lands as tenants in common; and the case of the New York and Sharon Canal Company v. The Fulton Bank, 7 Wendell 412, is cited in the opinion delivered by the district judge, and is the only authority produced to sustain this proposition. From an examination of the case, we think that it maintains the opposite doctrine.

The eminent counsel on the part of the plaintiff, *arguendo*, asserted that two or more corporations may unite in the purchase of property real or personal; they may take a deed of real estate for the establishment of their houses of business. Insurance companies may own pilot boats in common, and canal companies may be tenants in common of locks, canal boats and other property subserving their mutual interest; 1 Kyd, 108; 2 Kent's Com., 315; and the counsel for the defendant said, "It is not denied that distinct corporations may own property in common," while Savage, the chief justice, in delivering the opinion of the court, said, "These two companies had certain moneys in the hands of their officer; they were both interested in those moneys, and probably in equal degree. Not being partners, they were tenants in common; in that character they made the deposit of the money, and in that character I can see no objection to their sustaining an action for it; thus the court decides that they may be tenants in common in a chattel, but does not decide that they may be so in lands, that question not being before the court," and yet this case is cited to maintain the doctrine that two corporations can not hold real estate as tenants in common.

The books and cases do not afford any instance in which this right of holding lands as tenants in common, either with each other or with natural persons, is denied to corporations. Not one of the reasons which work a want of capacity to hold as *joint tenants* would prevent their holding as *tenants in common*, for this estate requires but one unity, that of possession.

So far from corporations not being able to hold lands in common, the original condition at common law of the largest class of corpora-

tions known to the law, was that of holding all their lands in *common* with each other; and they were never separated until the original position produced inconveniences. 1 Kyd Corporations, 108. * * *

Order denying motion reversed.

Note. See to same effect, as to joint tenancy: 1851, Telfair v. Howe, 3 Rich. Eq. (S. C.) 235, 55 Am. D. 637. Also to same effect, as to tenancy in common: 1883, Estell v. University of the South, 80 Tenn. (12 Lea) 476; 1885, Hackett v. Multnomah R. Co., 12 Ore. 124, 53 Am. Rep. 327; 1894, Calvert v. Idaho Stage Co., 25 Ore. 412; 1895, Bates v. Coronado Beach Co., 109 Cal. 160.

Sec. 294. (B) By devise.

(*a*) History and general doctrines.

McCARTEE v. ORPHAN ASYLUM SOCIETY OF NEW YORK.[1]

1827. IN THE COURT FOR THE CORRECTION OF ERRORS OF NEW YORK. 9 Cowen (N. Y.) Rep. 437–525, 18 Am. Dec. 516.

[J., being seized of real estate, devised that if, at his death, he should have a child living, the rents and profits should be received by his executors, and applied for the support, etc., of the child, the surplus to be invested in stock to accumulate and be paid over to the child at twenty-one, or marriage. He gave all the residue of his real and personal estate, after payment of all legacies and other bequests, to a corporate company (the Orphan Asylum Society in the city of New York), the bequest to take effect immediately after debts and legacies paid, if he should leave no child; or, if he should leave a child, then, upon the child's death, inter-marriage or attaining twenty-one. The will then gave to his executors all his real estate, subject to the trusts aforesaid, and declared his will to be that when such child should attain twenty-one, or marry, his real estate should be sold by his executors, and one-half of the proceeds paid to the child, if it should attain twenty-one, or marry. The testator died, seized, and a posthumous child was born to him, which died before twenty-one, and unmarried.

The chancellor, JONES, upheld the devise to the orphan asylum, and appeal was taken.]

STEBBINS, SENATOR, dissenting. * * *

The questions presented by the case, as I view it, are *first*, whether the testator (Phillip Jacobs) devised the real estate in question to the corporation directly, or to his executors, subject to the trusts mentioned in the will; *second*, whether the devise to trustees for the use of the respondents, is a valid devise, under which they can take as *cestuis que use*; and *third*, whether the use is executed by the statute of uses, and if so, the effect.

[After holding contrary to the majority opinion that the devise was

[1] Statement abridged; Chancellor Jones' and Senators Woodworth's and Crary's opinions omitted, and only part of Senator Stebbins's opinion given.

not to the corporation directly, but to the executors in trust—a question of construction, proceeds:]

The next and more important question is, whether the corporation can take the use under this will, notwithstanding the provisions of our statute of wills. This statute enacts that any person having any estate of inheritance in any lands, tenements or hereditaments, may give or devise the same, or any rent or profit out of the same, to any person or persons (*except bodies politic and corporate*) by his last will and testament, or by any other act by him lawfully executed; and it is contended that if a devise to a corporation directly would be void, a devise of the use is also void.

Although in England, under the Saxons, lands were devisable by will at common law, yet at the conquest, and upon the introduction of the feudal system, the common law underwent a complete change in this respect; and an estate in fee-simple in lands was no longer devisable. It became inconsistent with the nature of that system, that a tenant should have an unlimited power to devise his lands; for the reason that he might devise to persons incapable of performing feudal services. The power of alienation by devise (except of a chattel interest) is in England, then, to be traced to the statutes of wills of the 32 Hen. VIII, ch. 1, and 34 Hen. VIII, ch. 5.

Our statute of wills is a transcript of these, with the additional enumeration of rents and profits. It is contended that the terms rents and profits, mentioned in the statute, are intended to describe a use, and that, as the lands can not, so the use also can not, be devised to a corporation under this statute.

I apprehend, however, there is a material difference between rents and profits, and that which has long been known under the denomination of a use.

Rents and profits are incorporeal hereditaments; but a use is not. A use is said to be neither *jus in re* nor *ad rem*, neither right, title nor interest in law, but a species of property unknown to the common law, and owing its existence to the equitable jurisdiction of chancery, resting upon confidence in the person and privity of estate, a thing collateral to the land, and only annexed to a particular estate in it, not to the mere possession; so that when the estate to which the use is annexed is destroyed, the use itself is destroyed, as by disseisin, or the entry of tenant by the curtesy or in dower. It was rather a hold upon the conscience of the feoffee to uses, than a lien upon, or interest in, the land; and the principle upon which it was founded was that the feoffee was bound in conscience to follow the direction of the feoffor. (See Cruis. Dig., tit. 11, ch. 2.) A thing so subtle, and cognizable only in courts of equity, which act upon the conscience, differs essentially from an incorporeal hereditament, which is of legal cognizance. Indeed, incorporeal hereditaments, such as rents, advowsons, etc., were the subject of conveyance to uses.

If, then, a use is not comprehended in the terms of the statute the

argument rests upon the ground that if a devise of land to the corporation would have been invalid, the devise of the use is equally so.

It might perhaps be conceded that if corporations were prohibited by statute from taking the fee by devise (which, by the by, is not the case), the law would not allow them to take the use. But the history of the English law furnishes at least a plausible argument against such a proposition.

Corporations were prohibited by several statutes of mortmain from holding lands; yet it was deemed necessary to enact the statute of 15 Rich. II, ch. 5, declaring uses subject to the statutes of mortmain. (Chudleigh's Case, 1 Rep. 120.)

But the statute of wills is an enabling statute, and not prohibitory. Before this statute individuals had no capacity to devise lands; but this enabled them to do so, except to corporations. In conferring the capacity to devise the legislature withheld the capacity to devise to a corporation, and for what reason?

Before the statute of wills, corporations were prohibited by the mortmain acts from taking or holding lands, or uses arising from them. The exception, therefore, in the statute of wills, could not have been introduced for the purpose of prohibiting corporations from taking by devise, for they were already prohibited from taking in any mode; but was to guard against enabling them to take by devise. Without the exception in the statute of wills in England they would have been enabled to take by devise, when the mortmain acts would have prohibited their taking in any other way.

The history of the statute, I think, fortifies this view of it. In the first statute of wills (32 Hen. VIII, ch. 1) corporations were not excepted, and were, therefore, enabled to take by devise in common with other persons, contrary to the policy of the statutes of mortmain; but two years afterwards the parliament, finding the mortmain acts so far repealed by the statute of wills, passed a new statute (34 Hen. VIII, ch, 5), not prohibiting corporations in terms from taking under the statute of wills, but entitled, "an act for the explanation of the statute of wills," in which they re-enact the provisions of the first statute of wills, and introduce the exception as to corporations; not, therefore, expressly prohibiting corporations from taking, but qualifying the capacity to devise. The intention seems to have been to rely upon the mortmain laws, to keep property from corporations and to qualify the statute of wills so as not to interfere with those prohibitory acts.

The distinction is a wide one between an incapacity to devise and a prohibition against taking; for, although there may be an incapacity to devise directly to a corporation, yet such incapacity will not prevent the corporation from taking by grant from the devisee in trust, if there is no prohibition against their taking. So, too, there may be an incapacity to devise *lands* to a corporation, and yet the corporation may take a use. But in either case, if prohibited from taking, the law would not probably allow that to be indirectly done which was directly prohibited.

If, then, there is no other reason arising from the statute of wills

why corporations may not take land by devise, except the want of capacity in the devisor to convey, there would seem to be no objection in this case against the corporation's taking as *cestui que use;* for a devisor has capacity to devise a use; and this corporation is not prohibited from taking and holding either land itself or a use. All the English mortmain acts, including the 15th Rich. 2, are repealed by our statutes.

And if corporations can not take by devise, merely for want of capacity to take in that particular way, the cases of a conveyance from a wife to her husband through the intervention of a trustee, and of a tenant in tail to a purchaser by means of a common recovery, seem to be conclusive to show that an indirect mode of conveyance is no fraud upon the law when resorted to only to remedy a want of capacity to convey directly.

If it is shown that the exception in the statute of wills is to be regarded not as a prohibition against the taking of lands by a corporation, but as a qualification of the capacity to devise, created by that statute, the opinion pronounced in the court of chancery in this cause contains another view of the subject which appears to my mind perfectly conclusive. It is, that before the statute of wills, when persons were not capacitated to take lands by devise, they might nevertheless take the use in that way; and, therefore, that since the statute of wills, although *corporations* can not take lands by devise, yet they may take the use, there being no prohibition.

Corporations, since the statute of wills, stand in the same situation as to taking lands by devise as all natural persons stood in before that statute. If, therefore, a use was devisable before the statute, a corporation may take a use by devise since the statute, especially if it be such as is not executed by the statute of uses.

It is said by Cruise that uses were devisable, though lands were not; and persons, by that means, acquired a disposition of property for the benefit of their families, which they had not otherwise. They were the invention of ecclesiastics to evade the statutes of mortmain. And after the 15th Rich. 2, ch. 5, which subjected them to the statutes of mortmain, the practice of conveying to uses was continued as the most effectual mode of evading the hardships of the feudal tenures, and of securing estates from forfeiture for treason. They became general, and were applied to purposes inconsistent with the policy of the government. * * *

Finally, by the statute of uses, 27 Hen. 8, ch. 10, after reciting all these mischiefs, the legislature declared that possession shall be annexed to the use.

The object of the crown was to reassert its rights of wardship and other feudal profits out of the lands of the nobility; and the intention of parliament was to abolish uses by changing them into legal estates, and subjecting them to the rules of common law tenures. * * *

Before the statute of uses we have seen they were devisable to natural persons, although there was then no statute of wills nor any common law capacity to devise. The operation of the statute upon

uses is said to have been by turning the use into land, to render it not devisable in the same manner as the land itself. (2 Black. Com., 375.) * * *

But all the reasoning arising from the statute of uses is answered, if the use in this case is such as could not be executed by that statute; for clearly, in such case, it could have no operation to destroy the capacity to devise.

The question then arises, whether the use in this case is within the statute; and the examination of it necessarily casts us back upon the will, to seek for the intention of the testator. He devises the estate to trustees, in trust for the Orphan Asylum Society, to be applied to the charitable purposes for which the association was established. His object was not to benefit the society; but through it, to apply the estate to the charitable purposes for which the society was organized. The society itself is a trustee; and has a trust to perform, which a court of equity would undoubtedly enforce. It is a devise to trustees for the use of the society, as trustees for certain charitable purposes. * * *

If it is granted, then, that the corporation itself had a trust to execute under this will, it is a case not within the statute of uses; for that statute can only execute the first use, which, in this case, would vest the estate in the corporation, unincumbered by any trust for charitable purposes, and contrary to the plain intention of the testator. A trust is a use not executed by the statute; and the author of the Touchstone remarks (p. 507, n. 1) that "one of the modes of creating a trust is said to be where lands are limited to the use of A. in trust to permit B. to receive the rents and profits; for the statute can only execute the first use."

The conclusions which follow my view of the case are, that the devise of the real estate in question was not to the corporation directly, but to the executors for the use of the corporation upon the contingency which has happened, to be appropriated to certain charitable purposes:

That under the statute of wills there is a mere *incapacity* in corporations to take lands by devise, and not a prohibition against their taking:

That a use was devisable at common law before the statute of wills; and therefore that this corporation may take a use by devise, not being prohibited by statute from taking either a use or the land itself:

That the use in this case is not such as could be executed by the statute of uses; or if it is, that the operation of the statute would not invalidate the devise, but vest the estate in the corporation.

If these propositions are established, it follows that the respondents are entitled to the estate in question, and that the decree of the court of chancery is, at least, substantially correct. * * *

Reversed.

Note. See following cases.

Sec. 295. Same.

(*b*) Restrictions in charters and restrictions in statutes of wills.

WHITE v. HOWARD.[1]

1871. IN THE SUPREME COURT OF ERRORS OF CONNECTICUT. 38 Conn. Rep. 342–368.

[Bill in equity by the executors of William Bostwick, praying for advice in the construction of the will. Bostwick devised certain property to trustees in fee-simple for the benefit of his daughter during life, and in case of her decease without issue or husband surviving her, the trust fund was to be divided equally among six benevolent societies, one of which was the American Tract Society, incorporated in New York, with power to hold, purchase and convey real and personal property, provided its net income therefrom should not exceed $10,000 annually. The New York statute of wills provided that "no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter, or by statute, to take by devise." It was contended by the heirs at law that this prevented the society from taking a devise of land in Connecticut, and that the residuary clause failed to this extent. Case was reserved by the superior court for advice on facts found by a committee.]

FOSTER, J. * * * It is asserted that the American Tract Society can take neither real nor personal property under this will. That it can not take real, because its charter of incorporation, granted by the state of New York, does not confer the power of taking by devise; that it can not take personal, because the charter provides that the net income of said society arising from real and personal estate shall not exceed the sum of $10,000 annually. This limit, it is claimed, has been reached and exceeded, and so the capacity of the society to take property is exhausted. This society was incorporated by a special act of the legislature of the state of New York, passed May 26, 1841. The third section of its charter provides that the corporation shall possess the general powers, and be subject to the provisions contained in title third of chapter eighteen of the first part of the revised statutes, so far as the same are applicable, and have not been repealed. The title and chapter referred to enumerate the powers of corporations, and the clause which bears directly upon this subject reads thus: "To hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter." This charter was amended by the legislature of New York on the 31st of March, 1866; but as this was after the death both of the testator and of his daughter, that amendment need not be particularly considered, as it can not materially affect the question involved. Now it is manifest that this corporation has express power by its charter to hold, purchase and convey

[1] Statement abridged. Arguments and part of opinion omitted.

real and personal estate, for specified purposes and to a limited amount. There is no express power to take by devise, nor is the power so to take expressly prohibited.

We suppose there could be no doubt that this corporation could take by devise in New York, if the statute of wills of that state empowered corporations generally to take in that manner. The English statute of wills, passed in the time of Henry VIII, authorized every person having a sole estate in fee-simple of any manors, etc., "to give, dispose, will or devise, to any person or persons, except to bodies politic and corporate, by his last will and testament in writing, or otherwise by any acts lawfully executed in his lifetime, all his manors, etc., at his own will and pleasure, any law, statute, custom, or other thing theretofore had, made, or used to the contrary notwithstanding." Thus corporations, by express exception in these statutes, were not enabled to take lands directly by devise in England, and the statute of wills of the state of New York makes the same exception. By that statute it is enacted, that all persons, except idiots, persons of unsound mind, married women, and infants, may devise their real estate by a last will and testament duly executed, etc. "Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise." 3 N. Y. Rev. Stat., 138 (5th ed.). This corporation, therefore, prior to the recent amendment of its charter, could not take by devise in New York, and such is the decision of their supreme court and court of appeals in this very case. And so it is earnestly contended that it can not take by devise in Connecticut. We yield readily to the doctrine laid down in this connection in regard to corporations; indeed it is too thoroughly established to be doubted or questioned. That doctrine perhaps is nowhere better stated than in the case of Head v. Providence Ins. Co., 2 Cranch 127, by the then illustrious head of the supreme court of the United States, the late Chief Justice Marshall. "It [a corporation] may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes." Now this corporation stands at the bar of this court claiming the right to take lands within our territory by devise. It is clothed with such powers as have been conferred by its charter. Those, a portion of them, as we have seen, are to hold, purchase, and convey real estate. It is not expressly authorized to take by devise, nor is it prohibited from so taking. Can it then take by devise? Not in New York, as we have seen. Therefore not in Connecticut, say the counsel for the heirs at law, for being a New York corporation, and by the law of that state devoid of power to take by devise, no argument is needed to show its inability to take by devise in Connecticut.

This conclusion is too hastily drawn. If the inability to take by devise arose out of a prohibitory clause in the charter, the conclusion would be legal and logical. But the inability does not so arise.

There is no prohibition in the charter; the inability is created by the New York statute of wills, expressly excepting corporations from taking by devise. Now this corporation brings with it from New York its charter, but it does not bring with it the New York statute of wills and can not bring it to be recognized as law within this jurisdiction. There is an obvious distinction between an incapacity to take created by the statute of a state, which is local, and a prohibitory clause in the charter, which everywhere cleaves to the corporation. The reasoning is fallacious, not recognizing this distinction. There being no prohibition in the charter, and the power to hold and convey real estate being expressly given, we must look to our own statutes and laws, and not to those of New York, to determine whether or not this corporation can take by devise in Connecticut.

The state of New York has partially adopted the policy of England in regard to devises to corporations, though the English statutes, usually called the statutes of mortmain, have not been re-enacted in that state. Those statutes began with *Magna Charta*, in 9 Henry III, and embrace a succession of acts down to and including 9 George II. They were intended to check the ecclesiastics of the Roman church from absorbing in perpetuity, in dead clutch, all the lands of the kingdom, and so withdrawing them from public and feudal charges. Shelford Mortmain, 2. By the statute of 43 Eliz., ch. 4, known as the statute of charitable uses, lands may be devised to a corporation for a charitable use, and the court of chancery will support and enforce such devises.

Whether a court of equity has power to execute and enforce such trusts, as charities, independent of any statute, is a question which has been much discussed, and very high authorities can be quoted both in favor and against the exercise of such a power. We think the latter and better opinion to be in favor of an original and necessary jurisdiction in courts of equity as to devises in trust for charitable purposes, when the general object is sufficiently certain and not contrary to any positive rule of law. It is unnecessary, however, to decide this question, for in this state we have no statutes of mortmain; no exception in our statute of wills prohibiting corporations from taking by devise; aliens, resident in this state or in any of the United States, may purchase, hold, inherit, or transmit real estate in as full and ample a manner as native born citizens; their wives are entitled to dower; their children and other lineal descendants may inherit; and we have besides a statute, passed in our colonial days in 1702, in effect re-enacting the statute of 43 Elizabeth, and containing indeed more liberal and comprehensive provisions to sustain devises of this description than are contained in the 43 Elizabeth. That act provides that "all lands, tenements, or other estates that have been or shall be given or granted by the general assembly, or any town or particular person, for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for any other public and charitable use, shall forever remain to the uses to which

they have been or shall be given or granted, according to the true intent and meaning of the grantor, and to no other use whatever."

We therefore entertain no doubt that the American Tract Society can take by devise in this state. As to the other objection, that having an income greater in amount than is allowed by its charter it has exhausted its power to take, it suffices to say that no such fact is found by the very competent committee whose report is on the record. * * *

Superior court advised accordingly.

Note. A statute of wills operates only within the state enacting it, and upon land lying therein, and hence does not prevent devises to corporations having power to take, of land lying in foreign states: 1855, Thompson v. Swoope, 24 Pa. St. 474; 1864, American Bible Society v. Marshall, 15 Ohio St. 537; 1871, Chamberlain v. Chamberlain, 43 N. Y. 424; 1871, White v. Howard, 38 Conn. 342, *supra;* 1876, United States v. Fox, 94 U. S. 315; 1880, Crum v. Bliss, 47 Conn. 592.

A charter provision, or a provision in the general corporation law (but not one in the general law of persons or property), limiting the corporation's right to take and hold property, cleaves to it everywhere, both at home and abroad, and makes a taking of such property in violation thereof *ultra vires:* 1859, Boyce v. St. Louis, 29 Barb. 650; 1871, White v. Howard, 38 Conn. 342, *supra;* 1874, Starkweather v. Am. Bib. Soc., 72 Ill. 50.

But a statute of wills may be so worded as to be considered a part of the general corporation law of the state, and therefore amount to a charter limitation: 1874, Starkweather v. Am. Bib. Soc., 72 Ill. 50, 22 Am. Rep. 133; 1874, U. S. Trust Co. v. Lee, 73 Ill. 142, 24 Am. Rep. 236.

A state statute or policy clearly meant to exclude corporations from holding real estate within the state would prevent a foreign corporation from so holding. 1893, In re Prime's Estate, 136 N. Y. 347, 362; 1897, Amherst College v. Rich, 151 N. Y. 282.

So, too, a corporation with power to take land can not take land left to it by a foreign testator when the devise is not in accordance with the law where the land lies. 1871, White v. Howard, 46 N. Y. 144.

The capacity to *bequeath personal* property generally depends upon the law of the domicile of the owner, rather than the law of the *situs* of the property, and with that modification, the rules above as to the corporation's right to take and hold a bequest would apply. Jarman Wills (6th ed.), p. 1, *et seq.* 1871, Chamberlain v. Chamberlain, 43 N. Y. 424; 1880, Crum v. Bliss, 47 Conn. 592; 1892, Cross v. U. S. Trust Co., 131 N. Y. 330, 27 Am. St. Rep. 597; 1893, Dammert v. Osborn, 140 N. Y. 30.

Sec. 296. Same.

(*c*) Who may object when limit is exceeded.

FARRINGTON ET AL. v. PUTNAM ET AL.[1]

1897. IN THE SUPREME JUDICIAL COURT OF MAINE. 90 Maine Rep. 405–447, 37 Atl. Rep. 652.

[Bill in equity brought by the heirs at law of Ira P. Farrington against his executors and the Maine Eye and Ear Infirmary to enjoin the executors from paying over and the infirmary from receiving gifts

[1] Statement abridged. Only part of opinion given.

of real and personal property as residuary legatee. The bill alleged that the law under which the infirmary was incorporated provided: "Such corporations may take and hold, by purchase, gift, devise or bequest, personal or real estate, in all not exceeding $100,000, owned at any one time;" also that the infirmary had at the death of the testator property to the full amount of $100,000; that any additional amount would be in excess of the limit, violate the statutes, be invalid and void, and revert to the heirs. General demurrers were filed and sustained by the court below, and final decree rendered in favor of respondents; exceptions were taken and appeal made to the supreme court.]

PETERS, C. J. * * * The question on the first branch of the case, therefore, is whether these devises and bequests are absolutely void as the complainants contend, or whether they are merely voidable according to the view of the question taken by the respondents. After very much examination of the authorities pro and con, and careful consideration of the principles which affect the respective positions of the parties, we feel forced to the conclusion that the position advocated by the complainants ought not to be sustained. We feel very much impressed with the theory, stated in many of the cases, that a charter is a contract between the state and the corporation; and that for any misuse or abuse of its privileges or powers the corporation is amenable to the state only, no individual having anything to do with the question. As applicable to the present case, the principle is that, if the infirmary, by accepting these bequests and devises, increases its property ever so much in excess of the amount in value which the statute allows it to possess, it would be a transgression of the law which the state can prosecute or not as it pleases, and the heirs of the testator have no interest therein. As long as the state does not interfere for the violation, it waives it and permits the infirmary to retain the property.

The general statute under which this infirmary was organized is not expressly prohibitory, but rather regulative and directory. No penalties are attached and none intended more than a possible forfeiture of the excessive property received, or of the charter, or of one or both. This interpretation of the statute can not by any possibility be harmful to the community, as the state can make it as stringent as it pleases at any time. But thus far the state has had no motive either to amend the statute or to enforce forfeitures for violation of its provisions. * *

It will be noticed that most of the authorities, on which the complainants rely, concede that the rule which we would apply to devises is at all events applicable to gifts by deed, the argument being that in such a case as this a deed would be valid and a devise void. It seems inconsistent that such potential consequences should attach to the mere form of transmitting the property. We do not appreciate the justice of saying that a deed of property delivered by a donor on the day of his death to a corporation would be good, and a devise of the same property made on the same day would be bad. But the argument by the complainants is that, in the one case, the transaction is

executed and, in the other case, that it can not be considered as executed without a resort to the forms and assistance of the courts. We think the whole thing involves a distinction without a difference, a formal but not substantial distinction. Each mode of transfer needs the protection and aid of the law to render it operative. In the first place, the will must be probated, it is said. But on that question no inquiry can be instituted to see if there be any impropriety in any particular devise or bequest. The residuary bequest in this will is fair and proper on its face, and that is all that is required. The act of probating the will is the probating of all its parts. A devise of real estate vests such estate at once in the devisee, the title of such devisee being liable to be defeated if the estate be necessary for the payment of debts or the expenses of administration. * * *

The foregoing reasoning only serves to illustrate the unsubstantial foundation upon which it is endeavored to raise a technical excuse for pronouncing a deed voidable and a devise absolutely void.

The true and conclusive answer, however, to this indefensible position of the complainants is, that it is utter assumption on their part in declaring a devise like this to be void when it is voidable merely, and can be rendered void in no way other than by the act of the government itself. No wrongful act by a corporation renders its charter void or creates any forfeiture without proceeding by which such forfeiture shall be established. A cause for forfeiture is not itself forfeiture. The same section which prescribes the amount of property which this corporation may hold, also declares that it may use and dispose of the same for the purposes for which it was organized. Suppose the corporation wrongfully uses or disposes of its property, could any party but the state intervene to punish the corporation for such transgression?

Now what is there illegal, let us ask, in this court or in the probate court below acting in the furtherance of bequests that are simply voidable and consequently valid until they have been declared to be otherwise upon the intervention of the state? If the state has the exclusive privilege, as it has, of rendering the voidable bequest void, what is there wrongful in our regarding it as sound and sufficient while the question of its validity is not acted upon by the state, or the error is waived or permitted by the state? What right has the judicial branch of the government to dictate what the state should do against its will or its policy, and decide a question for the state which the state can better decide for itself? What right has the court to deprive the state of all opportunity to determine whether it will thus severely punish this corporation for the mistake of the testator or will waive or overlook it? Certainly the state should not be prevented from making such election. If courts at the instigation of heirs can refuse to act upon voidable bequests as valid until avoided by the state, then, as a matter of course, the state can practically never have any opportunity to exercise its discretion in such a case any more than as if such right never existed, and the court would be assuming the prerogative of really acting in opposition to the state. The court could not exercise

any broad discretion in the solution of the question, while the state could. It certainly is an excellent policy to refer such questions to the discretionary power of the state, which can determine them, according to the circumstahce, upon the great principles of justice and generosity, and in conformity with the wishes and welfare of the whole community. * * *

There is but little authority, either English or American, favoring the conclusion that bequests or devises not strictly authorized by law are to be considered void instead of voidable. This will be seen in the examination of cases in this country to be made in the progress of this discussion. But it may also be worth the while to notice what application has been made of the principle by the English courts in view of the statutes of mortmain as existing in that country. In Grant on Corporations, a reputable English work on the subject, at page 101, the author states the doctrine as follows:

"It is clear, however, that if a corporation have exhausted their license to hold in mortmain, the fact does not make a devise or conveyance to them void. The only result is, that they may take, though, unless they can obtain an extension by the crown of their license, they can not hold the lands, unless the mesne lords and the crown choose to sleep upon their respective titles." * * * *

The cases in this country, most of them which favor the principle that an estate in the condition this is goes to the heirs of a testator rather than to the devisee, seem to inculcate the idea that the heirs may waive their right so as to allow the estate to pass to the devisee. And we have not the slightest doubt that, but for the interference of the heirs in the present case by this bill in equity, no obstacle would have stood in the way of a complete administration of the testator's estate according to his clearly expressed intention. No court would have had the least hesitation in following the ordinary course of procedure, or would have entertained the thought *suo moto*, of instituting inquiry to see whether the bequests in question were valid or not. But why should a bequest, invalid when not consented to by the heirs, become unobjectionable when such consent is obtained? If illegal as coming from the testator, why not just as illegal when coming from the testator and his heirs? Such considerations as these go to show how illogical and untenable a position it is to denominate the devises and bequests in the present will absolutely void. * * *

[After citing and reviewing numerous authorities upon both sides, and particularly Trustees of Davidson College v. Chamber's Executors, 3 Jones Eq. (N. C.) 253; Heirs v. Louisville Orphan's Home, 3 Bush (Ky.) 365; Chamberlain v. Chamberlain, 43 N. Y. 424; Matter of McGraw, 111 N. Y. 66; Wood v. Hammond, 16 R. I. 98; and De Camp v. Dobbins, 31 N. J. Eq. 671, specially relied upon by counsel for plaintiff, proceeds:]

Upon closing his discussion of the direct cases cited on his opening brief, the learned counsel for the complainants says: "But if the decisions of New York are claimed to rest upon the provisions of special New York statutes, what has the counsel to say as to all the

other cases cited by the plaintiffs from North Carolina, from Kentucky, from New Jersey and from Rhode Island?" We have substantially, according to our view, answered the question ourselves by saying that the force of the opinion of the two judges in the North Carolina case is much lessened by the able minority opinion of the chief justice in the case, and by the fact that the majority opinion yields the question as to devises of real estate; that the Kentucky case is a better authority for the respondents than for the complainants; that it is not sure that the complainants have any support in the New Jersey case outside of that contributed by the chief justice in his opinion; and that the Rhode Island case evidently follows the decisions in New York. How little authority then have the complainants to rely on outside of the McGraw case in New York? We have no reason to doubt the correctness of the result of the decision in that case as based upon exceptional statutes in that state not existing elsewhere. * * *

From the foregoing propositions it is clearly deducible that bequests like the present are voidable only, and may be avoided by the state alone, and are in no sense to be regarded as void; that a policy arose as to what better be done in the circumstances of each particular case, and that that policy belongs to the state and not to the court and is an executive and not a judicial right, for the court would decide the question in the case for all cases and all time, while the state may decide the question differently at different times according to its discretion and the public good. This right the state has never surrendered and the court can not take it from the state. But it would surely deprive the state of its privilege if the court fails to act upon these bequests as valid bequests until, in proper and independent proceedings, such bequests are declared to be void.

This conclusion renders it unnecessary and inexpedient to discuss the further contention of the respondents that the bequests are valid in equity if not at law, upon the maxim that no legal trust of a charitable nature shall fail for want of a competent trustee, and that if this corporation can not act some other party may be appointed by the court that can.

Exceptions overruled.

Appeal dismissed, and decree below affirmed.

Note. Accord: 1844, Vidal v. Girard's Executors, 2 How. (43 U. S.) 127; 1846, Wade v. Am., etc., Soc., 7 Sm. & M. (Miss.) 663, 45 Am. Dec. 324; 1847, Bogardus v. Trinity Church, 4 Sandf. Ch. (N. Y.) 633, 758; 1860, Chambers v. St. Louis, 29 Mo. 543; 1870, Smith v. Sheeley, 12 Wall. 358, 361; 1871, Rainey v. Laing, 58 Barb. (N. Y.) 453; 1872, Hayward v. Davidson, 41 Ind. 212; 1878, De Camp v. Dobbins, 29 N. J. Eq. 36; 1879, Jones v. Habersham, 3 Woods 443, 476; 1880, National Bank v. Whitney, 103 U. S. 99; 1882, Jones v. Habersham, 107 U. S. 174; 1884, Alexander v. Tolleston Club, 110 Ill. 65; 1889, Fritts v. Palmer, 132 U. S. 282; 1889, Heiskell v. Chickasaw Lodge, 87 Tenn. 668; 1890, Hamsher v. Hamsher, 132 Ill. 273; 1894, Hanson v. Little Sisters, etc., 79 Md. 434; 1897, In re Stickney's Will, 85 Md. 79, 60 Am. St. R. 308.

See next case and note, *contra*.

Sec. 297. Same.

In Re McGRAW'S ESTATE.[1]

In Re FISKE'S ESTATE.

1888. In the Court of Appeals of New York. 111 N. Y. 66–137, 19 N. E. Rep. 233.

[Appeal from judgment of the general term of the supreme court. The will of Mrs. Fiske directed that her estate "be converted into money," and after numerous bequests contained the following residuary clause: "I give, devise, and bequeath all the rest, residue and remainder of my property (if any there shall be) to Cornell University, aforesaid, to be added to the 'McGraw Library Fund' aforesaid, and subject to the trusts, purposes, uses and conditions hereinbefore prescribed for said fund." The amount of Jennie McGraw Fiske's estate at the time of her death, as found by the surrogate, was $2,275,933.46; legacies to other than Cornell University, $1,121,570; bequests to said university, $1,154,363.46. The university already had property valued at more than $3,000,000. the amount limited by the charter. The judgment below was against Cornell University.]

Peckham, J. The question to be decided in this case is whether Cornell University, or some other parties, being the residuary legatees, or else the heirs at law or next of kin of John McGraw, deceased, or of Jennie McGraw Fiske, deceased, or her husband, shall have the property, or any portion of it, bequeathed to the university by the will of Mrs. Fiske. * * *

Our revised statutes provided that every corporation, as such, has power, among other things (§ 1, subd. 4), to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter. * * *

Under this power to hold, purchase and convey, * * * the corporation could take the property by devise. * * * The same revised statutes, in providing for the transmission of real property by will, stated that "every estate and interest in real property descendible to heirs" might be devised. "Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." * * *

[The revised statutes provided that the trustees of every such college shall have power] * * * to take and hold, by gift, grant or devise, any real or personal property, the yearly income or revenue of which shall not exceed the value of $25,000. * * *

Section 5 of the charter of the Cornell University reads as follows: "Sec. 5. The corporation hereby created may hold real and personal property not exceeding three millions of dollars in the aggregate." * * *

Looking for a moment outside of and beyond the statute laws of

[1] Statement abridged. Arguments and much of opinion omitted.

the state, and in order to strengthen his position regarding the true construction to be given that law as to the material distinction, in the case at least of a corporation, between the power to take and the power to hold property, the counsel for the appellant has made a most able and learned argument. Its outlines are, in substance, as follows: A corporation, at common law, could take and hold property by devise. At an early stage in the history of the law of England, relating to the power of corporations to hold real property, and while the feudal system still prevailed, it was enacted that no man should alien his feud to a corporation under penalty of a forfeiture thereof to his next superior, of whom he held the land, and, in default of such superior insisting upon the forfeiture, then his superior might do so, and thus on until the king, as the general superior and lord of all, was reached. But, in case the forfeiture was not insisted upon, the corporation, which had taken a defeasible title to the land, could hold it as against all the world.

He, therefore, insists that this distinction between taking and holding strengthens his claim that the use of the word "hold" in the charter was intentional and for the specific purpose of permitting the corporation to "take" an unlimited amount of property and to hold only the amount specified. No sound reason for giving such unlimited power to take, while limiting the power to hold, can, as it seems to me, be stated; and, if such were the intent, I think it would have been plainly stated in the charter, instead of trusting to such a conjectural application to be given to another statute.

The counsel cites about all the writers upon the subject of corporations, and they have all adverted to this distinction as existing in relation to the English corporations subject to the mortmain statutes, and they state that licenses to hold in mortmain were granted to such bodies, but without such licenses they took the title to the real property aliened, subject only to the right of the superior lord to enter and take the land under the power of forfeiture. The only penalty, therefore, which a corporation risked when it took lands without a license in mortmain was that of a forfeiture of the land to the next superior of the grantor, and so on up to the king; and the counsel claims that in this state, in the case of a corporation with unlimited power to take, but not to hold more than a certain amount, the penalty for holding more is that the state, representing the whole people, and standing in this respect in lieu of the king (there being no mesne lords), can forfeit the charter of the corporation, and thus prevent the further holding. And, assuming this to be the fact, he uses it as strengthening his argument as to the existence of this clear and material distinction between taking and holding property.

The further claim is then made that, as title to the property has vested in the corporation, which, in holding it, has become subject to the forfeiture of its charter, the heirs or next of kin of the testator have no more right to raise the question than any other third parties who have no interest therein. It is said that it is a matter for the state alone to take cognizance of, and until it does the corporation holds the

property, however much it may transcend the limitation prescribed in its charter.

The counsel states accurately the law of mortmain in England, and its consequences of possible forfeiture of the estate granted, and, until forfeiture, the vesting of the title in the corporation indefeasible, except by the re-entry of the person entitled to take it by reason of the forfeiture. But the circumstances under which lands are held by citizens of New York, where their tenure is so wholly different from that which prevailed in England when the early mortmain acts were enacted, render any argument in regard to those acts and their effect totally inapplicable to the case of a corporation of this state. Taking the law as it exists in our statutes, including the special provision upon the subject in the charter of the university, it seems to me that the provision therein limiting the holding of property is, as I have said, a restriction also upon the power to take in excess of the specified amount. As, at common law, a corporation could take real property in the same way as an individual, the consequence was that, in England, large landed possessions were held by religious corporations, and, by reason of alienations of real estate to them, the services due by the vassal to the lord were partially, if not totally, paralyzed, and the chief lords lost their escheats. This was a constantly growing and alarming evil. To remedy the difficulty, the first mortmain act was placed in Magna Charta, which declared all such alienations to corporations entirely void, and that the lands should revert to the lord of the fee. It was held, however, that the reversion must be accomplished by an entry, and then and from that time there was a forfeiture, the corporation having taken the title and held the property until such forfeiture by re-entry. Shelf. Mortm. 8, 34; 1 Kyd Corp., 81; Grant Corp., 106. * * *

The nature of the tenure of real property at the time of the passage of the early mortmain acts in England bears no resemblance to the tenure by which a citizen of this state holds lands. Here there is no vassal and superior, but the title is absolute in the owner, and subject only to the liability to escheat. Const. N. Y., art. 1, § 13. The escheat takes place when the title to lands fails through defect of heirs. Const. N. Y., art. 1, § 11.

A devise to a corporation which is forbidden to take (or forbidden to hold, if the word, under the circumstances of the case, is construed to include a taking also) does not, therefore, give a title subject to the right of some superior to claim a forfeiture of the land; but, if it be in violation of a statute, I think the devise is void, and the land descends to the heir or residuary devisee.

We have not, in this state, re-enacted the statutes of mortmain, or generally assumed them to be in force, and the only legal check to the acquisition of lands by corporations consists in those special restrictions contained in the acts by which they are incorporated, and which usually confine the capacity to purchase real estate to specified and necessary objects. 2 Kent Comm., 282. Of course, the re-

strictions contained in any general law, if applicable, must also be referred to.

There is, by reference to our laws, no such necessary and universal distinction between taking and holding property by corporations as is seen in the laws of England relating to alienations in mortmain. Whether the legislature, when using language providing for a limitation upon holding property, meant to permit an unlimited taking, is a question of legislative intent; and I think the general inference would be, in the absence of some plain and controlling circumstance to the contrary, that the legislative body meant to limit a taking as well as a holding beyond the specified amount. * * *

The counsel for the appellant does not claim that this property was itself forfeited to the state, if the state should choose to enforce the forfeiture. His claim is, as I understand it, that if the university exceeded its limitation by holding more property than it was allowed by law to hold, a cause of forfeiture of the charter was thereby created, and that in enforcing such forfeiture after the payment of the debts of the corporation the rest of the property would (as he insists) probably go to the state, because there would be no living claimant to it who would have any right to acquire it. A forfeiture the state may claim and may enforce at pleasure, when the occasion arises, but it is a forfeiture of the charter, and not a forfeiture of the property held by the corporation. It is further claimed that this distinction between the right to take and the power to hold property is one which has been admitted and enforced in the courts of England, of this state, and of the other states of the Union for a long number of years, and that there is no reason why effect to such a distinction should not be given in this case; the result being, as is stated, that the corporation has an unlimited right to take property, and also an unlimited right to hold it as against any one but the state in its capacity of sovereign. There is undoubtedly a distinction between the right to take and the power to hold property under some circumstances, the only question being whether the legislature had such distinction in mind, and meant to provide for it in the case in hand. It is said that an alien has the right to take property by purchase, but he can not hold it as against the state. That is so. He takes, however, a defeasible title, good as to all but the sovereign power, which must take it upon office found or by escheat. Wright v. Saddler, 20 N. Y. 320.

In such case it is not exactly an accurate description of the alien's title to simply say that he can take but can not hold. That is a contradiction in terms. If he take, he must hold, if for but a fractional part of a second of time. The expression is but a short one for the statement that he can not hold, as against the claim of the state, where properly made and enforced. The same expression is used in the case of a corporation under the mortmain laws, that it can take but not hold; the meaning being that it can not hold as against the claim for forfeiture when made by the next superior lord of the grantor of the lands. That the words lose all their meaning when wrenched from the circumstances under which they were used, and applied to

corporations existing by virtue of the laws of this state, seems to me a plain proposition.

The counsel has, however, with great industry and research, cited a number of cases from our own courts and those in other states, where this distinction, he claims, has been admitted, and in cases, too, where the principles involved were similar to the case at bar (one or two being, he says, precisely like it), and where it has been held that in such cases, although the corporation was violating the law of its being, yet no one but the state could take advantage thereof.

I think that, with the exception of one case, they were all entirely different from this one, and the decisions were based upon a totally different, and probably a perfectly unassailable, ground. [Citing and discussing Leazure v. Hillegas, 7 Serg. & R. 313; Baird v. Bank, 11 Serg. & R. 411; Runyan v. Coster, 14 Pet. 122; Jones v. Habersham, 107 U. S. 174; Smith v. Shelley, 12 Wall. 358–361; Bogardus v. Trinity Church, 4 Sand. Ch. 633; De Camp v. Dobbins, 29 N. J. Eq. 36; Davis v. Railroad Co., 131 Mass. 258–273; Hayward v. Davidson, 41 Ind. 212; Vidal v. Girard's Ex'rs, 2 How. 127; Bank v. Whitney, 103 U. S. 99; Fortier v. Bank, 112 U. S. 439.] * * *

Although we never adopted or enacted the English statutes of mortmain, yet in this, as in other states, we have a decided mortmain policy. It is found in our statute in relation to wills, prohibiting a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise.

"It is a statute of mortmain, resting on a mortmain policy as distinctly as any act of the British parliament. * * * The necessity is recognized of forbidding the acquisition by will, unless the legislature, in granting the charter, and in full view of the reasons for so doing, think proper to confer the power in express terms." * * *

The counsel claims, however, that a devise to a corporation vests the title in it, so far as the question of capacity is concerned, whenever it would in the case of a sale for a valuable consideration. Hence he says that the cases of sales above cited are decisive of this, if they be admitted as well decided. In the case of an executed sale, however, the question of *ultra vires*, as set forth in the modern cases, comes in play, and the question of a want of title in the corporation in such case would not be permitted to be raised by the grantor, or his heirs, because it would be against justice and would accomplish a legal wrong. Whitney Arms Co. v. Barlow, 63 N. Y. 62.

The question of an executed gift without consideration by a donor, by an absolute delivery to a corporation without power to take, is also instanced, and the question is asked whether the title vests in such a case in the corporation so that the donor or his heirs could not recover it back, and if it do, the counsel asks where is the difference in the two cases? It is time enough to decide such a case when it arises. But it seems to me there is a decided difference. In the one case the gift is made *inter vivos* by the absolute owner, and it is made effectual as to him by a delivery. In such case it would seem that he stands in no position to ask the aid of the court to get him out of a

situation into which he voluntarily entered with his eyes open, and the court might well say to him that he stood in no position to attack the right of his donee to property which he freely and absolutely gave it. As to his heirs, it could be said that their ancestor had made a disposition of property which was absolutely his own in his lifetime, and in such a way that he could not question its validity, and that as he could not, they succeeding only to his rights, were alike disabled.

In the case of a devise, however, the case is essentially different. The will does not take effect until the testator's death, and then, if his property is not legally devised or bequeathed, no title vests for a single moment in the devisee or legatee, but it vests instantly in the heir or next of kin; and the corporation claiming under the will asks the aid of the law to give the property to it, and in so doing it must show the authority it has to take. And if there were only a prohibition in words against holding the property, would the law not be doing a vain thing in handing it over to a corporation which by the very fact of holding would render itself liable to have its charter forfeited on that account? Would not the prohibition against holding be properly and necessarily construed as a prohibition against taking also?

Is not this an argument against the right of the corporation to take, if by holding it is thus rendered liable to such a penalty? And is it not an argument in favor of the construction of the language in the charter that the limitation upon the power to hold property is, under all the circumstances, a limitation upon the power to take any more than it can legally and properly hold? * * *

Upon a review of the whole question as to the proper construction of the legislation, general and special, affecting this university, I am of the opinion that it had no power to take or hold any more real and personal property than $3,000,000, in the aggregate.

Second. Coming to the conclusion I have, on the first branch of the case, it becomes necessary to examine the second and only remaining question, viz.: Does this property, if taken and held by the university, exceed the amount which by law it can hold?[1] * * * This brings the property of the university, above set forth, up to more than its permitted aggregate at the time of the decease of Mrs. Fiske, and no debts to be deducted therefrom. Under such circumstances, the university could not take the various legacies bequeathed to it by her will. * * *

Affirmed.

[1] Part of the opinion relating to this question is omitted.

Note. Accord: 1857, Trustees v. Chamber's Ex., 3 Jones Eq. (N. C.) 253; 1867, Cromie v. Louisville, etc., Soc., 3 Bush (Ky.) 365; 1871, Chamberlain v. Chamberlain, 43 N. Y. 424; 1879, De Camp v. Dobbins, 31 N. J. Eq. 671, 690; 1889, Wood v. Hammond, 16 R. I. 98; 1890, Cornell Univ. v. Fiske, 136 U. S. 152; 1894, Coggeshall v. Home for Children, etc., 18 R. I. 698.

See preceding case and note, *contra.*

Sec. 298. (2) To acquire personal property

(1) In general.

THE NORTHWESTERN UNION PACKET COMPANY v. SHAW.[1]

1875. IN THE SUPREME COURT OF WISCONSIN. 37 Wis. Rep. 655–662.

[Appeal by plaintiff from judgment in a suit to recover $1,000 paid upon a contract and damages for its breach. The packet company was organized in 1870, and from that time had been engaged in the business of a common carrier upon the Mississippi, and also in buying, selling and dealing in wheat, grain and produce generally; it contracted to purchase 4,000 bushels of wheat from Shaw and paid him $1,000 on account, the wheat to be delivered at a certain time and place, but Shaw failed to deliver as agreed. The corporate charter provided for owning and controlling vessels of various kinds for transportation on the Mississippi river, etc., to own warehouses, depots, etc., necessary for freighting, storing and forwarding property and persons, with power to sell any of its property of every description, and to do any and all acts and things necessary to an economical and successful prosecution of said business, to borrow money for all its purposes, to contract with any person in reference to the storing, forwarding or freighting of any kind of property, or "to any and all business incidental to, or arising from, the transportation of persons and property."]

LYON, J. * * * The question to be determined is, whether the plaintiff can lawfully buy and sell the produce of the country in the same manner and to the same extent that a natural person may.

We think this question must be answered in the negative. There is no necessary connection between the business of a common carrier and that of buying and selling the commodities which the carrier transports. Neither is the latter business necessarily or usually dependent upon the former. The two are as essentially distinct as the business of the carrier and that of the producer. It will scarcely be claimed that the plaintiff is authorized, under its articles of incorporation, to purchase large tracts of land on which to raise grain and other produce to be stored in its warehouses and shipped over its lines. If it may not do this, it is not perceived on what principle it may purchase the commodities instead of raising them. We think the principle is the same in both cases. Moreover, in view of the fact that the transportation of the products of the country is mainly controlled by powerful corporations representing immense aggregations of capital, there are reasons, if not of public policy, certainly reasons which should have much weight with the legislature, for confining common carriers to their legitimate business as carriers. At least no forced construction of their charters should be sanctioned to enable them to become producers or purchasers of such products.

[1] Statement abridged, part of the opinion omitted.

By confining them to the proper business of common carriers, the temptation to make unjust discriminations in the transportation of their own property to the manifest injury and oppression of persons having like property for transportation, can only be avoided. Hence, while it is conceded that the legislature may confer upon a corporation common carrier the right of a natural person to buy and sell the commodities which it transports, it must be held that until so conferred the right does not exist.

We conclude that the contract set forth in the pleadings as to the plaintiff, is *ultra vires*, and that no claim for damages resulting from a breach thereof can be successfully asserted by either party. This disposes of the counter-claim of the defendant, and of all claims of the plaintiff except the claim to recover the $1,000 paid on account of the attempted purchase of the wheat. * * *

[After holding that the $1,000 might be recovered in an action for money had and received, and that the complaint stated facts justifying this:]

Reversed and remanded.

Note. Personal property: Such personal property, but such only both as to kind and amount, as is reasonably necessary for the corporate purposes, may be lawfully acquired: 1858, Pearce v. R. Co., 21 How. (62 U. S.) 441; 1860, Downing v. Road Co., 40 N. H. 230; 1875, Northwestern Packet Co. v. Shaw, 37 Wis. 655; 1876, Farmers', etc., Bank v. Baldwin, 23 Minn. 198, 23 Am. Rep. 683; 1877, Morgan v. Donovan, 58 Ala. 241; 1877, Franklin Co. v. Lewiston Sav. Inst., 68 Maine 43, 28 Am. Rep. 9; 1884, Central R. Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; 1885, Day v. Buggy Co., 57 Mich. 146, 58 Am. Rep. 352; 1888, Chewackla Lime-Works v. Dismukes, 87 Ala. 344; 1890, Jemison v. Citizens' Sav. Bank, 122 N. Y. 135, 19 Am. St. Rep. 482; 1895, Bosshardt & W. Co. v. Crescent Oil Co., 171 Pa. St. 109; 1897, Farwell v. Wolf, 96 Wis. 10, 65 Am. St. Rep. 22, 37 L. R. A. 138; 1897, Mahoney v. Butte Hardware Co., 19 Mont. 377; 1897, Malone v. Lancaster Gas L., etc., Co., 182 Pa. St. 309; 1899, Central Ohio Nat'l Gas, etc., Co. v. Cap. City Dairy Co., 60 Ohio St. 96, 53 N. E. Rep. 711; 1899, State v. Debenture G. & L. Co., 51 La. Ann. 1874, 26 So. Rep. 600; 1899, Herring v. Ruskin Co-op Assn., — Tenn. Ch. App. —, 52 S. W. Rep. 327.

There, however, is no limit upon the amount of personal property that a corporation may acquire or hold arising from the profits of carrying on properly its legitimate business.

Sec. 299. (2) Power to acquire its own shares.

(1) The English rule.

In Re DRONFIELD SILKSTONE COAL COMPANY.[1]

1880. In the High Court of Justice, Chancery Division. L. R. 17 Chancery Division 76–97.

Jessel, M. R. The memorandum of association of a limited colliery company gave the company power to do all things which it should consider conducive to the attainment of its objects, but did not in terms

[1] Only the opinion of the master of the rolls is given. The statement of facts is that given in the syllabus to the case.

give any power to purchase its own shares. The tenth clause of the articles empowered the directors to purchase for the company any shares in the company, and directed that the shares so purchased should be dealt with as if they had never been issued, and that any profit arising on the reissuing or subsequent sale of such shares should be deemed profits of the year in which they were reissued or sold. In 1872, disputes having arisen as to the conduct of the business, the directors agreed with W., the largest shareholder, who was also one of the directors, to purchase for the company his shares, and also his interest as landlord of the mines worked by the company. This arrangement was confirmed by an extraordinary general meeting of the company, and was carried into effect by an assignment of his interest in the mines to the company for a specific sum, and by a transfer to the company of his shares for another specific sum. The company was entered in the share register as holder of these shares, and in all the subsequent returns to the registrar of joint stock companies the company was entered as such holder. The company for some time was prosperous, but afterwards fell into difficulties, and in 1879 an order was made for winding it up. * * *

I now come to the point as to the surrender of shares—a point upon which I feel much more difficulty. It is not for me to say what the limits of surrender are which are allowable by the act. As I read this same judgment of Lord Justice James,[1] certain surrenders are allowable.

I can imagine one where the shares would be liable to forfeiture, and it is the shortest way to surrender them; then the same result would follow. But I am by no means prepared to say that there is a right under the term "surrender" to buy up the shares, and to have them surrendered to the company as on an ordinary purchase for money. That, I think, is clearly beyond the limit; but it is not necessary for me to say what is exactly within the limit, because each case as it arises must be decided on its own merits. I can well imagine that certain cases are clearly within the limit, and ought not to be treated as a diminution of capital, and that other cases are clearly beyond the limit—such as the cases I have put of an ordinary purchase or ordinary traffic in shares, although the term "surrender" may be employed instead of the transaction taking the form it does here, of an actual transfer to the company.

Having dealt with the case so far, let us see what the twelfth section of the companies act, 1862, must, as I think, mean. The suggestion made on the part of Mr. Ward is this, that all the act of parliament means is that the company must not alter the terms of the memorandum as to the nominal amount of the capital. It would be a very singular result if that were so, because it would come to this—the company may destroy the whole of its real capital without altering its nominal amount. I will put the case in this way: The company has a million of capital in £10 shares, and has £100,000 paid upon the shares, leaving £900,000 remaining to be paid; there is a power

[1] Hope v. International Finan. Soc., 4 Ch. D. 327, 336.

to accept a surrender of shares; the company resolve at a general meeting to retain one share for each of the seven directors, and to accept a surrender of all the other shares. I am putting an extreme case to try the question. According to the argument of Mr. Ward, that is perfectly valid; so that the result is that the primary capital of the company is reduced from £900,000, remaining to be called up, to £70, if there are seven directors. That is an extreme case, no doubt, but it shows to what an absurdity you would reduce the provisions of the act of parliament if that were allowed. It can not be said that the conditions of the memorandum mean that the company may in effect destroy the nominal capital; that it can not so mean is, I think, clear from the words of the section. The company may increase its capital by the issue of new shares to such an amount as it thinks expedient, or it may consolidate and divide its capital to a larger amount than the existing shares, or it may convert the paid-up shares into stock. If the section were only to apply to nominal capital, what is the meaning of the power for the company "to convert its paid-up shares into stock"? What the section means is that the company shall not convert the unpaid-up shares into stock. That implies, as it has always been held to imply, that the company can not turn the unpaid-up shares into stock, so as to exclude the right of making further calls. Therefore, the section must apply to the issued capital, and not merely to the nominal capital; and it has always been so treated, as far as I know.

There is the additional observation to be made that the subsequent acts of parliament, namely, the acts of 1867 and 1877, would have singularly little meaning if it were not so, for they contain most elaborate provisions as regards the mode of increasing the capital, and reducing the capital, and as regards the trading capital and the issued capital. The provisions of the section, I admit, are difficult to construe if you read them word by word, but I do not think they are so difficult to construe if you look at the meaning of the whole of the acts as to the formation of these companies. If they are to be taken to apply only to the amount of the nominal capital, I must say that the acts of 1867 and 1877 are the most extraordinary legislative productions I ever saw. But if you read the section the other way, and say that it means that the conditions in the memorandum relate to the issued capital, then the subsequent acts are perfectly intelligible. Let us now look at the ninth section of the act of 1867: "Any company limited by shares may, by special resolution, so far modify"—what?—"the conditions contained in its memorandum of association, if authorized so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital." What capital? Does that mean nominal capital? It is plain that it means the trading capital. Therefore when you look at the ninth section it is clear that the legislature considered the twelfth section of the original act somehow or other prohibitive, and that a new act was required to authorize a company to reduce its capital. Then there are provisions which the legislature

considered necessary for the protection of creditors in case of a reduction of capital.

But it is said a surrender is no more a diminution of capital than is a forfeiture, and the creditors are not injured by a surrender. That, however, is not so. If the company could, either by taking a surrender or by a purchase of shares, actually diminish the capital, not in the shape of dealing with a solitary individual shareholder who can not pay, but to a greater extent, what would be the result? I am not now speaking of future creditors, who must be held to take with notice of what was on the register. What would be the result? Every creditor who could not enforce his demand would lose it. Suppose, for instance, the vendor, having sold the mine to the company, were to take a mortgage of it not to be called in for five years if the interest were duly paid, and the directors then found that they were carrying on business at a loss and could take a surrender of all the shares except seven, then the mortgagee-creditor would be actually without remedy, because he could not apply to have the company wound up until the mortgage debt was due. That would not be until the end of five years, by which time all the shareholders would have been off as past shareholders for probably four years. So that it is not correct to say that in case of surrender the creditors are protected, because they may all lose all remedy whatsoever, unless indeed their money becomes payable within a twelve month after the transaction takes place.

It seems to me that when you look at what I may call the purview of the act, it can not be possible that the company can buy up its own shares in this way so as to destroy the shares in every sense and for every purpose and intent, except that they may, if they can, reissue or transfer the shares to new shareholders during the intervening period that the capital is diminished, if not absolutely extinguished. That being my view of the whole of the act, and I may say of the result of the decisions, which really have any bearing on the subject-matter I have to consider, I think the present transaction was a diminution of the capital of the company which is prohibited by the companies act, 1862, and the transaction is, therefore, void on that ground also.

The transfer being void, and, if I may say so, void at law, although that expression has no longer the meaning that it formerly had, the result is that Mr. Ward remains a contributory; and that is the only point I have now to decide. * * *

[This decision of the master of rolls was appealed from and *overruled*, on the appeal. But the views of Jessel, M. R., of the general doctrine of the company's capacity to purchase its own shares, given here, were taken and applied in the later case of Trevor v. Whitworth, in the house of lords, L. R. 12 Appeal Cases, 409, holding that a limited "company has no power under the companies acts to purchase its own shares." See particularly the opinion of Lord Macnaghten, in Trevor v. Whitworth, L. R. 12 App. Cas. 432–438.]

Note: (1) An English company has no right to purchase its shares unless specially authorized: 1870, In re London, Hamburg, etc., Bank, L. R. 5 Ch. App. Cas. 444, 39 L. J. Ch. 598; 1870, In re United Service Co., L. R. 5

Ch. App. Cas. 707, 39 L. J. Ch. 730, 23 L. T. 331; 1876, Hope v. International F. Soc., 35 L. T. 623; 1887, Trevor v. Whitworth, 12 App. Cas. 409, 57 L. J. Ch. 28, 57 L. T. 457; 1888, In re Walker & Hacking, 57 L. T. 763.

(2) But may if specially authorized. 1874, In re County Palatine, L. & D. Co., App. Cas. L. R., 9 Ch. 54, 43 L. J. Ch. 578, 29 L. T. 707; 1886, In re Balgooley Distillery Co., 17 L. R. Ir. 239; 1889, In re General Finance Co., 23 L. R. Ir. 173; 1892, In re Sovereign, L. A. Co., 3 Ch. 279, 62 L. J. Ch. 36, 67 L. T. 336.

(3) As to what is such a purchase, see 1871, Phosphate Lime Co. v. Green, L. R., 7 C. P. 43, 25 L. T. 636; 1874, In re County Palatine, L. & D. Co., L. R., 9 Ch. 54, 43 L. J. Ch. 578, 29 L. T. 707; 1893, In re Denver Hotel Co., 1 Ch. 495, 62 L. J. Ch. 450, 68 L. T. 8.

Sec. 300. (2) American rule: Theories.

(*a*) May (with certain exceptions) acquire its own shares, unless expressly or impliedly restrained.

CHAPMAN v. IRON CLAD RHEOSTAT COMPANY.

1898. In the Supreme Court of New Jersey, 62 N. J. Law 497, 41 Atl. Rep. 690, 9 A. & E. C. C. (N. S.) 769.

Dixon, J. The declaration alleges that it was agreed between the plaintiff and the defendant, the latter being a corporation organized under the laws of this state, that the defendant should employ the plaintiff at a regular weekly salary; that the plaintiff should purchase and hold during his employment eighty shares of stock in the defendant company; and that if the defendant should discharge the plaintiff from its employ, it would purchase said stock from the plaintiff at par. The declaration further alleges that in pursuance of said agreement, the plaintiff entered into the employ of the defendant at a weekly salary; that he purchased said stock, and held it during his employment, and that the defendant discharged him from the employment against his will; that thereupon the plaintiff demanded of the defendant that it should purchase the said stock from him at par, and the defendant refused to do so. To this the defendant demurs, insisting that the defendant's contract for the purchase of stock was, on its face, *ultra vires* and, therefore, not enforcible against it.

In England the general rule seems to be that corporations can not purchase their own stock without express authority from the statute, though perhaps even there this rule would not be applied if it appeared that the object of the purchase was not merely to traffic in the stock or to diminish the amount of the capital, but to accomplish some legitimate corporate purpose. Hope v. Society, 4 Ch. Div. 327. But in the United States the weight of authority seems to be in favor of the view that corporations have an implied power to purchase shares in their own capital stock, provided, of course, no illegitimate design appears. Many of the cases are cited in the notes of 23 Am. & Eng.

Enc. Law, 676. This question, as it turns on common-law principles, seems not to have been judicially decided in New Jersey, nor need it now be; for the provisions of our corporation act (P. L. 1896, p. 277), by which (section 20) the shares of stock in every corporation are declared to be personal property, and (section 1) every corporation is vested with power to purchase such personal estate as the purposes of the corporation shall require, except (section 3) certain designated sorts of personal property, which do not embrace shares of its own capital stock, coupled with those provisions which recognize the power of corporations to own capital stock (sections 29, 38), plainly imply a legislative grant of the necessary power in all cases where the purposes of the corporation require it. In the present case the fact that the corporation exerted the power in order to secure the services of the plaintiff is *prima facie* sufficient indication that the purpose of the corporation required it.

There is also another principle standing in the defendant's way. The plaintiff has fully performed the contract on his part, and can not be restored to his former status, nor be honestly dealt with otherwise than by holding the defendant to performance of its share of the bargain. Under these circumstances the plea of *ultra vires* is inadmissible. Camden & A. R. Co. v. May's Landing & E. H. C. R. Co., 48 N. J. Law 530, 7 Atl. 523. The plaintiff is entitled to judgment on the demurrer.

Note. Accord: 1828, Hartridge v. Rockwell, 1 R. M. Charlt. (Ga.) 260; 1831, Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 84; 1846, Bank v. Champlain Trans. Co., 18 Vt. 131, 139; 1858, City Bank v. Bruce, 17 N. Y. 507; 1873, Dupee v. Boston Water Power Co., 114 Mass. 37; 1877, Chicago P. & S. W. R. Co. v. Marseilles, 84 Ill. 643; 1877, Chetlain v. Repub. L. I. Co., 86 Ill. 220; 1878, Iowa Lumber Co. v. Foster, 49 Iowa 25, 31 Am. Rep. 140; 1881, Fraser v. Ritchie, 8 Ill. App. 554; 1882, Clapp v. Peterson, 104 Ill. 26; 1888, Morgan v. Lewis, 46 Ohio St. 1, 8; 1889, First National Bank v. Salem, etc., Co., 39 Fed. Rep. 89; 1889, State v. Minnesota, etc., Co., 40 Minn. 213; 1890, Rollins v. Shaver W. Co., 80 Iowa 380, 20 Am. St. Rep. 427; 1890, Eggman v. Blanke, 40 Mo. App. 318; 1890, Thompson v. Moxey, 47 N. J. Eq. 538; 1890, Republic L. Ins. Co. v. Swigert, 135 Ill. 150; 1892, Yeaton v. Eagle, etc., Co., 4 Wash. St. 183; 1894, N. E. Trust Co. v. Abbott, 162 Mass. 148, 27 L. R. A. 271; 1895, Lowe v. Pioneer Threshing Co., 70 Fed. Rep. 646; 1895, Browne v. St. Paul, etc., 62 Minn. 90; 1895, Dock v. Cordage Co., 167 Pa. St. 370; 1896, Vent v. Coffee Co., 64 Minn. 307; 1897, Vercoutere v. Golden S. L. Co., 116 Cal. 410; 1897, Shoemaker v. Washburn, etc., Co., 97 Wis. 585; 1899, West v. Averill Grocery Co., 109 Iowa 488, 80 N. W. Rep. 555. See following cases and notes. See note 61 L. R. A. 621.

Shares of its own stock, held by the corporation, or in trust for it, can not be voted: 1821, United States v. Columbia, etc., Ins. Co., 2 Cr. C. C. 266, Fed. Cas. 14, 840; 1826, *Ex Parte* Holmes, 5 Cow. (N. Y.) 426; 1869, Am. Railway Frog Co. v. Haven, 101 Mass. 398, 3 Am. Rep. 377; 1869, Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; 1876, State v. Smith, 48 Vt. 266; 1881, Vail v. Hamilton, 85 N. Y. 453; 1888, Allen v. De Lagerberger, 20 W. L. B. (Ohio) 368.

Sec. 301. Same. Exceptions to rule allowing acquisition of its own shares.

PRICE v. PINE MOUNTAIN IRON AND COAL COMPANY.[1]

1895. IN THE COURT OF APPEALS OF KENTUCKY. 32 S. W. Rep. 267–268.

[Price sued the company on a note given by it for $8,500 in payment of 179 shares at $50 each, of the stock of the company. The company had concluded to sell out its property; propositions were submitted by Churchill, and by Calhoun respectively, the former being much the more advantageous to shareholders, but the latter claimed to have an option on the property. Perhaps this was not well-founded, but it was, nevertheless, thought best to have him withdraw his claim, and in order to do so, the company agreed to sell him within ten days 2,500 shares of its stock at $25; the company sought to purchase shares in the market, but failed to get enough; a meeting was held at which plaintiff was present, and at which it was proposed that the directors and such shareholders as would should sell to the company enough to have the deal go through. This was objected to by the president as being illegal, and the opinion was given by a lawyer present that the giving of notes for the purchase of its shares by the company itself would be illegal, and would not be upheld, unless the deal was successful.

The company had no money to invest in its shares, yet it was reasonably certain that if the sale was made to Churchill as proposed, it would be beneficial to all concerned, even if the company had to purchase 2,500 shares in order to complete the sale. The scheme of sale to Churchill was not consummated. The lower court found for the defendant, and plaintiff appeals.]

HAZELRIGG, J. * * * It is insisted by the appellant—and we are not unmindful of the strength of his contention—that as he was not a director or officer of the company, as the note was executed in good faith by the corporation in an effort to benefit all its stockholders, and is unconditional in its terms, and as he was an outsider, and wholly without notice of the existence of any contingency upon which the validity of the note depended, not being present at any meeting or discussion of this matter, as he testifies, therefore the company, not being prohibited by its charter from buying its own stock, is bound by its purchase from him, whatever may be said by its dealings with its directors. We are not satisfied, however, even regarding the appellant as ignorant of the terms on which the notes were executed, and the officers as attempting in the best of faith to forward the interests of all stockholders alike, that the company may not elect not to be bound by the contract. *Corporations ought not to be allowed to speculate in their own stocks; and, while they may not always do an illegal thing in buying in their own stock, such a transaction*

[1] Statement abridged; part of opinion omitted.

must be not only in entire good faith, but the exchange must be of equal value, and the transaction free from all fraud, actual or constructive, and when the corporation is neither insolvent nor in process of dissolution; and, further, the rights of creditors are not to be injuriously affected. Such is the principle laid down in Clapp v. Peterson, 104 Ill. 30, a case cited by this court with approval in Jefferson v. Burford, 17 S. W. Rep. 855. *We may add to these qualifications that the contract of exchange ought not to be to the advantage of a few favored stockholders, to the injury of the great body of them.* In this case how much soever the apparent intention was to benefit all, the result of the contracts, if enforced, is disastrous to the last degree to the main body of the stockholders. Under this state of case, the contracts are, at least, voidable at the option of the company if repudiated within a reasonable time. See 1 Beach Priv. Corp., § 242.

Affirmed.

Note. Corporation can not purchase its own stock to the injury of creditors' security: 1879, State v. Oberlin, etc., Assn., 35 Ohio St. 258, 263; 1880, Peterson v. Ill. L. & L. Co., 6 Ill. App. 257; 1887, St. Louis C. Mfg. Co. v. Hilbert, 24 Mo. App. 338; 1887, Farnsworth v. Robbins, 36 Minn. 369; 1890, Commercial Natl. Bank v. Burch, 40 Ill. App. 505; 1892, Blalock v. Kernersville Mfg. Co., 110 N. C. 99; 1892, In re Columbian Bank, 147 Pa. St. 422; 1892, Commercial Bank v. Burch, 141 Ill. 519; 1900, Hall v. Henderson, 126 Ala. 449, 61 L. R. A. 621.

Or to the injury of shareholders: 1895, Price v. Pine, etc., Co., 32 S. W. Rep. 267, *supra;* 1897, Augsburg, etc., Co. v. Pepper, 95 Va. 92.

But a purchase of stock in itself by a corporation is not necessarily a reduction of its capital: 1858, City Bank v. Bruce, 17 N. Y. 507; 1891, Jefferson v. Burford, 17 S. W. Rep. (Ky.) 855; 1897, Western, etc., Co. v. Des Moines, etc., Bank, 103 Iowa 455; 1899, Howe G. & M. Co. v. Jones, 21 Tex. Civ. App. 198, 51 S. W. Rep. 24.

But see 1892, In re Sovereign L. A. Co., 3 Ch. 279, 62 L. J. Ch. 36, 67 L. T. 336, *contra.*

See case preceding, and case following, with notes.

Sec. 302. Same.

(*b*) May not, unless necessary to prevent loss to the company.

COPPIN v. GREENLEES & RANSOM COMPANY.[1]

1882. In the Supreme Court of Ohio. 38 Ohio St. Rep. 275–281, 43 Am. Rep. 425.

[Suit by Coppin for specific performance or for damages for nonperformance of a contract between him and the company whereby it agreed to convey to him two lots at $1,800, and do manufacturing work to the extent of $1,500 in consideration of the transfer by Coppin of 33 shares of $100 each of the company's stock to the company. It was alleged that the plaintiff had for a time been employed

[1]Statement abridged; arguments omitted.

by the company, and while so employed had acquired the stock; that it had been a custom of the company to buy back the stock of those of its servants when they ceased to work for the company, and that the foregoing contract was made in accordance with that custom. The trial court found for plaintiff, but this was reversed by the district court, on the ground that the facts did not show a sufficient cause of action. To reverse this the case was taken to the supreme court.]

McIlvaine, J. Whether the defendant corporation was bound by its executory agreement with the plaintiff to purchase shares of its own stock, under the circumstances detailed in the petition, was, undoubtedly, the question upon which the case turned in the district court.

The power of a trading corporation to traffic in its own stock, where no authority to do so is conferred upon it by the terms of its charter, has been a subject of much discussion in the courts; and the conclusions reached by different courts have been conflicting. Of course, cases wherein the power is found to exist by express or implied grant in the charter, furnish no aid in the solution of the question before us; unless the claim of the plaintiff can be sustained, that such power was conferred on the defendant by section 63 of the corporation act of 1852 (Swan & C. St. 301), as amended, which confers on manufacturing corporations the powers enumerated in section 3 of the act, and among others, the power "to acquire and convey at pleasure, all such real and personal estate as may be necessary or convenient to carry into effect the objects of the corporation." We think, however, that this claim can not be maintained. The sole object of the defendant organization was "for manufacturing purposes;" and it can not be said, in any just sense, that the power to acquire or convey its own stock was either necessary or convenient "for manufacturing purposes."

The doctrine that corporations, when not prohibited by their charters, may buy and sell their own stocks, is supported by a line of authorities; and prominent among them may be mentioned the cases of Dupee v. Boston Water Power Co., 114 Mass. 37, and Chicago, P. & S. W. R. Co. v. Town of Marseilles, 84 Ill. 145. But nevertheless, *we think the decided weight of authority, both in England and in the United States, is against the existence of the power unless conferred by express grant or clear implication.* The foundation principle upon which these latter cases rest is that a corporation possesses no powers except such as are conferred upon it by its charter, either by express grant or necessary implication; and this principle has been frequently declared by the supreme court of this state; and by no court more emphatically than by this court. It is true, however, that in most jurisdictions, where the right of a corporation to traffic in its own stock has been denied, *an exception to the rule has been admitted to exist, whereby a corporation has been allowed to take its own stock in satisfaction of a debt due to it.* This exception is supposed to rest on a necessity which arises in order to avoid loss; and was recognized in this state as early as Taylor v. Miami Exporting Co., 6 Ohio 176, and has been incidentally referred to as an ex-

isting right since the adoption of our present constitution. State v. Building Ass'n, 35 Ohio St. 258.

But, however that may be, the right of a corporation to traffic in its own stock, at pleasure, appears to us to be inconsistent with the principle of the provisions of the present constitution (article 13, § 3), which reads as follows: "Dues from corporations shall be secured by such individual liability of stockholders, and other means, as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." Now, it is just as plain, that a business or trading corporation can not exist without stock and stockholders, as it is that the creditors of such corporations are entitled to the security named in the constitution. State v. Sherman, 22 Ohio St. 411. The corporation itself can not be a stockholder of its own stock within the meaning of this provision of the constitution. Nobody will deny this proposition. And if a corporation can buy one share of its stock at pleasure, why may it not buy every share? If the right of a corporation to purchase its own stock at pleasure exists and is unlimited, where is the provision intended for the benefit of creditors? This is not the security to which the constitution invites the creditors of corporations. I am aware, that the amount of stock required to be issued is not fixed by the constitution or by statute, and also that provision is made by statute for the reduction of the capital stock of corporations; but of these matters, creditors are bound to take notice. They have a right, however, to assume that stock once issued, and not called back in the manner provided by law, remains outstanding in the hands of stockholders liable to respond to creditors to the extent of the individual liability prescribed. In this view it matters not whether the stock purchased by the corporation that issued it becomes extinct, or is held subject to be reissued. It is enough to know that the corporation, as purchaser of its own stock, does not afford to creditors the security intended. And surely, if the law forbids the organization of a corporation without stock, because the required security is not furnished, it can not be that, having brought the corporation into existence, it invests it with power to assume, at pleasure, the identical character or relation to the public that was an insurmountable objection to the giving of corporate existence in the first place.

Plaintiff in error lays much stress on the averments in the petition, that it had been the custom of the corporation that its officers and others, actively engaged in its service, should be holders of shares of its stock, and upon ceasing to be connected with the company such persons had been accustomed to sell, and the company to buy, such stock; and that the plaintiff had purchased the stock for the price of which suit was brought while in the employment of defendant.

We can not see why these averments should take the case out of the general rule.

If it were averred that the plaintiff had purchased this stock from the defendant, or from others, under an agreement with the company

that it would buy the same from him when he quit its employment, or if the contract of purchase by the defendant had been executed, very different questions would arise.

It is not even averred that the plaintiff relied upon such custom, either in making the purchase or the sale of the stock; so that, in fact, he is unaffected by the alleged custom. But if such custom had been relied on by the plaintiff when he purchased the stock, it would not have made the executory contract of the defendant to buy the stock binding, which, without such custom, would be void. The usage of a corporation does not become the law of its existence, or the measure of its powers. The general law of the state, of which all persons are presumed to have knowledge, is the source and limit of all its powers and duties; and these can not be varied either by usage or contract. The doctrine of estoppel has no application in the case. Nor is there any such equity in the case as would have arisen between the parties in case the contract had been executed.

Judgment affirmed.

Note. Accord: 1833, Taylor v. Miami Ex. Co., 6 Ohio 176, 218; 1854, Barton v. Port Jackson, etc., Co., 17 Barb. 397; 1875, Currier v. Lebanon State Co., 56 N. H. 262; 1875, First Natl. Bank v. Exchange, etc., Bank, 92 U. S. 122; 1877, German Sav. Bank v. Wulfekuhler, 19 Kan. 60; 1878, Hubbard v. Riley, 3 W. L. B. (Ohio) 434; 1879, Abeles v. Cochran, 22 Kan. 405; 1882, Coppin v. Greenlees, etc., Co., 38 Ohio St. 275, 43 Am. R. 425, *supra*; 1884, Crandall v. Lincoln, 52 Conn. 73; 1887, St. Louis C. M. Co. v. Hilbert, 24 Mo. App. 338; 1888, Shaw v. Ohio Edison, etc., Co., 19 W. L. B. (Ohio) 292; 1895, Adams, etc., W. Co. v. Deyette, 8 S. D. 119; 1896, Barto v. Nix, 15 Wash. 563, 46 Pac. Rep. 1033; 1897, Hamor v. Taylor-Rice, etc., Co., 84 Fed. Rep. 392; 1897, St. Louis Rawhide Co. v. Hill, 72 Mo. App. 142; 1898, Merchants' Natl. Bank v. Overman, 17 Ohio C. C. 253; 1899, Herring v. Ruskin Co-op. Assn., — Tenn. Ch. App. —, 52 S. W. Rep. 327.

See preceding cases and notes.

Sec. 303. (3) Power to acquire shares of stock in other corporations.

1. The English rule.

IN RE BARNED'S BANKING COMPANY.[1]

EX PARTE THE CONTRACT CORPORATION.

1867. IN ENGLISH CHANCERY APPEALS. L. R. 3 Ch. App. Cas. 105–118.

[Appeal by the official liquidator of The Contract Corporation from the decision of the master of the rolls, who had placed its name on the list of contributories to the banking company, as a contributory upon 368 shares owned by it.]

LORD CAIRNS, L. J. The first objection taken to the order under

[1] Statement abridged; only part of opinion given; arguments omitted.

appeal was that it was *ultra vires* The Contract Corporation to take shares in any other trading corporation, and to apply its funds in payment for those shares. Generally speaking, this would be so. It is at first sight beyond the province of one trading corporation to become a shareholder in another, and to apply its funds for that purpose. But here one of the objects of The Contract Corporation, as defined by its memorandum of association, was "to purchase or accept any obligations, bonds, debentures, notes and shares in any foreign or English company, and to negotiate the sale of any such securities." It appears to me, that in applying for and accepting shares in Barned's Banking Company, The Contract Corporation, Limited, was strictly and to the letter complying with and acting within these terms. If it were necessary to make this power still clearer, the forty-seventh clause of the articles of association provides that the directors may invest any of the money of the corporation on such securities (other than the corporation's own shares) as they, the directors, may think desirable, plainly implying that, although they might not invest their money upon the purchase or allotment of their own shares, they might invest them upon the allotment or purchase of shares *ejusdem generis* in other companies.

The second argument was, that even assuming that, according to the constitution of the contract corporation, it was not *ultra vires* to invest their money in shares of another trading company; yet that under the act of 1862 one trading corporation could not become a member of another trading corporation. Now, if that argument is to prevail, it must be upon the words of the act of parliament of 1862, because there is no apparent or *prima facie* objection to a corporation so joining with another corporation in trade. A trading corporation, as we all well know, may enter into trade or partnership along with an individual. There is no reason at common law, so far as I know, why one corporate body should not become a member of another corporate body. Other acts of parliament relating to companies appear to assume that corporations may become members of and shareholders in companies. For example, the general act, the companies clauses consolidation act of 1845, provides, in the interpretation clause, that "shareholder" in that act shall include a corporation; and the chartered companies act, 1 Vict., c. 73, expressly points out that the crown may grant a charter to a trading corporation, the shareholders in which may themselves be corporate bodies, and whose liability under that charter may be limited. Now, looking to the words of the act of 1862, it is said, no doubt justly, that they appear throughout to point to person, and to the executors and administrators of persons, as if the shareholders were all to be persons in their natural capacity. But even in this act there are traces that the term "shareholder" and the word "persons" must have been intended to be used in a larger sense, for in the fiftieth and fifty-first clauses provision is made for the determination of questions of considerable importance by general meetings, and by votes to be given at those meetings, either in person or by proxy, in cases where, by

the regulations of the company, proxies are allowed, and on turning to the forms in the schedule, which may be adopted by any company for its regulation, we find, in the forty-ninth clause of table A, a provision that the instrument appointing a proxy shall be in writing under the hand of the appointer; "or if such appointer is a corporation, under their common seal." Form B contains a similar clause (clause 22), as do also the forms in the schedule to the act of 1865. It would, therefore, appear to have been in the contemplation of the legislature that the appointer of a proxy might be a corporation; and inasmuch as the appointer was to be a shareholder, that a shareholder might be a corporate body.

The case, however, does not rest there. The act of 1862 is an act amending and consolidating the whole of the prior laws with regard to the joint stock companies. Among other acts of parliament repealed by the act of 1862 are 7 and 8 Vict., ch. 110 (the joint stock companies act of 1844), and 11 and 12 Vict., ch. 45 (the winding-up act of 1848). The interpretation clause in each of those acts provided that the word "person" throughout the act should include bodies politic or corporate, whether sole or aggfegate. In the present act of 1862 there is no interpretation clause, but section 180 and the following sections provide that companies formed under the repealed act of the 7 and 8 Vict., ch. 110, and under the chartered companies act, 1 Vict., ch. 73, may be registered under this act of 1862, and that before registration they must send in a list showing the names, addresses and occupations of all persons who on a certain day were members of the company, and when so registered they are to become subject in every respect to the act of 1862. But the company which was thus to register itself, and thus to send in a list of its shareholders to the registrar under the act of 1862, might be a company entitled to have and having among its shareholders corporate bodies, whether sole or aggregate, and they would become members of the company registered under that act of 1862. It would, therefore, be necessary, in reading the act of 1862, with regard to a company of that kind, to read the word "person" as including bodies politic.

So also, on turning to section 199, and the following sections, we find provisions for the winding up of joint stock companies formed under 7 and 8 Vict., c. 110, and provisions which, as regards the process of winding up, are identical with provisions applicable to companies formed for the first time under the act of 1862. There again the whole of those provisions, though apparently pointing to persons and individuals, must, of necessity be read as applying to corporate bodies which should be shareholders under the former act of parliament. Now, I think the conclusion irresistible, that if in all these sections to which I have referred, beginning with section 180, and ending with section 200, the general words used must be read as comprising bodies corporate which are shareholders, there is no reason why, throughout the whole of the act, from the beginning to the end, the same words should not be read in the same way, and be held to include bodies corporate. It is satisfactory to find that the conclusion

at which I have arrived tallies with the conclusion which has been arrived at in several cases, because instances were mentioned, and do not appear to have been disputed, in which limited companies have been registered as shareholders in other companies, and have been fixed as contributories in the course of the winding up of those other companies. It is true the objection does not seem in any of those cases to have been taken, or the point to have been argued, and if the matter rested upon practice alone, probably there would not have been enough in the practice by itself to have led to the conclusion at which I have arrived. But it appears to me, upon the proper construction of the act, that the practice is entirely warranted by the act of parliament. The second argument, therefore, of the official liquidator seems to me to fall to the ground.

Order of master of rolls affirmed.

Note. Accord: 1863, Great Western Ry. Co. v. Met. Ry., 32 L. J. Ch. 382; 1869, Royal Bank of Indiana, 4 Ch. App. 252.

But see 1851, East Anglican Ry. Co. v. Eastern Counties Ry., 7 Eng. L. & Eq. 505; 1878, *Ex Parte* Liquidators B. N. L. I. Assn., L. R. 8 Ch. 679, *contra*.

Sec. 304. Same.

2. General rule in the United States.

THE PEOPLE, EX REL. PEABODY, v. THE CHICAGO GAS TRUST COMPANY.[1]

1889. IN THE SUPREME COURT OF ILLINOIS. 130 Ill. Rep. 268–303, 17 Am. St. Rep. 319, 8 L. R. A. 497.

[*Quo warranto* as to the authority of the Gas Trust Company to exercise certain powers. The company pleaded that its charter permitted the exercise of the powers in question. The error assigned was the overruling of demurrers to the pleas.]

MAGRUDER, J. The Chicago Gas Trust Company, appellee herein, was organized under the general incorporation law of this state. The statement filed by the original incorporators with the secretary of state sets forth that the Trust Company was formed for two objects, or for one object of a twofold character. The object, named in the first clause of the second specification of the "statement" is, in brief, the erection and operation of works in Chicago and other places in Illinois, for the manufacture, sale and distribution of gas and electricity.

The object named in the second clause of the second specification of the "statement," is, in brief, "to purchase and hold or sell the capital stock" of any gas or electric company or companies in Chicago or elsewhere in Illinois.

In this proceeding no attack is made upon the validity of the organization of the Gas Trust Company as a corporation.

[1] Statement, except as in opinion, arguments and part of opinion omitted.

The controversy presented by the record relates solely to the authority of the appellee to carry out the object designated in the second clause above mentioned. It is claimed, on the part of the people, that the charter or articles of association of the Gas Trust Company did not and could not confer upon it the power "to purchase and hold * * * the capital stock" of other gas companies. It is averred in the information, and admitted in eight of the eleven pleas, that appellee has purchased and now holds a *majority* of the shares of the capital stock of four gas companies.

There are two views which may be taken of the power to purchase *and hold the capital stock of other gas companies as designated in said* second clause. Must it be regarded as an original, independent power intended to exist exclusively of and in addition to the power named in the first clause, or may it be considered as merely ancillary to the other power of maintaining and operating works for the manufacture and sale of gas? If the latter view be correct, the main object for which the Gas Trust Company was formed would be that it might itself maintain and operate works for the manufacture and sale of gas, while the purchase of shares of stock in other companies would be merely a subordinate object, incidental only to the main purpose of the corporate formation. An illustration of this idea may be found in the general law of this state in regard to the life insurance companies, which makes it lawful for a life insurance company organized in the state to "invest its funds or accumulations in the stocks of the United States * * * or in such other stocks and securities as may be approved by the auditor." The main object of forming such a company is to engage in the business of life insurance, but the power to invest surplus funds in certain stocks is given as an incident to such business.

Can the power to purchase and hold the stock of other gas companies be lawfully exercised by the appellee as incidental to the main purpose of maintaining and operating works for the manufacture and sale of gas?

Corporations can only exercise such powers as may be conferred by the legislative body creating them, either in express terms, or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted, and to accomplish the purposes of their creation. (C. P. & S. W. R. Co. v. Marseilles, 84 Ill. 643; Chicago Gas Light Co. v. People's Gas Light Co., 121 Ill. 530.) An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it. (Hood v. N. Y. & N. H. R., 22 Conn. 1; Franklin Co. v. Lewiston Savings Institution, 68 Maine 43.)

Where a charter in express terms confers upon a corporation the power to maintain and operate works for the manufacture and sale of gas, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between manufacturing gas and buying stocks.

If the purpose for which a gas company has been created is to make and sell gas and operate gas works, the purchase of stock in other gas companies is not necessary to accomplish such purpose. "The right of a corporation to invest in shares of another company can not be implied because both companies are engaged in a similar kind of business." (1 Morawetz on Priv. Corp., § 431.)

It is true that a gas company might take the stock of another corporation in payment of a debt, or perhaps as security for a debt, but the actual purchase of such stock is not directly and immediately appropriate to the execution of a specifically granted power to operate gas works and manufacture gas. Some corporations, like insurance companies, may find it necessary to keep funds on hand for the payment of losses by death or fire, or to meet other necessary demands, but it is questionable whether even these can invest their surplus funds in the stocks of other corporations without special legislative authority. But there is nothing in the nature of a gas company which renders it proper for such a company to accumulate funds for outside investment; its surplus profits belong to the stockholders, and, when distributed among them, can be used by them as they see fit.

If, then, the power to purchase outside stocks can not be implied from the power to operate gas works and make and sell gas, a company to whom the latter power has been expressly granted can not exercise the former without legislative authority to do so. This is the law as settled by the great weight of authority.

Boone on the Law of Corporations says: "Without a power specifically granted, or necessarily implied, a corporation can not become a stockholder in another corporation, and especially where the object is to obtain the control or affect the management of the latter." In Green's Brice's Ultra Vires (page 91, note *b*) it is said: "In the United States a corporation can not become a stockholder in another corporation unless by power specifically granted by its charter, or necessarily implied in it." So also Morawetz on Private Corporations (secs. 431–433) says: "A corporation has no implied right to purchase shares in another company for the purpose of controlling its management. * * * A corporation can not, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly through persons acting as its agents or tools." The authorities referred to by these text writers sustain the conclusions announced by them. It has been held in many cases, that, "in the United States, corporations can not purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law," and that "one corporation can not become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute." (Franklin Co. v. Lewiston Sav. Ins., *supra*;[1] Franklin Bank v. Commercial Bank, 36 Ohio St. 350; Milbank v. N. Y., L. E. & W. R. Co., 64 How. (N. Y.) 20; Sumner v. Marcy, 3 W. & M. 105; Mut. Savings Bank v. Meriden Agency, 24 Conn. 159; Central R. Co. v. Collins, 40 Ga. 582; Hazelhurst v.

[1] P. 938.

Savannah R. Co., 43 Ga. 13; Berry v. Yates, 24 Barb. 199.)

The special charters of the Chicago Gas Light and Coke Campany and of the People's Gas Light and Coke Company, which are set out in full in the information and not called in question in any of the pleas, confer by express grant the power to erect gas works and manufacture and sell gas, etc., but do not confer the power to buy shares of stock in other companies; upon the latter subject they are silent. It will not be denied, that, under the authorities already cited, these two companies can not buy and hold stock in other gas companies. The same would undoubtedly be admitted to be true of the Chicago Gas Trust Company, if it held under a special charter of like tenor and effect granted before the adoption of the constitution of 1870. Does it make any difference that the appellee was organized under the general incorporation act?

The general incorporation act of this state does not, in express terms, confer upon the corporations organized under it the power to purchase and hold shares of stock in other corporations. It is silent upon that subject. The only powers granted by it are the ordinary corporate powers, such as the rights to be bodies corporate and politic, to sue and be sued, to have a common seal, etc. The charter of a corporation formed under such a general law does not consist of the articles of association alone, but of such articles taken in connection with the law under which the organization takes place. (1 Morawetz on Priv. Corp., § 318.) The provisions of the law enter into and form a part of the charter. It certainly can not be true, that a corporation, formed under the general incorporation act for a purpose other than that of dealing in stocks, can exercise the power of purchasing and holding stock in other corporations, where such power can not be necessarily implied from the nature of the power specifically granted, and is not necessary to carry the latter into effect.

The power to purchase and hold stock in other companies must be the subject of legislative grant, if not in all cases, at least in cases where it can not be implied from the powers expressly granted. The general incorporation law contains no grant of such power by the legislature. Can a corporation organized under that law be clothed with such a power by merely naming it in the statement filed with the secretary of state? We think not. The action of the secretary of state in issuing the license and the certificate of organization is necessarily, to a large extent, merely ministerial. (Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S. 1[1]; 4 Am. & Eng. Ency. of Law, Tit. Corporations, page 192, note 1.) Whether the articles of association, consisting of the statement, the license, the report of the commissioners, the certificate of organization, etc., do or do not confer such rights and powers as are authorized by the law, is a matter for judicial determination. Counsel for appellee say: "We do not claim, of course, that the action of the secretary of state is conclusive and not subject to review by this court." * * *

When a corporation is formed under the general incorporation act

[1] *Supra*, p. 429.

for the purpose of carrying on a lawful business, the law, and not the statement, or the license, or the certificate, must determine what powers can be exercised as incidents to such business. Even if shares of stock be regarded as personal property, as claimed by counsel for appellee, section five of the general law provides, that corporations formed under it "may own * * * so much * * * personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the uses of the corporation, * * * and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed." This language negatives the idea that a corporation formed under the general law can exercise the power of buying and holding the stock of other companies. A company engaged on its own account in manufacturing and selling gas does not need the stock of other gas companies in order to transact its business. Hence, it is forbidden to own such stock, the same being "personal estate." * * *

The second of the two objects is stated as follows: "*And* to purchase and hold or sell the capital stock, or purchase, or lease, or operate the property, plant, good will, rights and franchises of any gas works, or gas company or companies, or any electric company or electric companies in * * * Chicago * * * or elsewhere in * * * Illinois, as said corporation may, by vote of the majority of the stockholders, elect," etc. Manufacturing and selling gas is one kind of business; dealing in stocks is another and different kind of business. If it appeared that the appellee was engaged in both under its present charter, a serious question might arise as to the power to organize one corporation for two distinct purposes under the general incorporation act of this state. This record, however, only shows that the appellee is exercising the power designated by the declaration of the second object of its formation. What is the power which it is so exercising? * * *

The fact that the appellee almost immediately after its organization bought up a majority of the shares of stock of each of these companies, shows that it was not making a mere investment of surplus funds, but that it designed and intended to bring the four companies under its control, and, by crushing out competition, to monopolize the gas business in Chicago.

The general incorporation act provides, "that corporations may be formed in the manner provided by this act *for any lawful purpose* except banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money." The purpose for which a corporation is formed under the act must be a *lawful* purpose. So far as appellee was organized with the object of purchasing and holding all the shares of the capital stock of any gas company in Chicago or Illinois, it was not organized for a lawful purpose, and all acts done by it towards the accomplishment of such object are illegal and void. * * *

The common law will not permit individuals to oblige themselves

by a contract either to do or not to do anything when the thing to be done or omitted is in any degree clearly injurious to the public. (Chappel v. Brockway, 21 Wend. 157; Transportation Co. v. Pipe Line Co., 22 W. Va. 600.) In Stanton v. Allen, 5 Denio 434, an agreement, whose tendency was to prevent competition, was held to be void by the principles of the common law, because it was against public policy and injurious to the interests of the state.

"Contracts creating monopolies are null and void as being contrary to public policy." (2 Addison on Cont., 743.) All grants creating monopolies are made void by the common law. (7 Bacon's Abridgment, page 22.) In The Case of the Monopolies (Coke's Reports, Vol. 6, part XI, page 84), it was decided as long ago as the forty-fourth year of the reign of Queen Elizabeth, that a "grant to the plaintiff of the sole making of cards within the realm was utterly void, and that for two reasons: 1. That it is a monopoly and against the common law. 2. That it is against divers acts of parliament," etc. (Bell v. Leggett, 7 N. Y. 176; Trist v. Child, 21 Wall. 441.)

If contracts and grants, whose tendency is to create monopolies, are void at common law, then where a corporation is organized under a general statute a provision in the declaration of its corporate purposes, the necessary effect of which is the creation of a monopoly, will also be void. * * *

That the exercise of the power attempted to be conferred upon the appellee company must result in the creation of a monopoly results from the very nature of the power itself. If the privilege of purchasing and holding all the shares of stock in all the gas companies of Chicago can be lawfully conferred upon appellee under the general incorporation act, it can be lawfully conferred upon any other corporation formed for the purpose of buying and holding all the shares of stock of said gas companies. The design of that act was that any number of corporations might be organized to engage in the same business if it should be deemed desirable. But the business now under consideration could hardly be exercised by two or three corporations. Suppose that after appellee had purchased and become the holder of the majority of shares of stock of the four companies in Chicago, another corporation had been organized with the same object in view, that is to say, for the purpose of purchasing and holding a majority of the shares of stock of the gas companies in Chicago. There being only four of such companies, what would there be for the corporation last formed to do? It could not carry out the object of its creation, because the stock it was formed to buy was already owned by an existing corporation. Hence to grant to the appellee the privilege of purchasing and holding the capital stock of any gas company in Chicago is to grant to it a privilege which is exclusive in its character. It is making use of the general incorporation law to secure a special "privilege, immunity or franchise;" it is obtaining a special charter, under the cover and through the machinery of that law, for a purpose forbidden by the constitution. To create one corporation

that it may destroy the energies of all other corporations of a given kind, and suck their life blood out of them, is not a "lawful purpose." * * *

The privileges awarded to the four gas companies under their respective charters were given them in return for, and in consideration of, services to be rendered by them to the public. When they entered the streets of Chicago, they assumed the performance of the public duty of furnishing light to the inhabitants. That they should be permitted, or required, or forced, to abandon the performance of such public duty is against the policy of the law. The public duty is imposed upon each company separately, and not upon the four when combined together. Each for itself, when it accepted its articles of association, assumed an obligation to perform the objects of its incorporation. But the appellee, through the control which it does or may exercise over the four companies by reason of its ownership of a majority of their stock, renders it impossible for them to discharge their public duties except at the dictation of an outside force, and in the manner prescribed by a corporation operating independently of them. They are thus virtually forced to abandon the performance of their duty to the public. The freedom and effectiveness of their action in carrying out the purposes of their creation are seriously interfered with, if not actually destroyed. A power, whose exercise leads to such a result can not be lawfully entrusted to any corporate body. * * *

The court below erred in overruling the demurrers. **Reversed.**

Note. See note at end of next case.

Sec. 305. Same.

3. Exceptions to general rule.

PEARSON v. CONCORD RAILROAD CORPORATION, Er. al.[1]

1883. In the Supreme Court of New Hampshire. 62 New Hampshire Reports 537–551, 13 Am. St. Rep. 590.

[Bill in equity by certain stockholders to set aside certain contracts of the directors of one railroad company whereby they purchased for it a controlling interest in the stock of a connecting road for the purpose of controlling the latter in the interests of the former.]

Smith, J. * * * The case finds that the Northern railroad is the owner of 1,290 shares of Concord railroad stock, purchased in 1873, upon which it has since voted at the meetings of the Concord railroad. A corporation can not become a stockholder in another corporation, unless such power is given it by its charter or is necessarily implied in it (Franklin Co. v. Bank, 68 Maine 43; Bank v. Agency Co., 24 Conn. 159; Green Bri. Ult. V. 91, and cases cited; Mor. Corp., section 229 and cases cited); especially if the purchase

[1] Only so much of the opinion as relates to the single point is here given.

be for the purpose of controlling or affecting the management of the other corporation. Sumner v. Marcy, 3 W. & M. 105; Central R. R. Co. v. Collins, 40 Ga. 582; Hazlehurst v. Savannah, etc., R. R. Co., 43 Ga. 13; G. N. Ry. Co. v. Eastern, etc., Ry. Co., 21 L. J. Ch. 837; Booth v. Robinson, 55 Md. 419, 439. Dealing in stocks is not expressly prohibited in the act of congress providing for the organization of national banks (U. S. Rev. St., section 5136, par. 7), but such prohibition is implied from the failure to grant the power. Bank v. Bank, 92 U. S. 122, 128. Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental or necessary to carry into effect the purposes for which they were established. Downing v. Mt. W. Road Co., 40 N. H. 230, 232; Trustees v. Peaslee, 15 N. H. 317, 330; Beaty v. Knowler's Lessee, 4 Pet. 152; Perrine v. Company, 9 How. 172; Bank v. Earle, 13 Pet. 519; Trustees Dartmouth College v. Woodward, 4 Wheat. 518, 636.

Certain classes of corporations, such as religious and charitable corporations, and corporations for literary purposes, may rightfully invest their moneys in the stock of other corporations. The power, if not expressly mentioned in their charters, is necessarily implied, for the preservation of the funds with which such institutions are endowed, and to render their funds productive. So an insurance company or savings bank may rightfully invest its capital or deposits in the stocks of railroad companies, banks, manufacturing companies, and similar corporations. The power is necessary to enable them to engage in the business for which they are organized, and hence is implied, if not expressly granted, in their charters. Such investments are in the line of their business. On the other hand, a manufacturing or railroad corporation is incorporated to do the business of manufacturing or transporting passengers and merchandise. Investing their funds in that of other corporations is not in the line of their business. Under extraordinary circumstances it may become necessary for a national bank, or a manufacturing corporation, or a railroad corporation, to acquire stock in another corporation, as in satisfaction of a valid debt, or by way of security, but with a view to its subsequent sale or conversion into money so as to make good or redeem an anticipated loss. Bank v. Bank, 92 U. S. 128; Fleckner v. Bank, 8 Wheat. 338.

In Hodges v. N. E. Screw Co., 1 R. I. 312, the court said there was no doubt the defendant company might have taken the stock in the iron company in payment for its rolling-mill, if it had been taken with a view to sell again, and not permanently to hold it.

The Northern Railroad by its charter was vested with all the powers necessary to carry into effect the purposes and objects of its incorporation, subject to the laws in relation to corporations and railroads contained in the Revised Statutes. The objects of its incorporation are declared to be the accommodation of the public travel and the transportation of goods and merchandise. Laws 1844, ch. 190. It was not contemplated that more funds would be raised by the issue of stock than was necessary to construct and equip its road. The pro-

vision that when the net receipts shall amount to a sum making, with the prior net receipts of the corporation, more than an average of 10 per cent. per annum from the commencement of its operations, the excess shall be paid into the treasury of the state, is evidence that the legislature never contemplated the accumulation of a fund from its earnings, or from loans, or from the issue of stock, to be invested in the stock of another railroad corporation. It can no more make a permanent investment of funds in the stock of another road than it can engage in a general banking, manufacturing or steamboat business. It is neither incidental to the purposes of its incorporation, nor necessary in the exercise of the powers conferred by its charter. If it can purchase any portion of the capital stock of the Concord company it may buy up the whole, and thus engage in a business for which its charter gives it no authority. And what would hinder a banking corporation from becoming a manufacturing company, or a manufacturing company from becoming a railroad common carrier?

But the facts in this case go further. The stock was bought at $105 or $106 per share (par value, $50), a price largely in excess of its market value, and for the purpose of obtaining control of the Concord and securing more favorable contracts to itself. In Sumner v. Marcy, 3 W. & M. 105, the corporation was chartered to deal in lumber, with a capital of $150,000, of which only $75,000 could be invested in personal property, and took stock in a bank to the value of $168,000, for the purpose of getting control of the bank—a clear violation of its charter, but no more so than in this case. The purchase by a corporation of stock in another corporation will be enjoined at the instance of stockholders, when it involves a misapplication of corporate funds, or is a mere speculation, or is induced by a vicious purpose. Pierce R. R., 505. If the investment by one railroad corporation of more than $135,000 in stock of another at prices exceeding its market value, for the purpose of controlling such corporation for its own benefit, is not a misapplication of corporate funds, it would be difficult to find a case where such investment would be.

[Contracts set aside and a trustee appointed to manage the affairs of the Concord company.]

Note. **Acquiring stock in other corporations.**

1. *General rule:* In the absence of particular charter or statutory provisions, or circumstances (indicated below), one business corporation has no general implied authority to acquire or hold stock in another such corporation (organized either for a similar or for a different purpose), as an investment for speculation, or for purpose of controlling or managing such corporation. This rule is applied in cases of:

(a) *Banks:* 1852, Talmage v. Pell, 7 N. Y. 328; 1877, Franklin Co. v. Lewiston Sav. Inst., 68 Maine 43 (in manufacturing); 1884, Franklin Bank v. Commercial Bank, 36 Ohio St. 350 (in banks); 1884, Nassau Bank v. Jones, 95 N. Y. 115, *infra*, p. 1205 (in railroad); 1893, Bank of Commerce v. Hart, 37 Neb. 197 (in insurance); 1897, California Bank v. Kennedy, 167 U. S. 362 (in banks); 1899, First National Bank v. Hawkins, 174 U. S. 364 (in banks). But compare, 1897, Latimer v. Citizens' S. B., 102 Iowa 162. See *infra* (i).

(b) *Furniture companies:* 1893, Denny Hotel Co. v. Schram, 6 Wash. 134, *supra*, p. 553 (in hotel); 1895, Knowles v. Sandercock, 107 Cal. 629 (same); 1898, Newland Hotel Co. v. Furniture Co., 73 Mo. App. 135 (same).

(c) *Insurance companies:* 1855, Mechanics' and W. M. Sav. B., etc., v. Meriden Agency, 24 Conn. 159 (in bank); 1857, Berry v. Yates, 24 Barb. (N. Y.) 199 (in insurance); 1878, *Ex parte* Liquidators L. R., 8 Ch. D. 679 (same); 1884, Pierson v. McCurdy, 33 Hun (N. Y.) 520 (same); 1891, Commw. Fire Ins. Co. v. Board of Rev., 99 Ala. 1, *supra*, p. 773 (in bank). See *infra* (i).

(d) *Land company:* 1893, Pauly v. Coronado Beach Co., 56 Fed. Rep. 428 (in manufacturing);

(e) *Lumber company:* 1893, Lanier Lumber Co. v. Rees, 103 Ala. 622 (in lumber company);

(f) *Manufacturing company:* 1847, Sumner v. Marcy, 3 Woodb. & M. 105, Fed. Cas. 13609 (in bank); 1888, Lake Erie, etc., R. Co. v. Iron Co., 46 Ohio St. 44 (in railway);

In other manufacturing: 1892, Easun v. Buckeye B. Co., 51 Fed. Rep. 156; 1892, Buckeye Marble Co. v. Harvey, 92 Tenn. 115; 1895, Merz Capsule Co. v. U. S. Capsule Co., 67 Fed. Rep. 414; 1897, People v. Chicago Gas Co., 130 Ill. 268; 1898, Martin v. Stove Co., 78 Ill. App. 105; 1898, People v. Pullman's P. C. Co., 175 Ill. 125; 1899, De La Vergne R. M. Co. v. German Sav. Inst., 175 U. S. 40. But compare, 1897, White v. Marquardt, 105 Iowa 145. See *infra* (i).

(g) *Railway companies:* In other railway companies: 1851, East Anglican R. Co. v. Eastern Counties R., 7 Eng. L. & Eq. 505; 1863, Maunsell v. Midland R., 1 Hem. & M. 130; 1869, Central R. Co. v. Collins, 40 Ga. 582; 1871, Hazelhurst v. Savannah, etc., R. Co., 43 Ga. 13; 1875, Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475; 1882, Milbank v. N. Y., L. E. & W., 64 How. Pr. 20; 1882, Elkins v. Camden & A. R. 36 N. J. Eq. 5; 1883, Pearson v. Concord Ry. Co., 62 N. H. 537; 1888, Mackintosh v. Flint, etc., R., 34 Fed. Rep. 582; 1888, Langdon v. Branch, 37 Fed. Rep. 449; 1892, Hamilton v. Savannah, etc., R., 49 Fed. Rep. 412; 1896, Farmers L. & T. Co. v. Railroad Co., 150 N. Y. 410; 1898, Military Interstate Assoc. v. Railway Co., 105 Ga. 420 (in an advertising company).

See *infra* (i) and,

(h) The general rule is applied with vigor where the object is to obtain control in order to prevent competition: 1869, Central R. Co. v. Collins, 40 Ga. 582; 1879, Central R. v. Penn. R., 31 N. J. Eq. 475; 1882, Elkins v. C. & A. R., 36 N. J. Eq. 5; 1889, People v. Chicago G. T. Co., 130 Ill. 268, 17 Am. St. R. 319, 8 L. R. A. 497, *supra*, p. 1054; 1892, Clarke v. R. Co., 50 Fed. Rep. 338; 1895, Louisville, etc., R. v. Ky., 161 U. S. 677; 1898, Martin v. Stove Co., 78 Ill. App. 105; 1899, De La Vergne R. M. Co. v. German Sav. Inst., 175 U. S. 40.

(i) But the following cases hold *contra* the general rule above given: 1849, Elysville Mfg. Co. v. Okisko Co., 1 Md. Ch. 392; 1850, Hodges v. Screw Company, 1 R. I. 312, 53 Am. Dec. 624; 1853, Elysville Mfg. Co. v. Okisko Co., 5 Md. 152; 1879, Terry v. Eagle Lock Co., 47 Conn. 141; 1880, Booth v. Robinson, 55 Md. 419; 1883, Pearson v. Railroad Co., 62 N. H. 537 (as to some corporations); 1894, Smith v. Newark, etc., R., 8 Ohio C. C. 583; 1895, Calumet Paper Co. v. S. I. Co., 96 Iowa 147; 1897, White v. Marquardt, 105 Iowa 145, 74 N. W. Rep. 930.

See, also, English rule, *supra*, p. 1051, and exceptions noted below.

2. *Exceptions* to the general rule.

(a) Express or implied authority; special authority. 1869, Miners' Ditch Co. v. Zellerbach, 37 Cal. 543; 1884, Evans v. Bailey, 66 Cal. 112; 1899, Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. Rep. 723.

Authority to consolidate implies power to purchase stock: 1863, Mayor of Baltimore v. B. & O. R., 21 Md. 50; 1879, Ryan v. Leavenworth, 21 Kan. 365; 1885, Terhune v. Potts, 47 N. J. L. 218; 1885, Hill v. Nisbet, 100 Ind. 341; 1892, Dewey v. Toledo R., 91 Mich. 351; 1893, Tod v. Ky. Union Land Co., 57 Fed. Rep. 47, *supra*, p. 952; 1894, Marbury v. Land Co., 62 Fed. Rep. 335; 1896, Louisville T. Co. v. Louisville, etc., R., 75 Fed. Rep. 433; 1898, Rogers v. Nashville, etc., Co., 91 Fed. Rep. 299; 1900, Trust Co. v. State, 109 Ga. 736, 35 S. E. Rep. 323.

In 1895, Calumet Paper Co. v. South Invest. Co., 96 Iowa 147, power to acquire stock in other companies is implied from a grant "to contract, acquire and transfer property as a private person"; so too, in 1897, White v. Mar-

quardt, 105 Iowa 145, 74 N. W. Rep. 930, it was held that a corporation might exchange its goods for stock in other corporations.

In many states the subject is regulated by statutory or other provision—*e. g.*, Georgia forbids her legislature authorizing one corporation purchasing the shares of another corporation. Const. 1877, art. iv, § 2, par. 4. See, 1900, Trust Co. v. State, 109 Ga. 736, 35 S. E. Rep. 323. On the other hand, several states authorize corporations to purchase and deal in such stocks, as Minn. G. S. 1891, § 2680; New Jersey, Acts 1896, § 51; New York, G. L. C. 36, art. iii, § 40.

(b) When necessary to prevent loss, or secure the payment of a debt, stock may be taken in other corporations: 1847, Sumner v. Marcy, 3 Woodb. & M. 105, Fed. Cas. 13609; 1852, Talmage v. Pell, 7 N. Y. 328; 1860, Howe v. Boston Carpet Co., 82 Mass. (16 Gray) 493; 1875, First National Bank v. National Ex. Bk., 92 U. S. 122; 1888, Railway Co. v. Iron Co., 46 Ohio St. 44; 1889, National Bank v. Case, 99 U. S. 628; 1891, Holmes & Griggs Mfg. Co. v. H. & W. M. Co., 127 N. Y. 252; 1893, Bank of Commerce v. Hart, 37 Neb. 197; 1895, Byrne v. Schuyler Elec. Mfg. Co., 65 Conn. 336; 1895, Calumet Paper Co. v. Invest. Co., 96 Iowa 147; 1897, California Bank v. Kennedy, 167 U. S. 362.

(c) But it seems a failing corporation may dispose of its property in exchange for the stock of another corporation, for the purpose of winding up its affairs, but not for holding permanently, and if creditors are protected: 1856, Treadwell v. Salisbury M. Co., 7 Gray (Mass.) 393; 1876, Buford v. Keokuk N. P. Co., 3 Mo. App. 159; 1895, Holmes & G. Mfg. Co. v. H. & W. M. Co., 127 N. Y. 252; 1895, Byrne v. Elec. Co., 65 Conn. 336; 1896, Pinkus v. Minn. L. M. Co., 65 Minn. 40.

But not if solvent, against the protest of shareholders: 1892, People v. Ballard, 134 N. Y. 269, *infra*, p. 1066; 1895, Byrne v. Elec. Co., 65 Conn. 336; 1896, Elyton Land Co. v. Dowdell, 113 Ala. 177, 59 Am. St. Rep. 105.

(d) A parent company may acquire the stock of a branch company: 1889, People v. Bell Tel. Co., 117 N. Y. 241.

3. Where stock of a corporation is held without authority by another corporation, the latter may collect dividends upon, or sell it, but can not vote upon it: 1872, State v. McDaniel, 22 Ohio St. 354, 368; 1882, Milbank v. N. Y., etc., R., 64 How. Pr. 20, 30; 1889, Memphis, etc., R. Co. v. Woods, 88 Ala. 630; 1899, Bigbee & W. R. Co. v. Moore, 121 Ala. 379, 25 So. Rep. 602; 1899, State v. Newman, 51 La. Ann. 833.

But if the holding is authorized, the stock so held may be voted: 1890, State v. Rohlffs, — N. J. —, 19 Atl. Rep. 1099; 1894, Oelbermann v. N. Y., etc., R., 77 Hun (N. Y.) 332.

As to liability of a corporation upon an *ultra vires* holding of stock in another corporation, see, 1894, Kennedy v. Cal. Sav. Bk., 101 Cal. 495; 1896, Citizens', etc., Bk. v. Hawkins, 71 Fed. Rep. 369; 1897, California Bk. v. Kennedy, 167 U. S. 362.

The *ultra vires* exclusive holding, however, does not merge the companies, and the one owning the stock of the other does not make the former liable for the debts of the latter: 1895, Einstein v. Rochester Gas, etc., Co., 146 N. Y. 46; 1898, National Bank of Commerce v. Allen, 90 Fed. Rep. 545; 1898, Louisville Gas Co. v. Kaufman, 20 Ky. L. Rep. 1069, 48 S. W. Rep. 434.

4. *Who may object.*

(a) A shareholder can, if the contract is executory, or if he acts promptly: 1849, Salomons v. Laing, 12 Beav. 339; 1853, Kean v. Johnson, 9 N. J. Eq. 401; 1885, Holt v. Winfield Bank, 25 Fed. Rep. 812; 1895, Byrne v. Elec. Co., 65 Conn. 336; 1899, Harding v. Am. Glucose Co., 182 Ill. 551, 74 Am. St. Rep. 190. See note, *supra*, § 291; *infra*, §§ 583–585.

But not if completely executed or if guilty of laches: 1882, Wright v. Pipe Line, 101 Pa. St. 204; 1885, Holt v. Winfield Bank, 25 Fed. Rep. 812; 1892, Willoughby v. Chicago Jct., 50 N. J. Eq. 656. See note, *supra*, § 291.

(b) The state can complain: 1889, People v. Chicago Gas Trust, 130 Ill. 268; 1892, People v. Ballard, 134 N. Y. 269; 1892, State v. Standard Oil Co., 49 Ohio St. 137. See note, *supra*, § 291, *infra*, §§ 583–585.

Sec. 306. 3. Power to alienate property.
(a) General doctrine.

THE AURORA AGRICULTURAL AND HORTICULTURAL SOCIETY OF AURORA v. PADDOCK ET AL.

1875. IN THE SUPREME COURT OF ILLINOIS. 80 Ill. 263–274.

CRAIG, J. This was a bill in equity, brought by appellees, to foreclose a mortgage executed by the Aurora Agricultural and Horticultural Society of Aurora, on the 28th day of December, 1870, to secure the payment of $6,000 loaned by John R. Coulter to the society. The court, on a hearing of the cause, rendered a decree directing a sale of the mortgaged premises in satisfaction of the mortgage debt.

The society has prosecuted this appeal, and, in order to obtain a reversal of the decree, it is insisted by the counsel for appellant:

First. That the society had no power whatever to mortgage.

Second. That the mortgage in question was wholly unauthorized.

The appellant was organized on the 6th day of March, 1869, under an act approved February 15, 1855, which authorized the incorporation of agricultural societies. (Gross' Statutes, 1869, page 119.) By the third section of the act the society was made a body corporate, with power to sue and be sued, to acquire and hold real estate not exceeding five hundred acres, to construct the necessary improvements and buildings for its purpose, to have and employ capital, machinery, live stock, etc., not exceeding in value $10,000.

While it is true no section of the act confers direct authority upon the society to sell or mortgage its property, except upon a dissolution of the corporation, yet the act does not prohibit or restrict the society from selling or giving a mortgage upon its real estate. The power to mortgage, when not expressly given or denied, must be regarded as an incident to the power to acquire and hold real estate and make contracts.

We understand it to be the common law rule that corporations have an incidental right to alien or dispose of their lands and personal property unless specially restrained by the act under which they are organized or by statute.

It is said in Angell & Ames on Corporations, p. 153: "Independent of positive law, all corporations have the absolute *jus disponendi*, neither limited as to objects nor circumscribed as to quantity." The same doctrine is clearly laid down by Kent, vol. 2, page 280.

We are, therefore, of opinion, as the society was not prohibited from mortgaging its lands, it possessed the power to do so as an incident to the power to purchase and hold real estate and make contracts.

In regard to the second point relied on by appellant that the directors of the society had no power to authorize its president and secretary to mortgage the premises, such power, if it existed at all, being

in the stockholders—a complete answer to this position is that the action of the directors was ratified by the stockholders.

Decree affirmed.

Note. Corporations have the power to alienate property, generally without special authority, and to any extent, if creditors, or dissenting shareholders, are not injuriously affected: 1838, Ref. Prot. Dutch Church v. Mott, 7 Paige Ch. (N. Y.) 77, 32 Am. Dec. 613; 1840, Burrill v. Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; 1856, Old Colony R. Co. v. Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394; 1856, Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490, *infra*, p. 1787; 1869, Miners Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; 1888, State v. Western, etc., Co., 40 Kan. 96, 10 Am. St. R. 166; 1891, Finch v. Ullman, 105 Mo. 255, 24 Am. St. R. 383; 1891, Holmes Mfg. Co. v. Holmes Metal, etc., Co., 127 N. Y. 252, 24 Am. St. R. 448; 1892, Union Pacific R. Co. v. C., R. I. & P. R., 51 Fed. Rep. 309; 1894, Benbow v. Cook, 115 N. C. 324, 44 Am. St. R. 454; 1897, Bartholomew v. Derby Rubber Co., 69 Conn. 521, 61 Am. St. R. 57; 1898, Central Trust Co. v. W. N. C. R. Co., 89 Fed. Rep. 24; 1898, Risdon Iron & L. W. v. Citizens' Traction Co., 122 Cal. 94, 54 Pac. Rep. 529 (rolling stock); 1899, Stockton v. Am. Tobacco Co., 55 N. J. Eq. 352; 1899, Michigan Tel. Co. v. City of St. Joseph, 121 Mich. 502, 80 N. W. Rep. 383; 1900, City of Spokane v. Amsterdamsch, etc., — Wash. —, 60 Pac. Rep. 141; 1900, Hamilton v. Menominee Falls Quarry Co., — Wis. —, 81 N. W. Rep. 876; 1900, Advance Benev. Order v. Penn. Safe D. & T. Co., — Pa. —, 46 Atl. Rep. 102. But see, *infra*, § 619, as to power of majority to sell without consent of minority of shareholders. Also *infra*, § 639, as creditors' rights to complain.

Sec. 307. (b) Limits.

PEOPLE v. BALLARD ET AL.[1]

1892. IN THE COURT OF APPEALS OF NEW YORK. 134 N. Y. Rep. 269–305.

VANN, J. In 1880 the Spring Valley Hydraulic Gold Company was organized as a corporation under the general manufacturing act of this state, and shortly thereafter it invested substantially all its capital in certain mines in the state of California, and until the year 1886 operated the same as its sole business. The object for which it was formed, as stated in the certificate of incorporation, was to carry on the business of mining various precious ores, and to smelt, refine and sell the product.

In July, 1886, the defendant trustees transferred all its property, both real and personal, including said mines, to a corporation organized at the time under the laws of the state of California, for the purpose of carrying on the business theretofore conducted by the defendant company and of taking title to its assets. This was done with the approval of stockholders holding a majority of the stock, in good faith, to save the property from sacrifice, but without the consent of the holders of a large number of shares and against the protest of some of the stockholders. The sole consideration for such transfer

[1] Part of opinion of Vann, J., and all of dissenting opinion of Landon, J. (with whom Brown, J., concurred), omitted.

was an agreement by the California company to pay the debts of the New York company and to issue to it certain shares of its capital stock. A majority of the directors of the former company were, and still are, residents of California, and the only object of the transaction was, without a dissolution, to reorganize the defendant company under the laws of another state in order to obtain some real or supposed advantage afforded thereby. The attorney-general commenced this action to remove the trustees and to compel them to account for the property thus transferred, but the special term dismissed the complaint because no one was joined as a relator and the general term affirmed the judgment, one of its learned justices dissenting.

This appeal presents two questions of grave importance:

1. Whether an action for the judicial supervision of a business corporation, its officers and members can be maintained by the attorney-general in the name of the people without a relator? (People v. Lowe, 47 Hun 577; People v. Bruff, 9 Abb. [N. C.] 153.)

2. Whether a corporation created by the laws of this state can be reorganized under the laws of another state without the process of lawful dissolution. * * *

(After holding that the New York statutes allowed the proceeding by the attorney-general alone, proceeds:)

A corporation is purely artificial, having no natural or inherent power, but only such as its charter confers. The charter of the corporation in question was the statute under which it was organized. Upon filing the certificate of incorporation it came into existence with power to do only that which is expressly or impliedly authorized by the statute. It had no power to act, except through its trustees, who were authorized to manage its "stock, property and concerns," and a majority of whom were required to be citizens of this state. (Laws of 1848, ch. 40, as amended by Laws of 1869, ch. 269.) While they were authorized to conduct its affairs, they were not authorized to terminate its existence, although, under special circumstances, the courts could dissolve it upon their application. (Code of Civ. Pro., § 2419.) A corporation can not cease to exist of its own will. Its life continues until either the charter period has expired or the court has decreed a dissolution. The law made it, and the law only can put an end to it. As it can not take its own life directly, it can not do so indirectly, for that would be a fraud upon the law and against public policy. By the transaction complained of the defendant company was stripped of all its property, and thus prevented from going on in business and deprived of all means of carrying into effect the object of its existence. While a corporation may sell its property to pay debts, or to carry on its business, it can not sell its property in order to deprive itself of existence. It can not sell all its property to a foreign corporation organized through its procurement, with a majority of non-resident trustees, for the express purpose of stepping into its shoes, taking all its assets and carrying on its business. That would be the practical destruction of the corporation by its own act, which the law will not tolerate. Whether the process by which it

was sought to convert the New York corporation into a California corporation is called reorganization, consolidation or amalgamation, it was the exercise of a power not delegated, and was void. It was corporate burial in New York for resurrection in California. While the stockholders who consented may be estopped by their acts, those who did not consent can take advantage of this violation of their rights, and in the state of New York can demand that those who did the wrong shall make restitution.

The case of Abbott v. American Hard Rubber Company (33 Barb. 578), is the leading authority upon the subject in this state, and it is also recognized as the leading authority in most of the states. In that case a majority of the trustees of a business corporation, without the consent of some of the stockholders, transferred all its personal property, which was especially adapted to its business, to two persons, who forthwith caused another corporation to be formed, and transferred such property to it. It was held that, as such transfer practically terminated the corporation by taking from it the power to fulfill the object of its organization, it was a violation of that object, was not within the power of the trustees, and was hence void as *ulta vires*. The case was elaborately considered both at general and special term, and we regard it as a sound and valuable authority.

A somewhat similar question was under consideration in Frothingham v. Barney (6 Hun 366), where the court said: "This, as a business arrangement, was wise, discreet and sagacious. As such it should be sustained if it legally is possible. The interests of one or two small stockholders should not enable them to work the destruction of the interests of co-owners, or compel the purchase of their stock at fictitious or unreal prices, if it can be avoided. * * * Upon the dissolution of the association, it became the duty of the trustees to convert the assets into money and distribute the proceeds among the stockholders. To a certain extent this has been done. A portion of such assets has not been distributed, and another portion, including the good will of the old association, has been exchanged by the trustees for the corporate stock of a new Wells, Fargo & Co. This, as I understand, the trustees had no right to do. They had no right to exchange the assets of the old association for the corporate stock of any corporation without the consent of all the stockholders. (Mann v. Butler, 2 Barb. Ch. 362.) Equally were they without authority in making this partial exchange without such consent. Stockholders of the old associatibn could not thus, against their will, be forced into relations with the new company. (Blatchford v. Ross, 54 Barb. 42: H. & N. H. R. Co. v. Croswell, 5 Hill 383, 386.)"

In Taylor v. Earle (8 Hun 1), a New York corporation, by the vote of a large majority of its stockholders, sold all its property, except cash on hand, mills and franchises, to a Vermont corporation and took in payment shares of stock in the latter company. The court said: "The whole scheme of the transfer and its execution was illegal. There is no power given by the acts under which the Burlington cotton mills (the New York corporation) was incorporated

to transfer all its property and thus terminate its existence, and take in payment stock in a company carrying on the same business with a different name, charter and stockholders, and being a foreign corporation. The corporation, by the New York law, could increase or diminsh its stock, or extend its business to other objects, but that falls far short, I think, of the sweeping power exercised on this occasion. The sale was not real. It was a mere form to turn a New York corporation into a Vermont one, and thus escape the scrutiny into the affairs of the company permitted by the New York law to the stockholders."

All the authorities in this state are uniform in holding that the trustees of a corporation can not so dispose of its property as to virtually end its existence and prevent it from carrying on the business for which it was incorporated. (Blatchford v. Ross, 54 Barb. 42; Copeland v. Citizens' Gas Light Co., 61 Barb. 60; Smith v. New York Consolidated Stage Co., 18 Abb. Pr. 419; Metropolitan El. Ry. Co. v. Manhattan El. Ry. Co., 14 Abb. [N. C.] 303; Hartford, etc., R. R. Co. v. Croswell, 5 Hill 383.)

Other courts of the highest standing have laid down the same rule. (Railway Co. v. Allerton, 85 U. S. 233; Stevens v. Rutland, etc., R. R. Co., 29 Vt. 545; New Orleans, etc., R. R. Co. v. Harris, 27 Miss. 517; see, also, Morawetz on Corporations, § 413; Spelling on Corporations, § 1012; Cook on Stock and Corporation Law, § 667; Beach on Corporations, §§ 358, 430).

The fact that the trustees acted in good faith did not empower them to do an illegal act; and the fact that there may be some difficulty in the final adjustment of rights, because some of the stockholders consented, while others did not, constitutes no defense to the action. We see no greater difficulty, however, than would exist if the action were brought by a trustee who had not consented to the act complained of, and no reason why "the liability of the trustees to account" should not be "limited to those stockholders who have not assented to the transfer."

We think that the transfer was unauthorized and void as to the non-assenting stockholders, and as to the state, and that the people can maintain the action in the name of sovereignty.

The judgment should, therefore, be reversed and a new trial granted, with costs to abide event.

Note. Compare, 1889, People v. Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. R. 319, 8 L. R. A. 497, *supra*, p. 1054; 1895, Coleman v. Howe, 154 Ill. 458, 45 Am. St. R. 133; 1896, Buck v. Ross, 68 Conn. 29, 57 Am. St. R. 61, *infra*, p. 1977; 1898, Sprague v. National Bank, 172 Ill. 149, 64 Am. St. R. 17; 1899, Harding v. Am. Glucose Co., 182 Ill. 551, 74 Am. St. R. 190; 1899, De La Vergne Refrigerating Match Co. v. German Sav. Inst., 175 U. S. 40, 20 Sup. Ct. Rep. 20.

Sec. 308. (c) **Same.** Property charged with public trust can not be sold without special authority.

HOAR, J., IN COMMONWEALTH v. SMITH.

1865. IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. 10 Allen (Mass.) 448, on 455–6, 87 Am. Dec. 672, on 674–5.

[Bill in equity by the state as the owner of prior mortgage on the property of the Troy and Greenfield Railroad Company, to impeach the validity of a mortgage executed by that company to Smith as trustee, covering the franchise and property of the railroad company then owned, or afterward acquired, to secure bonds to the amount of $900,000 to be issued to the contractor as part compensation for the construction of the road.]

There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restriction, express or implied, in its charter, or in some other legislative act. A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make contracts, under which it may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of its powers, but was originally the usual and peculiarly appropriate form of corporate agreement. The general power to dispose of and alienate its property is also incidental to every corporation not restricted in this respect by express legislation, or by "the purposes for which it is created, and the nature of the duties and liabilities imposed by its charter." Treadwell v. Salisbury Manufacturing Co., 7 Gray 404.

But in the case of a railroad company, created for the express and sole purpose of constructing, owning and managing a railroad; authorized to take land for this public purpose under the right of eminent domain; whose powers are to be exercised by officers expressly designated by statute; having public duties, the discharge of which is the leading object of its creation; required to make returns to the legislature; there are certainly great, and, in our opinion, insuperable objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred by its own act upon another person or body, without authority other than that derived from the fact of its own incorporation. The franchise to be a corporation clearly can not be transferred by any corporate body, of its own will. Such a franchise is not, in its own nature, transmissible. The power to mortgage can only be coextensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure. And although the franchise to exist as a corporation

is distinguishable from the franchises to be enjoyed and used by the corporation after its creation, yet the transfer of the latter differs essentially from the mere alienation of ordinary corporate property. The right of a railroad company to continue in being depends upon the performance of its public duties. Having once established its road, if that and its franchise of managing, using and taking tolls or fares upon the same are alienated, its whole power to perform its most important functions is at an end. A manufacturing company may sell its mill and buy another; but a railroad company can not make a new railroad at its pleasure.

See note at end of next case.

Sec. 309. Same.

BRUNSWICK GAS LIGHT COMPANY v. UNITED GAS, FUEL AND LIGHT COMPANY.[1]

1893. In the Supreme Judicial Court of Maine. 85 Maine Rep. 532–541, 35 Am. St. Rep. 385.

[Action to recover damages for breach of the covenants in a lease. The defense was that the plaintiff, being a corporation that owed a duty to the public, had no legal right to lease such property as disabled it from performing this duty.]

Walton, J. The question is whether a gas company, which possesses and exercises the right to lay its pipes in the public streets, can sell, lease or assign its corporate rights and privileges to another gas company without the consent of the legislature.

We think the question must be answered in the negative. Corporations possessing and exercising the right of eminent domain, owe duties to the public from the performance of which they are not allowed to escape by a sale or lease of their franchises, without first obtaining the consent of the legislature. The franchise of a corporation having the right to receive tolls may be levied on to satisfy an execution against the corporation, and in this way it may be deprived of its corporate powers and privileges. And they may be lost by the foreclosure of a legally executed mortgage. And they may also be lost by laches in reclaiming them when they have been illegally sold, leased or assigned. But subject to these well-defined exceptions, it is now settled by an overwhelming weight of authority that public or *quasi*-public corporations, which possess and exercise the right of eminent domain, or its equivalent, owe duties to the public, as well as to their stockholders; and that they can not sell or lease their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority. It is the duty of gas companies, water companies, electric light companies,

[1] Statement abridged. Part of opinion omitted.

telegraph and telephone companies, street railway companies, and all similar corporations, which have obtained the right to use the public streets for the erection or extension of their works, to serve the public faithfully and impartially, and at reasonable rates. And this is a duty the performance of which may be enforced by the courts. And one reason why these corporations are not allowed to sell or lease their corporate powers and franchises, without legislative authority, is that if they were able to do so, they might thereby disable themselves from the performance of their public duties, and thus escape from the power of the courts and of the legislature to enforce their performance.

But a still more serious objection to the traffic in corporate franchises is the ease with which such a power could be used to create monopolies. By its exercise, a single corporation could easily become possessed of the corporate powers and privileges of all its rivals, and thereby annihilate competition and obtain a complete control of the markets. Such combinations are usually hurtful, and sound public policy requires that they be kept under legislative supervision and restraint.

To the argument that similar combinations may be made by individuals, it has been aptly replied that men are mortal, and their combinations short-lived, but corporations are immortal, and their combinations and acquisitions may go on forever; that they may add field to field, wealth to wealth, and power to power, till they become too strong for the government itself; that all experience shows that such accumulations of wealth and power are dangerous to the public welfare; and that while society can endure the accumulations and combinations of mortals, which must end at the grave, it can not endure similar accumulations and combinations of power by corporations, which may continue forever. * * *

(Citing and commenting upon as supporting this view Stockton v. Central Railroad, 50 N. J. Eq. 52; Feitsam v. Hay, 122 Ill. 293;[2] People v. Chicago Gas Trust, 130 Ill. 268;[3] People v. Sugar Refining Co., 121 N. Y. 582[4].)

The law does not assume that all combinations of corporate powers and franchises are necessarily hurtful. It recognizes the fact that they are sometimes beneficial, and provides a way by which they may be lawfully made. But as such combinations are liable to be made for improper purposes and with conditions annexed to them which are inadmissible, sound public policy requires that they be made under legislative supervision and restraint.

In the present case the Brunswick Gas Light Company undertook to lease all its property, and all its corporate rights and privileges, to the United Gas, Fuel and Light Company for twenty-five years. The latter company took possession of the works and held them for seventeen and a half months, making improvements upon them and pay-

[2] *Supra*, p. 141. [3] *Supra*, p. 1054. [4] *Supra*, p. 100.

ing a portion of the agreed rent. It then abandoned the works, and possession was resumed by the lessors.

This is a suit by the lessors against the lessees for a breach of the covenants contained in the lease. It was contended in defense that the lease was illegal and void, and that no recovery could be had upon it. The presiding justice ruled, as a matter of law, that the plaintiff company and the defendant company had power to execute the lease, and that a recovery could be had for a breach of the covenants contained in it. We think the ruling was erroneous. No legislative authority for making the lease was shown, and, without such authority, we think the lease must be regarded as *ultra vires* and void. The authorities bearing upon the question are not in entire harmony; but the weight of authority seems to us to be overwhelmingly in favor of this conclusion. See 2 Beach on Corporations, sections 831 to 856, inclusive, and the six pages of authorities, *pro* and *con*, cited under the section last cited. The cases are too numerous for citation here, and the few cases to which we have referred will furnish a key to all of them.

But it is claimed that, inasmuch as the defendant company took and held possession of the plaintiff company's works by virtue of the lease, *ultra vires* is no defense to an action to recover the agreed rent. We do not doubt that the plaintiff company is entitled to recover a reasonable rent for the time the defendant company actually occupied the works; but do not think the amount can be measured by the *ultra vires* agreement. We think that in such cases the recovery must be had upon an implied agreement to pay a reasonable rent; and that while the *ultra vires* agreement may be used as evidence, in the nature of an admission, of what is a reasonable rent, it can not be allowed to govern or control the amount. It seems to us that it would be absurd to hold that the *ulta vires* lease is void and at the same time hold that it governs the rights of the parties with respect to the amount of rent to be recovered. A void instrument governs nothing. We think the correct rule is the one stated by Mr. Justice Gray, in a recent case in the United States Supreme Court. He said that a contract made by a corporation which is unlawful and void, because beyond the scope of its corporate powers, does not by being carried into execution become lawful and valid; and that the proper remedy of the aggrieved party is to disaffirm the contract and sue to recover as on a *quantum meruit* the value of what the defendant has actually received the benefit of. Pittsburgh, etc., v. Keokuk, etc., 131 U. S. 371. We think this is the correct rule. 2 Beach on Corp., § 423, and cases there cited.

Exceptions sustained.

Note. See, also, 1825, Ammant v. New Alex. Tp. R., 13 Serg. & R. (Pa.) 210, 15 Am. Dec. 593; 1845, Susquehanna Canal Co. v. Bonham, 9 Watts & S. 27, 42 Am. Dec. 315; 1859, Coe v. C. P. & I. R., 10 Ohio St. 372, 75 Am. Dec, 518; 1880, Gooch v. McGee, 83 N. C. 59, 35 Am. Rep. 558; 1887, Chicago Gas L. Co. v. People G. L. Co., 121 Ill. 530, 19 Am. St. R. 663; 1892, Overton Bridge Co. v. Means, 33 Neb. 857, 29 Am. St. R. 514; 1892, Union Pacific R.

Co. v. C., R. I. & P. R., 51 Fed. Rep. 309; 1893, Gardner v. Mobile, etc., R. Co., 102 Ala. 635, 48 Am. St. R. 84; 1895, Reynolds v. Reynolds Lumber Co., 169 Pa. St. 626, 47 Am. St. R. 935; 1895, Bank v. Tanning Co., 170 Pa. St. 1; 1896, Johnson Co. v. Miller, 174 Pa. St. 605, 52 Am. St. R. 833; 1897, Smith v. R. Co., 182 Pa. St. 139; 1898, Risdon Iron & Locomotive Works v. Citizens' Traction Co., 122 Cal. 94, 54 Pac. Rep. 529; 1899, Harding v. Am. Glucose Co., 182 Ill. 551, 74 Am. St. R. 189.

Sec. 310. Same. (d) Contra.

BULLITT, J., IN BARDSTOWN AND LOUISVILLE RAILROAD COMPANY v. METCALFE.

1862. IN THE COURT OF APPEALS OF KENTUCKY. 4 Metcalfe (Ky.) Rep. 199, on pp. 206–210, 81 Am. Dec. 541, on 546–550.

[The charter of the railroad company authorized its directors to borrow money not exceeding $50,000; the board of directors authorized the president to borrow $30,000 from Metcalfe, and execute a mortgage upon the road and its property. This was done, default in payment made, foreclosure suit brought, and judgment that the road be leased for eight years to the highest bidder, the rent to go to pay the debt, and if no one would lease, that the road be sold to the highest bidder. Appeal was taken from this judgment.]

4. It is contended that the appellant had no power to mortgage its road or franchises. This question, and the next one that we shall consider, were raised by a general demurrer to the petition. Generally, a private corporation has an implied power to do whatever may be necessary to execute its express powers, and to accomplish the purposes for which it was formed. The appellant was expressly authorized to borrow this money, but was not expressly authorized to make a mortgage. Had it not an implied power to do so? It can not be doubted that a manufacturing corporation having power, express or implied, to borrow money, might, unless expressly prohibited, mortgage its property to secure the debt. But it is contended that a railroad corporation stands upon a different footing, because its road is built for public use as well as for the profit of its stockholders; that it is under a duty to the public to keep its road in repair, and carry on its business for the transportation of freight and passengers; and that it can not relieve itself from those duties by conveying its road away.

These views seem to be sustained by several English decisions. At any rate, it seems to be settled in England that a railway company can not, without express authority from parliament, assign or mortgage or lease its road, upon the ground that it is against public policy. An examination of several of those cases does not enable us to state the precise views of public policy out of which that doctrine sprung. It probably arose in part of a general statute which is not in force here. Judge Redfield, however, says: "The ground upon which the decisions in England and America, which hold the franchises of

corporations not to be assignable, except by consent of the legislature, rest is mainly the same as that upon which it has been held in this country, that such franchises are beyond the legislative control; namely, that the charter constitutes a contract between the sovereignty and the corporation, on the one part, for the grant of certain privileges and immunities, and upon the other, for the performance of certain duties and functions which are deemed an equivalent or consideration. * * * The state confers upon railways some of its most essential powers of sovereignty, that of eminent domain, and of a virtual monopoly, in the transportation of freight and passengers, and in return therefor stipulates for the performance of those duties by the corporation. The corporation have no more right in equity and justice to transfer their obligations to other companies, or to natural persons, than the state has to withdraw them altogether." Redfield on Railways, 422, note 14.

The doctrine, according to Judge Redfield, rests upon the ground that the corporation is under an obligation to the state to build and operate its road. Such was formerly the rule in England, even as to a railway corporation that had not made any express undertaking to that effect, and to which no exclusive privileges had been granted. Redfield on Railways, section 192. But concerning that class of cases, the doctrine seems to have been overruled in England, and has never prevailed in America. Redfield on Railways, section 192, and notes. The appellant did not expressly undertake to build the road authorized by its charter; nor did its charter expressly declare that it should do so; nor was any exclusive right to do so conferred upon it. In our opinion, the appellant was not bound to commence the road, nor to complete it after commencing, nor to put it in operation after completion, nor to continue it in operation. It might have forfeited its charter by non-user, but was not bound to use it. So long as it shall avail itself of the privileges conferred by its charter, it will be liable to the burdens thereby imposed. But, in our opinion, neither the public nor any individual not connected with it can compel it to exercise its corporate franchises, or make it pay damages for failing to do so. The doctrine under consideration has, therefore, no foundation in this case, if the ground on which it rests is earnestly stated by Judge Redfield. Nor do we perceive any other solid ground on which to place it.

We do not suppose that the appellant could mortgage its corporate existence, or any prerogative franchise conferred upon it. But the right to build and use a railroad is not a prerogative franchise. It has, indeed, been said that "both currency and internal communication between different portions of the state are exclusively the prerogatives of sovereignty"; Redfield on Railways, 23; and that "the right to build and use a railroad, and take tolls or fares, is a franchise of the prerogative character, which no person can legally exercise without some special grant of the legislature"; Redfield on Railways, 23, note 1. Possibly these passages were not designed to mean more than this: A road can not be made over the lands of un-

willing proprietors except under authority from the state; and the state, in order to encourage internal improvements, may grant to a corporation or individual the exclusive right to build a road between two points. In the absence of any positive law upon the subject, our opinion is that an individual has as much right to build a railroad over his own land, or the land of others with their consent, as he has to build a stage or a wagon; and as much right to use the former as the latter in carrying freight and passengers for pay.

The denial of the right of a railroad corporation to transfer its road has sometimes been based upon considerations of general convenience and public interest, and upon the ground that the corporation, having been chosen by the legislature as the fit depositary of the right to construct and operate the road, should not be permitted to transfer it to irresponsible parties. To this argument several objections present themselves. The appellant's directors, in authorizing this mortgage to Metcalfe, declared themselves "satisfied that to furnish and complete the road they will require the sum of thirty thousand dollars in addition to the means at their command." Assuming, as we must do, that the loan was necessary to complete the road, and assuming it to be probable, as we may do, that the loan could not have been effected without a mortgage, considerations of general convenience seem to be on the side of the power to make the mortgage rather than against it.

The public had an interest in seeing the road constructed and operated according to the terms of the charter. But whether it shall be thus operated by A or B, by an individual or corporation, does not seem to be a matter of any interest whatever to the public. Under the charter of the appellant, its road, while held by it, is under the control of its stockholders. A single person, by purchasing all the stock, can control the road as completely as if he owned it individually. A purchaser, under its mortgage, would take the road subject to the terms of the charter designed to protect the public, and would be bound thereby as fully as the corporation is.

We perceive no reason to suppose that a purchaser of all the property of appellant would be less responsible in a pecuniary point of view than the appellant. Nor do we perceive any other reason to suppose that the individual responsibility of the purchaser would not be quite as beneficial to the public as the corporate responsibility of the appellant. General convenience requires that the appellant shall in some manner be compelled to pay the money it borrowed. But it is contended that this should be done by merely subjecting the accruing profits. To do that effectually it might be necessary to appoint a receiver to take charge of the road, because under the management of the directors it is possible that no profits might accrue, while under a different management the road might be profitable. Yet every argument against allowing the appellant to mortgage its road applies with equal force against the appointment of a receiver to control it, with perhaps the additional argument that a receiver would not be personally liable, like a purchaser, as a common carrier.

That a mortgage by a railway company to secure money borrowed for the construction of its road is not opposed to the public policy of this state is indicated by the general course of legislation upon the subject. We believe that all the railroads in the state, except that of the appellant, were constructed under charters authorizing such mortgages; and mortgages made by the Covington and Lexington Company and by the Lexington and Big Sandy Company, without express authority either to make a mortgage or to borrow money, were afterward ratified by the legislature. And we are not aware of an instance in which the legislature, when applied to, has refused to confer such power or to ratify the exercise of it.

The facts that the appellant voluntarily mortgaged its property to secure the money which it was expressly authorized to borrow, and that the bondholders invested their money upon the faith of the mortgage, furnish, in our opinion, a sufficient distinction to relieve this case from the operation of the distinction in the case of Winchester and Lexington Turnpike Co. v. Vimont, 5 B. Monroe 1, in which it was held that a turnpike road could not be sold for a general debt of the corporation. If the decision in that case could be regarded as denying that property or franchises, in the use of which the public have an interest, can be assigned, we might perhaps hesitate to follow it, in view of several other decisions of this court. In Jouitt v. Lewis, 4 Litt. 160, the vendee of a turnpike road was held liable upon his covenant to keep it in repair without any question being made as to the validity of the sale. In Trustees of Maysville v. Boon, 2 J. J. Marsh. 227, a ferry franchise was held to be alienable. And in McCauley v. Givens, 1 Dana 261, a lease of a ferry under an order of court was held to be valid. Our decision rests upon the ground that the appellant, having been authorized to borrow this money, had implied power to execute a mortgage to secure its payment. The American decisions cited in Pierce on Railroad Law, chapter 20, and Redfield on Railways, section 235, note 19, present such a conflict of opinion that we have felt free to consider the question as an open one, and have not deemed it advisable to attempt to sustain our opinion by referring to cases which are perhaps counterbalanced by opposing authorities. * * *

Reversed on another ground.

Compare, 1869, Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; 1888, State v. Western, etc., Co., 40 Kan. 96, 10 Am. St. Rep. 166; 1899, Michigan Telephone Co. v. St. Joseph, 121 Mich. 502, 80 Am. St. Rep. 520, 80 N. W. 383.

Sec. 311. (e) Power to mortgage.

JONES v. GUARANTY AND INDEMNITY COMPANY.[1]

1879. IN THE SUPREME COURT OF THE UNITED STATES. 101 U. S. Rep. 622–633.

[Appeal from United States Circuit Court, E. D. New York. The New York Kerosene Oil Co., and the New York Guaranty and Indemnity Company were both New York corporations. In 1867, Cozzens, president of the oil company, applied to the guaranty company for a loan for $100,000; this was agreed to, and $50,000 advanced; and to secure the same, by agreement with Cozzens, a bond and mortgage were directed to be executed, after the written consent of the holders of more than two-thirds of the stock of the oil company had been obtained. The mortgage was duly executed to secure a loan of $100,000, and was stated to be given to cover any advances then made, or thereafter to be made by the guaranty company, to Cozzens to the amount of $100,000, on condition that whenever any sum was so advanced the amount and date should be indorsed and signed by Cozzens on the bond—and whenever he made any payment such sum should also be indorsed on the bond. No dishonesty was alleged or shown in the transactions, and the company had express authority to secure its debts "contracted by it in the business for which it was incorporated, by mortgaging any or all of its real estate." The unsecured creditors, after the corporation became insolvent, attacked the validity of the mortgage. The circuit court sustained it, and this decision is brought here for review.]

MR. JUSTICE SWAYNE. * * * The central and controlling questions to be determined are:

Whether the oil company had the power to give a mortgage for future advances; and,

Whether the mortgage here in question is, in the view of a court of equity, for the debt of the oil company or for the debt of Abraham M. Cozzens.

The oral arguments of the eminent counsel who appeared before us were addressed principally to these subjects. Numerous other points are made by the counsel for the appellant in his brief, and have been fully discussed in the printed arguments upon both sides. They are minor in their character, and we think involve no proposition that admits of doubt as to its proper solution. We are satisfied with the disposition made of them by the circuit court, and shall pass them by without further remark.

At the common law, every corporation had, as incident to its existence, the power to acquire, hold and convey real estate, except so far as it was restrained by its charter or by act of parliament. This comprehensive capacity included also personal effects of every kind.

[1] Statement abridged. Part of opinion omitted.

The *jus disponendi* was without limit or qualification. It extended to mortgages given to secure the payment of debts. 1 Kyd Corp., 69, 76, 78, 108; Angell & Ames, § 145; 2 Kent Com., 282; Reynolds v. Commissioners of Stark County, 5 Ohio 204; Whitewater Valley Canal Co. v. Valette, 21 How. 414.

A mortgage for future advances was recognized as valid by the common law. Gardner v. Graham, 7 Vin. Abr. 22, pl. 3. See also, Brinkerhoff v. Marvin, 5 Johns. (N. Y.) Ch. 320; Lawrence v. Tucker, 23 How. 14.

It is believed that they are held valid throughout the United States, except where forbidden by the local law.

The statute under which the oil company came into existence made it "capable in law of purchasing, holding and conveying any real and personal estate, whenever necessary to enable" it to carry on its business: but it was forbidden to "mortgage the same, or give any lien thereon." This disability was removed by the later act of 1864, which expressly conferred the power before withheld. This change was remedial, and the clause which gave it is, therefore, to be construed liberally with reference to the ends in view.

The learned counsel for the appellant insisted that a mortgage could be competently given by the oil company only to secure a debt incurred in its business and already subsisting. This, we think, is too narrow a construction of the language of the law. A thing may be within a statute but not within its letter, or within the letter and yet not within the statute. The intent of the lawmaker is the law. The People v. Utica Insurance Co., 15 Johns. (N. Y.) 358; United States v. Babbit, 1 Black 55.

The view of the court in Thompson v. New York and Hudson River Railroad Co., 3 Sandf. (N. Y.) Ch. 625, was sounder and better law. There the charter authorized the corporation to build a bridge. It found one already built that answered every purpose, and bought it. The purchase was held to be *intra vires* and valid. Here the object of the authorization is to enable the company to procure the means to carry on its business. Why should it be required to go into debt, and then borrow, if it could, instead of borrowing in advance and shaping its affairs accordingly? No sensible reason to the contrary can be given. If it may borrow and give a mortgage for a debt antecedently or contemporaneously created, why may it not thus provide for future advances as it may need them? This may be more economical and more beneficial than any other arrangement involving the security authorized to be given. In both these latter cases the ultimate result with respect to the security would be just the same as if the mortgage were given for a pre-existing debt in literal compliance with the statute. No one could be wronged or injured, while the corporation, whom it was the purpose of the law to aid, might be materially benefited. Is not such a departure within the meaning, if not the letter, of the statute? There would be no more danger of the abuse of the power conferred than if it were exercised in the manner insisted upon. The safeguard provided in the required assent of

stockholders would apply with the same efficacy in all the cases. The object of the loan, the application of the money, and the restraints imposed by the charter in those particulars, would be the same whether the transaction took one form or the other. According to our construction the company could give no mortgage but one growing out of their business, and intended to aid them in carrying it on. In legal effect the difference between the two constructions is one merely of mode and manner, and not of substance.

Such securities are not contrary to the law or public policy of the state. Many cases are found in her reported adjudications where both judgments and mortgages for future advances have been sustained.

Our view is not without support from the language of the statute, that "every mortgage so made shall be as valid to all intents and purposes as if executed by an individual owning such real estate." If this mortgage had been given by individuals, the question we are examining doubtless would not have been brought before us for consideration.

When a deed is fatally defective for the want of a sufficient consideration to support it, such a consideration subsequently arising may cure the defect and give the instrument validity. Sumner v. Hicks, 2 Black 532. It is not necessary to go through the form of executing a second deed to take the place of the first one. This principle applies to the mortgage after all the advances had been made, conceding that it had before been invalid for the reason insisted upon.

The statute of 1864 neither expressly forbids nor declares void mortgages for future advances.

If the one here in question be *ultra vires*, no one can take advantage of the defect of power involved but the state. As to all other parties it must be held valid, and may be enforced accordingly. Silver Lake Bank v. North, 4 Johns. (N. Y.) Ch. 370; National Bank v. Mathews, 98 U. S. 621. In the latter case this subject was fully examined.

A corporation can act only by its agents If there were any such technical defect as is claimed touching the execution of this mortgage, it has been cured by acquiescence and ratification by the mortgagor.

No one else can raise the question. All other parties are concluded. Gordon v. Preston, 1 Watts (Pa.) 385.

Where money had been obtained by a corporation upon its securities, which were irregular and *ultra vires*, but the money was applied for the benefit of the company, with the knowledge and acquiescence of the shareholders, the company and the shareholders were estopped from denying the liability of the company to repay it. And the same result follows where such securities are issued with the knowledge of the shareholders, so far as the money thus raised is applied for the benefit of the company. *In re* Cork & Youghal Railway Co., Law Rep. 4 Ch. 748.

A court of equity abhors forfeitures, and will not lend its aid to

enforce them. Marshall v. Vicksburg, 15 Wall. 146. Nor will it give its aid in the assertion of a mere legal right contrary to the clear equity and justice of the case. Lewis v. Lyons, 13 Ill. 117.

The second point to be considered is whether the mortgage was for the debt of Cozzens or for the debt of the oil company. * * *

We are satisfied beyond a doubt that it was the debt of the oil company and not his debt that was intended to be secured and was secured by the mortgage. * * *

Decree affirmed.

Note. As to power to mortgage property: 1830, Jackson v. Brown, 5 Wend. 590; 1832, Leggett v. N. J. M. & B. Co., 1 Saxt. Ch. (N. J.) 541, 23 Am. Dec. 728; 1833, Gordon v. Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75; 1852, Susquehanna, etc., Co. v. Gen'l Ins. Co., 3 Md. 305, 56 Am. Dec. 740; 1867, Hendee v. Pinkerton, 14 Allen (Mass.) 381; 1887, Warfield v. Marshall Co., 72 Iowa 666, 20 Am. St. Rep. 283; 1892, Evans v. Boston Heating Co., 157 Mass. 37; 1894, Benbow v. Cook, 115 N. C. 324, 44 Am. St. Rep. 454; 1896, Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 56 Am. St. Rep. 187; 1898, First Nat'l Bank v. Winchester, 119 Ala. 168, 72 Am. St. Rep. 904; 1899, New Britain Nat'l Bank v. Cleveland Co., 158 N. Y. 722, 53 N. E. Rep. 1128; 1899, G. V. B. Mining Co. v. First Nat'l Bank, 95 Fed. Rep. (C. C. A.) 23; 1899, Rutherford, etc., Elec. Co. v. Franklin Trust Co., 58 N. J. Eq. 584, 43 Atl. Rep. 1098; 1900, Citizens' State Bank v. McGraft Lumber Co., 122 Mich. 573, 81 N. W. Rep. 567.

Sec. 312. (f) Franchise.

1. Not without special authority.

1302. "Royal franchises never pass by assignment, without special words in the Kings' grant"—*Quo warranto* against John Arundel, and asked him by what warrant he held a market once a week and a fair twice a year in his manor of C. Answer—held by descent from our father who was enfeoffed by Walter de Ralegh of the manor of C. with appurtenances, to whom King John granted the franchises: *Held* as above.—Y. B. 30 Ed. I, 220, *Cornish Iter.*

See Fietsam v. Hay, 122 Ill. 293, 3 Am. St. Rep. 492, *supra*, p. 141, § 25, and note; Memphis & L. R. R. Co. v. R. Commrs., 112 U. S. 609, *supra*, p. 143, § 26.

Note. See note, *supra*, p. 157; also, 1895, Bank v. Fanning, 170 Pa. St. 1; 1897, State v. Anderson, 97 Wis. 114; 1898, Central Trust Co. v. W. N. C. R. Co., 89 Fed. Rep. 24; 1899, Michigan Telephone Co. v. St. Joseph, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, *contra.*

Sec. 313. 2. Theory of a sale, when authority to convey franchise is given.

THE STATE OF OHIO, EX REL. ATTORNEY-GENERAL, v. JOHN SHERMAN ET AL.[1]

1872. IN THE SUPREME COURT OF OHIO. 22 Ohio St. Rep. 411–435.

[*Quo warranto* against defendants, as claiming to be the P., F. W. & C. *Railway* Co. in Ohio, without authority. The O. & P. Co., by proper authority from Pennsylvania and Ohio, had built a railroad from Pittsburg to Crestline, Ohio; the O. & I., by authority of Ohio and Indiana, from Crestline, Ohio, to Ft. Wayne, Ind.; and the F. W. & C., by authority of Indiana and Illinois, from Ft. Wayne to Chicago. These three roads, by proper authority from each of the states, were duly consolidated into the P., F. W. & C. *Railroad* Co., and a certificate of its organization, according to the laws of Ohio filed with secretary of state of Ohio, as required. This company issued its bonds as authorized, but made default in payment of interest thereon, whereupon proceedings to foreclose the mortgages securing the bonds were had in the proper courts, and a sale made in 1861 to Lanier et al., as trustees for the creditors, "of said railroad and the property and franchises connected therewith." Lanier and his associates became duly incorporated under the laws of Pennsylvania, Indiana and Illinois, as the P., F. W. & C. *Railway* Co., and Lanier et al. conveyed by deed all the property and franchises pertaining to the P., F. W. & C. *Railroad* Co. Afterward, in 1863, this P., F. W. & C. *Railroad* Co. conveyed by deed properly executed its "franchise to be a corporation," in conformity with the law of Ohio, to the P., F. W. & C. *Railway* Co., and, under this conveyance, the latter company claimed to have become a legal and valid corporation in Ohio.]

WELCH, C. J. * * * The questions to be decided, therefore, are:

1. Is the Pittsburg, Fort Wayne and Chicago Railway Company a corporation of Ohio? 2. If not such corporation, has it the right and power, as a foreign corporation, to own, operate and maintain its road in Ohio, and for that purpose to use and enjoy the privileges and franchises specified in the information? We will consider these two questions in their order.

1. Are the defendants an Ohio corporation?

Their claim is, that the consolidated company, the Pittsburg, Fort Wayne and Chicago *Railroad* Company, was an Ohio corporation, and that its charter, "its franchise to be," or right of existence, has passed to, or become vested in the defendants, by virtue of the deed made under the act of April 4, 1863. Unless this act, and the deed

[1] Statement of facts abridged. Arguments omitted. Only part of opinion given.

made under it, are sufficient and effectual so to transfer or vest the charter of the consolidated company, it is quite unnecessary to inquire whether that company was, or is, a legal corporation of Ohio, and we are saved the necessity of considering the various questions made and argued by counsel, touching the legality of the consolidation, and of the proceedings preliminary and antecedent thereto.

Assuming, then, for the present, what I believe to be the fact, that the Pittsburg, Fort Wayne and Chicago *Railroad* Company was an Ohio corporation, did its charter pass to or vest in the defendants, by virtue of the deed and act of 1863, and thus constitute the defendants, or rather thus constitute the Pittsburg, Fort Wayne and Chicago *Railway* Company, an Ohio corporation?

That a corporation can, when authorized by law so to do, transfer, sell, or convey its charter or franchise to be a corporation, and thus vest it in others, seems to be quite well settled by judicial decisions. And we have no objections to make to this proposition of law, except it may be to the form of stating it. The real transaction in all such cases of transfer, sale, or conveyance, in legal effect, is nothing more or less, and nothing other, than a surrender or abandonment of the old charter by the corporators, and a grant *de novo* of a similar charter to the so-called transferees or purchasers. To look upon it in any other light, and to regard the transaction as a literal transfer or sale of the charter, is to be deceived, we think, by a mere figure or form of speech. The vital part of the transaction, and that without which it would be a nullity, is the *law* under which the transfer is made. The statute authorizing the transfer and declaring its effect, is the grant of a new charter, couched in few words, and to take effect upon condition of the surrender or abandonment of the old charter; and the deed of transfer is to be regarded as mere evidence of the surrender or abandonment. According to our understanding of the cases cited by counsel for the defendants in support of the doctrine of the transferability of such charters, this is the view entertained wherever the courts have spoken directly of the legal effect of such conveyances. And such seems to be the view taken by counsel themselves. For they say, among other things: "If the corporators ('of the old company') saw fit, nobody would question their right to dissolve the old corporation and surrender their franchise to the state, and no question could be made of the right of the state, by a general law, to provide for conferring it upon the purchasers of their property." And the counsel add: "*That is what, in effect, is done by this act*," the act of 1863. We agree to this proposition of counsel, with a single proviso. We think, with them, that "*that* is what, in effect, is done," provided anything is constitutionally and effectually done.

In other words, the legislature of Ohio, by the act of 1863, have granted to the defendants a charter of incorporation similar to that held by the Pittsburg, Fort Wayne and Chicago *Railroad* Company, *provided* the legislature, at the date of the act, had constitutional power to grant such a charter, *and provided* the requirements of the

act have been complied with by the parties. It matters not if we regard the charter granted as identical with the one surrendered—a *something* which really passes from the old or defunct corporation into the hands of the legislature, and thence to the new organization. There must be at the time constitutional power in the legislature, not only to receive but also to reissue the charter. It must pass through legislative hands before it can take life in a new organization. It comes into their hands the work and offspring of the old constitution, but it goes out again, if at all, as the work and offspring of the new one, and subject to all its requirements and limitations.

By the present constitution of Ohio, the power of the legislature to grant charters of incorporation is subjected to important limitations, which did not exist under the constitution of 1802. One of these is, that the grant must be made by a general law; another is that the charter must be subject to alteration and revocation by the legislature: and a third is, that the grant must be made in some such form as will subject the stockholders to individual liability, to at least a certain extent, for the debts of the corporation. The claim upon the part of the state is that the act of April 4, 1863, is in violation of these several provisions of the constitution; or, if the act will admit of a construction consistent with these provisions, then the claim is that the provisions and requirements of the act, taken in their proper and constitutional sense, have not been conformed to by the parties.

We have no hesitation in holding that the act of 1863 is not liable to the objection that it is a "special act." It is a "general law," in our judgment, within the meaning of article 1, section 2, of the constitution. In so holding we merely repeat, in substance, what has been heretofore decided by this court in Cricket v. The State, 18 Ohio St. 9; Welker v. Potter, 18 Ohio St. 87.

The objection, that if the defendants did thus acquire a charter under the act of 1863, that charter would not be subject to alteration or repeal, has, in effect, been answered in what is said above. If the charter thus acquired is to be regarded in law as identical with the charter of the reorganized company, and not as a new charter issuing directly from the legislature; and if, in like manner, the charter of the reorganized company is to be regarded not as a legislative grant made to it, but as a grant directly from the original companies so consolidated, then it may be true that the charter would be unalterable and irrevocable, and the act of 1863 be unconstitutional on that ground. But, as we have already said, such is not the law of the case, and the charter, if so vested, would remain, as other charters granted under the present constitution, liable to amendment and repeal by the legislature.

But the trouble in defendants' case arises when we attempt to reconcile their claim that they are an Ohio corporation under the act of 1863, with the third-named limitation in the constitution—the limitation in regard to individual liability. Under the present constitution the legislature are powerless to grant a charter to any such corporation, unless the grant is made in a form that will secure the individual

liability of its stockholders for the debts of the corporation, at least to the amount of their stock over and above their subscription. This liability may be secured by an express provision in the act of incorporation. Where it is to exceed the amount of the stock, it must be secured in that form. In the absence of any such provision in the act of incorporation, I presume this provision of the constitution would enter into and form part of the act of incorporation, and to that extent execute itself. In either case, however, the act of incorporation, the grant of the charter, must be in some such form as will secure this liability. It must require of the *individuals* availing themselves of its provisions some acts *as such*, under and in pursuance of it, as will subject them individually to its provisions, or to this provision of the constitution in regard to liability. If it fails to do this, it is simply unconstitutional and void.

The act of 1863, under which the defendants claim title, contains no provision imposing liability upon individuals who may become stockholders under it. Whether the act, properly interpreted, does or does not require of the persons becoming incorporated under its provisions, acts or proceedings which will secure their individual liability as stockholders, is totally immaterial to the present case. Because, if it is to be interpreted as requiring such acts—namely, an *organization of individuals under the act*, such as is required by the act of April 11, 1861; a *deed* to be made to, and accepted by them, or a *taking* of stock by them in the company thus organized—then the defendants have put a wrong interpretation upon the act, and have failed to comply with its provisions. On the other hand, if they have rightly interpreted the act, then the act itself is unconstitutional and void, for the want of adequate provisions to secure the individual liability of stockholders becoming incorporated under its provisions. I presume it is not claimed on behalf of defendants that they have done any act, by way of organization, the taking of stock, or the acceptance of the deed made under the act of 1863, which subjects them, *as individuals*, to any liability whatever beyond that incurred by becoming members of the foreign company. They never organized under the Ohio act; their organization was complete before it was passed. They took no stock under the Ohio act; their stock had already been taken under the Pennsylvania act. Nor was the deed made to, or accepted by them; it was made to, and accepted by the corporation, of which they were members. As such corporation it had no power, by any act whatever, to pledge the individual liability of its stockholders. The powers of a corporation are limited to the common property and common interests of the organization. Over these, and within the scope and purpose of its organization, a *majority* of its members, acting through and by its officers and agents, can exercise dominion and control, and bind its individual members. Beyond this common fund and outside this scope, the corporation, as such, is powerless to bind its individual members. In some cases it has been found very difficult to determine the exact line between what may be done by a majority of the corporators, thus acting by and through common agents,

and what can only be effected by the individual consent of each and all; but no difficulty of the kind can occur in solving questions of individual liability. There the line is distinctly drawn and marked. The *contract* by which he becomes such member fixes the boundary between the interests of the stockholder and those which are embarked in the common enterprise, and thus subjected to the common control. And this contract, be it express or implied, must be interpreted in the light of the law as it existed at the time, and under which the organization is had. The private interests and rights of the stockholder, not by this contract, or some subsequent *individual* act of his, placed in the common fund, or subjected to the corporate control, are as completely outside the reach and power of the corporation as are the property and rights of strangers.

The element of individual liability must be ingrafted upon the stock by the law under which the organization is had, or the stock is taken, and by *virtue* of that organization or taking, or else by some subsequent *individual* assent of the stockholder; otherwise he stands liable for no more than the amount which, by his contract with the company, he has agreed to contribute to the common fund.

In this view of the case, it plainly follows, that the defendants have not become members of an Ohio corporation, created under the present constitution of the state, for the reason that they have never subjected themselves to the individual liability which it imposes on stockholders, and which it makes an indispensable element in the creation of all such corporations. Either the defendants have misinterpreted the act of 1863, and wholly failed to conform to its provisions, or, if they have rightly interpreted it, as authorizing the bestowment of a charter upon a foreign corporation, without securing any individual liability of its stockholders, then the act itself is unconstitutional and void. In either alternative the defendants are no legal corporation of Ohio. It is unnecessary, therefore, to inquire whether their charter as a corporation of Pennsylvania, gives them authority, as such corporation, to accept an additional charter from another state: or whether, if they have such authority, it is competent for another state, not having a constitution like ours, thus to grant them a second charter—that is, to make the grant directly to the corporation, *eo nomine*, and not to the individuals composing it. If we concede both the authority to accept a second and foreign charter, and the general power of another state in this manner to make the grant, it is enough for the present case to say, that the power in question has been denied to the legislature of Ohio by her present constitution.

[On the second question the court held that the company, as a foreign corporation, had a right under the Ohio laws to maintain and operate its road in Ohio.]

Judgment of ouster as to being an Ohio corporation.

Note. See, 1845, Babcock v. Western R. Corp., 9 Metc. (Mass.) 553, 43 Am. Dec. 411; 1857, Phillips v. Winslow, etc., Co., 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729; 1864, Shamokin Valley R. Co. v. Lawrence, 47 Pa. St. 465, 86 Am. Dec. 552; 1874, Metz v. Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. R. 201;

1876, Morgan v. Louisiana, 93 U. S. 217; 1884, Memphis, etc., R. Co. v. R. Commrs., 112 U. S. 609, *supra*, p. 143; 1885, Chesapeake, etc., R. Co. v. Miller. 114 U. S. 176; 1887, Lawrence v. Morgans' L. & T. R., etc., Co., 39 La. Ann. 427, 4 Am. St. R. 265; 1889, Gulf, etc., R. Co. v. Newell, 73 Texas 334, 15 Am. St. 788.

ARTICLE V. POWER TO ACT IN A PERSONAL RELATION.

Sec. 314. 1. Power to take as trustee.

MR. JUSTICE STORY IN VIDAL ET AL. v. GIRARD'S EXECUTORS.[1]

1844. IN THE SUPREME COURT OF THE UNITED STATES. 2 Howard (43 U. S.) 126–201, on pp. 187, 188.

[Stephen Girard, in his will, bequeathed to the city of Philadelphia certain real and personal estate for the erection and support of a college, upon the trusts, and for the uses designated in the will. The city, by its charter, was capable in law to have, purchase, take, receive, possess and enjoy lands, tenements and hereditaments, liberties, franchises and jurisdictions, goods, chattels and effects to them and their successors forever, or for any other or less estate, without any limitation as to value, amount or purpose. The heirs objected to the will, and claimed, among other things, that the corporation could not take as trustee.]

Part of Mr. Binney's argument, p. 148.

The old doctrine was that a corporation could not be seized to a use. Sugden on Uses, 10.

But it has been since settled that a corporation may be a trustee. If it receives a deed, the legal estate will pass, provided the statutes of mortmain do not prohibit it. If the trust is void, equity will decree a reconveyance; but this can not be necessary, unless the legal estate had passed. And if a corporation is incapable of executing the trust, equity will appoint some person who is not. 1 Saunders on Uses, 346, 349; Willes on Trustees, 31; Levin on Trusts, 10, 11; 2 Thomas's Co. Litt., 706, note; 1 Cruise Dig., 403, tit. 12, Trust., ch. 1, § 89.

Also, that a corporation may be a trustee. 2 Vern., 411; 2 Bro. P. C., 370; 7 Bro. P. C., 235.

Where a corporation abused a trust and was dismissed, see 3 Bro. Ch. Cas., 171, 371; 4 Ves., 453; 2 Bro. Ch. Cas., 46; 1 Bro. Ch. Cas., 467; 14 Bro. Ch. Cas., 253; 12 Mass. 547; 17 Serg. & R. (Pa.) 89; 3 Rawle (Pa.) 170.

The cases in 12 Mass. 547 and 17 Serg. & R. (Pa.) 89 may not appear at first to sustain the doctrine, but the cases are right. That of 3 Rawle (Pa.) 170 is very much like the present, and establishes the doctrine, that if the trust is for the welfare of the corporation, it may take it.

[1] Only that part of the opinion relating to a corporation's power to take as trustee is given.

STORY, JUSTICE. Now, although it was in early times held that a corporation could not take and hold real or personal estate in trust upon the ground that there was a defect of one of the requisites to create a good trustee, viz., the want of confidence in the person; yet that doctrine has been long since exploded as unsound, and too artificial; and it is now held, that where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do. It is true that if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction to enforce and perfect the objects of the trust.

Note. See, 1826, Greene v. Dennis, 6 Conn. 293, 16 Am. Dec. 58 (requires special charter authority to be trustee); 1842, Commissioners v. Walker, 6 Howard (Miss.) 143, 38 Am. Dec. 433; 1858, Bell County v. Alexander, 22 Texas 351, 73 Am. Dec. 268; 1889, Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7; 1897, White v. Rice, 112 Mich. 403.

Sec. 315. 2. Power to act as administrator or executor.

FIDELITY INSURANCE, TRUST, ETC., CO. v. D. G. NIVEN.[1]

1878. IN THE COURT OF ERRORS AND APPEALS OF DELAWARE.
5 Houston's (Delaware) Reports, 416–432, 1 Am. St. 150.

The ruling of the court below in the case and now assigned for error in this court was that by the laws of this state no corporation aggregate, whether incorporated by the legislature of this state or of any other state, can be appointed an administrator in this state or can sue as an administrator in the courts of this state.

WALES, J. * * * Secondly, it is objected that by the common law the plaintiff is not capable of being an administrator. Blackstone, among the disabilities of a corporation, includes its inability to be an executor or administrator, "for it can not take an oath for the due execution of the office." 1 Bl. Com., 477. In Bacon's Ab., Tit. Executors and Administrators, 2, the same doctrine is laid down on the same ground, but under a *semble*, and with these additional reasons: First, because corporations can not be feoffees in trust for the use of others; and, second, because they are a body framed for a special purpose. When the reason of a rule ceases, so does the rule itself. The plaintiff is not required to take an oath. It has heen incorporated or "framed for the special purpose" of acting in the character and

[1] Arguments omitted. Only part of opinion relating to capacity of corporation is given.

capacity in which it has come into court; and it is now well and long established that a corporation may be a trustee in the same manner as an individual, not only of real estate, but of personal property, to the same extent as private persons. Hill on Trustees, 48 (and cases cited in the note). Says Toller: "It now seems settled that corporations can be executors, and that on their being so named they may appoint persons styled syndics to receive administration with the will annexed, who are sworn like all other administrators. Such corporations as can take the oath of an executor are clearly competent," as, for instance, a corporation sole. Toller on Excs., 30. There is, then, no inherent disability or disqualification belonging to a corporation as such which excludes it from acting as an administrator, and it may accept the office if not prohibited by its charter, or forbidden by statute, whenever from the objects of its incorporation and the nature of its business it may become necessary and proper, and it is able to comply with the conditions prescribed by law as to giving bond, etc.

Practically, the position of the plaintiff is meritorious and unobjectionable. With the express power contained in its charter to receive the appointment of administrator, and with its capital stock pledged as the security required for the faithful performance of its duties, it brings an action in its representative capacity for the recovl ery of a debt due to its intestate, and is met at the outset by technicarules, which, whatever may have been the reason of their origin and adoption, have either become obsolete or have been so modified and relaxed as to be no longer of general application. The execution of the bond would, at the best, amount to little more than a form, and be without substantial benefit or necessity; but still the defendant is entitled to it, if it is insisted upon, and the plaintiff has a full and lawful power to execute it as it would have to make or indorse a promissory note, or accept a bill of exchange, or to execute any other description of bond which may be fairly and legitimately considered as necessary and proper in the usual course of its business. It has not been made to appear in what manner the interests of this state or of its citizens would be impaired, or in what way its policy would be invaded or subverted, by sustaining the plaintiff's action. Admitting that a corporation may be unable to act as an original administrator under the provisions of the general statute, it does not follow that it may not be recognized as a foreign administrator on the production of letters duly authenticated and giving bond. The word "persons" may extend to and include bodies corporate and politic as well as individuals. Amend. Code, ch. 5. If the plaintiff can give the bond, it does all that the law requires. The rights of our citizens will not be endangered, their property rendered less secure, or the dignity of the state be diminished. If the policy of the state is to be inferred from the history of its legislation, the act of the general assembly of Delaware of April 9, 1873, incorporating a company for the special purpose, among others, of acting as administrator would be conclusive of that question. 14 Del. Laws, 714. * * *

Reversed.

See, to same effect, 1885, Camden S. D. & T. Co. v. Ingham, 40 N. J. Eq. 3; 1889, Minnesota Loan & Trust Co. v. Beebe et al., 40 Minn. 7, holding that a law authorizing corporations to be *guardians*, was valid and they could so act; 1890, Coleman's Admr. v. Parrott, 17 Ky. L. Rep. 814, 37 A. & E. C. C. 1.
See *note*, 32 A. & E. C. C., p. 2.

Sec. 316. 3. Power to act as agent, or attorney in fact.

W. M. KILLINGSWORTH, APPELLANT, v. THE PORTLAND TRUST CO., OF OREGON, RESPONDENT.[1]

1890. IN THE SUPREME COURT OF OREGON. 18 Oregon Reports 351–356, 17 Am. St. Rep. 737, 32 A. & E. C. C. 33.

LORD, J. This is an action to recover damages for failure of the defendant to execute and deliver to the plaintiff a conveyance of certain premises, pursuant to an agreement to that effect. The defendant denies this, and alleges as the attorney in fact of one Deborah H. Ingersoll, in compliance with said agreement, that it did execute and tender to the plaintiff a conveyance of said premises, etc., and now brings it into court and deposits it for the plaintiff, and that plaintiff refuses to accept the same. To this the plaintiff demurred on the ground that the same does not state facts sufficient to constitute a cause of defense to the cause of action alleged. The point raised by the demurrer is: Can the defendant, a corporation, execute a deed of conveyance of real property as the attorney in fact of another? * * *

It is provided by our statute that a corporation may engage in any lawful enterprise, business pursuit or occupation (Code, section 3217), so that, unless corporations are affected with some disability, when the articles of incorporation are sufficient for the purpose, there is no lawful occupation or business in which it may not engage in this state exactly as individuals. By its articles of incorporation the defendant corporation is expressly authorized and empowered "to act as the general or special agent, or attorney in fact, for any public or private corporation or person in the management and control of real estate or other property, its purchase, sale or conveyance, etc." No question is made but what the defendant, by its articles of incorporation, has conferred upon it the power to do the act for which there is claimed to be an alleged failure; but the contention is that a corporation, from the nature of the organization as an artificial body, necessitated to act through agents, is incapable of executing a deed as an attorney in fact. This argument is based on the assumption that there are some things, from the inherent nature of the case, that a corporation is incapable of doing, and seeks its illustrations in the common law, as that a corporation can not be an administrator or executor, because its duties are of a personal nature and can not be delegated, or to take an oath, when so required by law, before proceeding to execute some.

[1] Only so much of the opinion as relates to the single point is given.

duty or trust. But this argument overlooks the fact that a corporation may be empowered to do by statute what it was incapable of doing under its common law powers, and when thus created, its powers, capacities and modes of exercising them depend upon the statute.

Having the power conferred upon it to act as an attorney in fact, is it not endowed with all the faculties or capacities essential to execute it and carry out the business projects of its creation? Why may not a corporation act as an agent for an individual or another corporation? As the owner of real property, it can, by its authorized agents, execute a conveyance, or it may authorize another, by power of attorney in writing, to convey such property for it. Why, then, may it not act as the agent or attorney in fact of another for a like purpose, when it is so authorized, and to thus act is one of the chief powers conferred to effect the object of its creation and to carry on the business in which it is engaged?

"Within the scope of its corporate powers," says Mr. Mechem, "unless there are express provisions in its charter, or constating instruments to the contrary, a corporation may act as agent, either for an individual, a partnership or another corporation. Many of the great corporations of the country are organized for this express purpose under statute or charters conferring and defining their powers and the methods of executing them; but even in other cases, the authority so to act might be implied as auxiliary to their main purpose." Mechem on Agency, § 64. It is clear, then, that a corporation may act as the agent of another, and if so, it must be endued with the faculties or instrumentalities to perform the office it is authorized to undertake, and carry out the purposes of its creation.

When a corporation engages in a legitimate business and is authorized by its incorporation to do the things necessary to carry on such business, it is an express grant of power to enable it to effect that object. If it is to be excluded from doing such things because, from the nature of its organization, it can not act personally, but only through agents, there would be little left in the domain of business it could do. As was said by the court in Hopkins v. Gallaton Turnpike Co., 4 Humph. 412, "the common law rule with regard to natural persons, that an agent, to bind his principal by deed, can not in the nature of things be applied to corporations aggregate, these being of mere legal existence, and their board, as such, literally speaking, are incapable of a personal act. They direct or assent by vote, but their most immediate mode of action must be by agent." Being a creation of the law—an artificial person—it can only act by agents who are its limbs or instrumentalities to effect the purpose for which it was organized and to act for it, their act being the act of the corporation, exactly as the act of an individual is his act. As such, upon the principle of the objection raised, it could not make an acknowledgment in person, but it may by its officers, and in such cases, its officer affixing the seal is the party executing the deed within the meaning of the statute requiring deeds to be acknowledged by the grantor. Kelly v. Calhoun, 95 U. S. 711; Frostberg M. B. Ass.

v. Brace et al., 51 Md. 508; Am. & Eng. Enc., "Acknowledgments," "Corporations."

In fact, within the same principle of reasoning, it may be said that a corporation can not make a deed of its own property; but we know it can, and that the act of its officers in so doing is the act of the corporation. When a corporation is made the agent of another to sell and convey property, it acts through the same instrumentalities as when acting for itself, and the relation between it and its instrumentalities is as one being, or artificial person, in the performance of its engagement, and involves no delegation of powers. So that when a corporation is invested with a power of attorney to sell and convey real property, the person conferring the power knows that the corporation can not act personally in the matter, but that in performing the engagement it will act through its agents, who for that purpose are its faculties, and whose acts in the discharge of that duty are the acts of the corporation, and as such must be considered to be included in the artificial person as instrumentalities authorized by him to do the act conferred upon it by his power of attorney. In this view, the argument that the corporation can not do such act under the power of attorney without a delegation of authority to its agents, and that the grantor of the power has given no such power of substitution, can not be sustained.

There was no error, and the judgment must be affirmed.

Note. See, 1875, McWilliams v. Detroit Co., 31 Mich. 275; 1890, Jemison v. Bank, 122 N. Y. 135; 1891, Van Dresser v. Ore. R. Co., 48 Fed. Rep. 202; 1896, Anderson v. Bank, 5 N. D. 451; 1897, Snow-Church Co. v. Hall, 19 Miscl. (N. Y.) 655.

Compare, 1885, Westinghouse, etc., Co. v. Wilkinson, 79 Ala. 312.

ARTICLE VI. POWER TO SUE AND BE SUED.

Sec. 317. Right to sue, at common law, anywhere.

THE SILVER LAKE BANK (IN PENNSYLVANIA) v. G. NORTH.[1]

1820. IN THE COURT OF CHANCERY OF NEW YORK. 4 Johns. Ch. (N. Y.) Rep. 370–374.

[Bill to foreclose a mortgage, given upon land in New York, to secure a claim of the bank against the defendant for money loaned.]

THE CHANCELLOR (Kent). There are several objections raised by the answer, and by the counsel, at the hearing, to the right of the plaintiffs to a foreclosure or sale of the mortgaged premises.

1. It is objected, that a foreign corporation can not be recognized as such and entitled to sue in our courts.

It appears by the pleadings and proofs that the plaintiffs are a banking corporation, created by an act of the legislature of *Pennsylvania*, and that they took the mortgage in question to secure a loan of money

[1] Arguments and opinion on other points omitted.

made at their banking house in that state. There is perfect justice and equity in their demand, and I can not see that the objection is even plausible. It is well settled that foreign corporations may sue here in their corporate name, and may prove, as a matter of fact, if the same were denied, that they were lawfully incorporated. The Bank of the United States has sued in our courts. (1 Johns. Cas. 132.) In Henriques v. Dutch West India Company (2 Ld. Raym. 1532, 1 Str. 612), a suit was brought by a *Dutch* corporation and sustained, both in the K. B. and in the House of Lords, though it was objected in that case that a foreign corporation could not maintain a suit. This court ought to be as freely open to such suitors as a court of law, and it would be most unreasonable and unjust to deny them that privilege. They might well exclaim:

Quod genus hoc hominum? * * *
* * * *hospitio prohibemur arenæ.*

See, 1896, National Tel. Mfg. Co. v. Dubois, 165 Mass. 117, 52 Am. St. Rep. 503, *infra*, p. 1490; 1899, Alliance Trust Co. v. Wilson, 9 Kan. App. 891, 59 Pac. Rep. 177; 1899, Ware Cattle Co. v. Anderson, 107 Iowa 231, 77 N. W. Rep. 1026; 1900, Texas & P. R. Co. v. Davis, 93 Texas 378, 55 S. W. Rep. 562; 1900, Schmidt & Bro. v. Mahoney, 60 Neb. 20, 82 N. W. Rep. 99.

Sec. 318. Under statutes, conditions imposed do not generally prevent suing.

GARRATT FORD CO. v. VERMONT MANUFACTURING CO. Et al.

1897. In the Supreme Court of Rhode Island. 20 R. I. Rep. 187–90, 7 Am. & Eng. Corp. Cas. (N. S.) 171–174.

Assumpsit for goods sold and delivered by a foreign corporation which had not appointed an attorney in this state on whom process against it might be served. Heard on defendant's petition for a new trial.

Stiness, J. The plaintiff, a corporation located in Boston, Mass., sold to the defendant a tank, through a salesman who took the order in Providence, and it now seeks to recover the price in this suit. The defendant asked the judge presiding at the trial to charge that the plaintiff, being a foreign corporation, which had not complied with the law of this state in appointing a resident of this state as its attorney (Gen. Laws, cap. 253, §§ 36 to 41), was not entitled to maintain this action. To the refusal of the judge so to charge, the defendant asks for a new trial on the ground of erroneous ruling.

The question, whether a corporation of one state can do business in another state without complying with the laws of such state, is one which has frequently arisen, and upon which decisions are conflicting, although many decisions turn upon the language of a statute. Thus it is held that a statute prohibiting a foreign corporation from doing

business in a state without complying with its terms makes such business illegal and void, and that no such corporation can maintain an action to enforce its illegal contracts. And where the statute does not provide for the consequences of non-compliance, the argument is that the acts of the corporation must be void, or else the statute would be nugatory. In Massachusetts a penalty is imposed upon the agent doing business, but the statute (Laws of 1884, cap. 330, § 3) says that a failure to comply with the conditions shall not affect the validity of an act of the corporation. Rogers v. Simmons, 155 Mass. 259. Some statutes declare the acts to be void. In such cases there can be no question of validity. Some cases hold that where the statute imposes a penalty upon the agent but is silent as to the validity of the act, it is to be presumed that the legislature intended the penalty as a sufficient safeguard for compliance, and that to declare the acts of the corporation void would go further than the statute and impose an additional penalty, by construction, which should not be done. A notable case of this kind is Fritts v. Palmer, 132 U. S. 282, in which the court says: "The fair implication is that, in the judgment of the legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that state. It is not for the judiciary, at the instance or for the benefit of private parties claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting, for the benefit of such parties, the estate thus conveyed to the corporation and by it conveyed to others. * * * If the legislature had intended to declare that no title should pass under conveyance to a foreign corporation purchasing real estate before it acquires the right to engage in business in the state, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been clearly manifested." To the same effect are Dearborn F. Co. v. Augustine, 31 Pac. Rep. (Wash.) 327; Edison, etc., Co. v. Canadian Co., 8 Wash. 370, 24 L. R. A. 315, with a note which holds the contrary view. See, also, an instructive article by Mr. Gunn in Am. Law Reg., January, 1897, p. 19. Without multiplying authorities, we think that the reasoning which we have quoted is conclusive, although we concede that the greater number of authorities are probably the other way. We think, moreover, that we find support for this view in similar legislation in this state.

In Gen. Laws R. I., cap. 182, § 17, it is declared, in the case of a foreign insurance company, that the contract shall be valid, and the same declaration is made as to resident insurance companies which fail to comply with the law. The argument is pressed that because this declaration of validity is made in these cases, its omission in the statute before us leads to the inference of the invalidity of other contracts. We do not think that the legislature intended to make one class of contracts valid and other contracts, under similar conditions, invalid. If the legislature intends to make such contracts as the one

in suit invalid, it is easy to say so; but, in the absence of such a provision, it is a wide stretch of judicial construction for the court to hold that such a result was intended. The purpose of the statute is not to invalidate contracts, but to require foreign corporations to appoint an attorney in this state upon whom service of process may be made. This purpose seems to be adequately served by imposing a penalty upon the agent who ventures to do business for the company without complying with the law. While we do not question the right of the state to impose such conditions and penalties upon foreign companies doing business here as it may deem proper, subject to the provisions of the federal constitution as to the regulation of commerce among the states, yet, in view of the vast amount of business now done by such corporations, we think it is a conservative position to hold that the legislature did not intend to exempt our citizens from paying just debts, upon grounds of non-compliance with our statutes, which may have been fully known to the debtors, when the general assembly has not clearly expressed that intention, and the inference of it is not necessary to the object of the statute.

We are referred to Electric News Co. v. Perry, 75 Fed. Rep. 898, in which it is claimed that our statute was construed to preclude a foreign corporation, which had not complied with it, from maintaining a suit. That case, however, was a bill in equity for an injunction to restrain police officers of Pawtucket, who had seized the property of the complainant for a violation of our statute against pool selling, from interfering with their business. Judge Colt, in the opinion, very properly said that a foreign corporation, which has not complied with statutory provisions, "can not invoke the aid of this court to prohibit the defendants from interfering with a business which it has no legal right to carry on." That is a very different thing from holding that a contract is void, which, in its nature, is not contrary to public policy.

Our decision is that the court did not err in refusing the instruction asked for, and that the petition for a new trial must be dismissed.

See, 1899, Alliance Trust Co. v. Wilson (Kan. App.), 59 Pac. Rep. 177; 1899, Morse v. Holland Trust Co., 84 Ill. App. 84, 56 N. E. Rep. 369; 1899, National Cash Register v. Wilson, 9 N. D. 112, 81 N. W. Rep. 285.

Sec. 319. But statutes may exclude from suing, except as to interstate or foreign commerce.

TABER v. INTERSTATE BUILDING AND LOAN ASSOCIATION.[1]

1897. IN THE SUPREME COURT OF TEXAS. 91 Texas Rep. 92–95, 7 Am. & Eng. Corp. Cas. (N. S.) 168.

[Action brought by the loan association, a Georgia corporation, to foreclose a mortgage upon a lot in Austin, Texas, given by Kate

[1] Statement abridged. Arguments omitted.

Taber to secure a loan from the company to her. The petition alleged that it had a branch office in Texas, and had a permit, under the Texas law, to do business in the state. This was met by a general denial; the question was raised as to whether, under these circumstances, the corporation must prove it had such a permit. Judgment was rendered for the corporation, but this question was certified for answer by the supreme court.]

BROWN, Associate Justice. * * * To the question propounded we answer that it was necessary for the corporation (plaintiff below) to prove that it had a permit to do business in Texas at the time that the contract sued upon was made in order that the court might enter judgment in its favor. Article 745, Rev. Civ. St. 1895, provides, in substance, that every corporation for pecuniary profit organized or created under the laws of another state which desires to transact business in this state, or to solicit business in this state, or which desires to establish a general or special office in this state, shall be required to file with the secretary of state a duly-certified copy of its articles of incorporation. Article 746, Rev. Civ. St. 1895, reads as follows: "No such corporation can maintain any suit or action, either legal or equitable, in any of the courts of this state upon any demand, whether arising out of contract or tort, unless at the time such contract was made or tort committed the corporation had filed its articles of incorporation under the provisions of this chapter in the office of the secretary of state for the purpose of procuring its permit." Every state has the right to prescribe the terms upon which any corporation created in another state or foreign country may do business within its limits, and may exclude such corporations entirely, with the exception of corporations engaged in interstate commerce, or such as are employed by the United States in the transaction of its business. Under this rule of law, about which there is no controversy, this state had the right to adopt such measures as it thought fit to enforce the provisions of its law, which required foreign corporations to deposit the articles of their incorporation with the secretary of state; and, the legislature having seen fit to prescribe as a condition to the maintenance of suits in its courts that such compliance should precede the transaction of business in the state, it follows that the filing of its articles of incorporation with the secretary of state is a condition precedent to the maintenance of suit upon any contract or right of action accruing to such foreign corporation; and, it being a condition precedent, the fact must be both alleged and proved to entitle the corporation to judgment in such case. Cumberland Land Co. v. Canter Lumber Co. (Tenn. Ch. App.), 35 S. W. Rep. 886; Mullens v. Mortgage Co., 88 Ala. 280, 7 So. Rep. 201; Thorne v. Insurance Co., 80 Pa. St. 15; Paul v. Virginia, 8 Wall. 168; Holloway v. Railway Co., 23 Texas 465. * * *

Note. See, 1899, Texas Pac. Ry. Co. v. Davis, 55 S. W. Rep. 562; 1900, Thompson Company v. Whitehead, 185 Ill. 454, 76 Am. St. Rep. 51; 1901, Helman Brewing Co. v. Remeise, — Minn. —, 88 N. W. 441; 1902, Anglo-American Provision Co. v. Davis Co., 169 N. Y. 506, 88 Am. St. R. 608, 62 N. E. 587.

Sec. 320. But such statutes can not exclude from suing in the United States courts.

MR. JUSTICE HUNT IN INSURANCE COMPANY v. MORSE.[1]

1874. IN THE SUPREME COURT OF THE UNITED STATES. 87 U. S. (20 Wall.) 445, on 454–5–6.

[The Wisconsin statutes of 1870 provided that it shall not be lawful for any fire insurance company, incorporated in any other state, directly or indirectly to take risks or transact any business in this state, without first appointing an attorney upon whom process may be served, and containing an agreement that such company will not remove the suit for trial into the United States courts. The Home Insurance Company, a New York corporation, began business in Wisconsin, and appointed such an agent, the power of attorney containing a provision not to remove suits to the United States courts. It insured Morse, and a loss occurred, for which he sued in the state court, and the company petitioned for removal. This was denied, error assigned and taken to the supreme court of Wisconsin; this court affirmed the decision, and the company brought the case here. After quoting the provision of the constitution of the United States as to the jurisdiction of the United States courts, and saying that jurisdiction depends on the laws of the United States, that the states can not limit it, and that for purposes of such jurisdiction corporations are citizens of the state creating them, proceeds:]

The Home Insurance Company is a citizen of New York, within this provision of the constitution. As such citizen of another state, it sought to exercise this right to remove to a federal tribunal a suit commenced against itself in the state court of Wisconsin, where the amount involved exceeded the sum of $500. This right was denied to it by the state court on the ground that it had made the agreement referred to, and that the statute of the state authorized and required the making of the agreement.

We are not able to distinguish this agreement and this requisition, in principle, from a similar one made in the case of an individual citizen of New York. A corporation has the same right to the protection of the laws as a natural citizen, and the same right to appeal to all the courts of the country. The rights of an individual are not superior in this respect to that of a corporation.

The state of Wisconsin can regulate its own corporations and the affairs of its own citizens, in subordination, however, to the constitution of the United States. The requirement of an agreement like this from their own corporations would be *brutum fulmen*, because they possess no such right under the constitution of the United States. A foreign citizen, whether natural or corporate, in this respect pos-

[1] Much of opinion containing citations from cases as to the general power of a state to exclude foreign corporations is omitted.

sesses a right not pertaining to one of her own citizens. There must necessarily be a difference between the status of the two in this respect.

We do not consider the question whether the state of Wisconsin can entirely exclude such corporations from its limits, nor what reasonable terms they may impose as a condition of their transacting business within the state. These questions have been before the court in other cases, but they do not arise here. * * *

(Citing and quoting Paul v. Virginia, 8 Wall. 168; Bank of Augusta v. Earle, 13 Pet. 519; Lafayette Ins. Co. v. French, 18 How. 407; Ducat v. City of Chicago, 10 Wall. 410; Bank of Columbia v. Okely, 4 Wheat. 235.)

On this branch of the case the conclusion is this:

1. The constitution of the United States secures to citizens of another state than that in which suit is brought an absolute right to remove their cases into the federal court, upon compliance with the terms of the act of 1789.

2. The statute of Wisconsin is an obstruction to this right, is repugnant to the constitution of the United States and the laws in pursuance thereof, and is illegal and void.

3. The agreement of the insurance company derives no support from an unconstitutional statute and is void, as it would be had no such statute been passed.

We are of opinion, for the reasons given, that the Winnebago County Court erred in proceeding in the case after the filing the petition and the giving the security required by the act of 1789, and that all subsequent proceedings in the state court are illegal and should be vacated. The judgment in that court, and the judgment in the supreme court of Wisconsin, should be reversed, and the prayer of the petition for removal should be granted.

Mr. CHIEF JUSTICE WAITE and Mr. JUSTICE DAVIS dissenting.

Note. See, 1857, Shelby v. Hoffman, 7 Ohio St. 450; 1872, Morse v. Home Ins. Co., 30 Wis. 496, 11 Am. Rep. 580; 1875, Hartford Fire Ins. Co. v. Doyle, 6 Biss. 461; 1876, State, *ex rel.* Drake, v. Doyle, 40 Wis. 175, 22 Am. Rep. 692; 1876, Doyle v. Insurance Co., 94 U. S. 535, *infra*; 1887, Barron v. Burnside, 121 U. S. 186; 1889, Rece v. N. N. & M. V. Co., 32 W. Va. 164, 3 L. R. A. 572; 1890, Texas v. Worsham, 76 Texas 556; 1892, Southern Pac. Ry. Co. v. Denton, 146 U. S. 202; 1894, Martin v. Balt. & Ohio R. Co., 151 U. S. 673, 684; 1895, Commw. v. East Tenn. C. Co., 97 Ky. 238.

Sec. 321. Federal corporations can sue in the federal courts.

SUPREME LODGE OF KNIGHTS OF PYTHIAS OF THE WORLD v. HILL.[1]

1896. IN THE UNITED STATES CIRCUIT COURT OF APPEALS. (W. Va.) 76 Fed. Rep. 468–472.

[Action on the case in assumpsit, brought in courts of West Virginia by Ellen Hill, against the lodge, to enforce the payment of a

[1] Statement abridged; only the part of the opinion relating to the one point is given.

policy of insurance on the life of Arthur Hill, in favor of the plaintiff. By petition of the lodge, a corporation created under the laws of the United States, the suit was removed to the United States Circuit Court, district of West Virginia. From a judgment in favor of Ellen Hill the lodge appealed.]

GOFF, Circuit Judge. * * * The first error assigned is to the action of the court in overruling the demurrer to the plaintiff's declaration. The grounds of the demurrer were that the circuit court of the United States had no jurisdiction of this case, that it did not properly present a federal question, and that the same was shown by the declaration itself, and also that there was no cause of action set forth in either count thereof. It should be remembered, in this connection, that this cause was removed from the state court on the petition of the defendant, in which it was alleged that said defendant was a corporation duly formed, organized and created by and under the laws of the United States, and also that the declaration as filed in the state court recited that the defendant was duly incorporated under an act of congress. This assignment of error is without merit, as it is plain that the demurrer was properly overruled by the court below. The supreme court of the United States has decided that corporations of the United States, created by and organized under acts of congress, are entitled to remove into the circuit court of the United States suits brought against them in the state courts, on the ground that such suits are suits "arising under the laws of the United States." Pacific Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. Rep. 1113; Butler v. National Home, 144 U. S. 64, 12 Sup. Ct. Rep. 581. That court also entertained and decided a writ of error in the case of Knights of Pythias v. Kalinski, 163 U. S. 289, 16 Sup. Ct. Rep. 1047, which had been removed from a state court, in the eastern district of Louisiana, to the circuit court of the United States for that district, upon the petition of the said Knights of Pythias, in which it was alleged that it was a corporation created by and organized under an act of congress. * * *

Affirmed.

Note. See, 1899, Supreme Lodge K. of P. v. England, 94 Fed. Rep. 369.

Sec. 322. Liability to be sued.

In the United States courts, citizenship.

ST. LOUIS AND SAN FRANCISCO RAILWAY CO. v. JAMES.[1]

1896. IN THE SUPREME COURT OF THE UNITED STATES. 161 U. S. Rep. 545–572.

[In 1892 Etta James brought this action in the United States Circuit Court, western district of Arkansas, against the railway company,

[1] Statement much abridged; arguments, part of opinion and dissenting opinion of Mr. Justice Harlan omitted.

for negligence in maintaining a switch target so near its tracks, in the state of Missouri, that her husband, a fireman on the company's engine, was killed. Mrs. James resided in Monett, Mo., where the accident took place. The railway company was incorporated in Missouri in 1876, and soon thereafter became the owner of a road extending southerly from Monett, to the state line, and on to Fort Smith in Arkansas; the latter part of this line had been purchased in 1882 by the St. L. & S. F. Co.; in 1889 Arkansas changed her former law relating to foreign railway companies owning or operating railways in that state by enacting that such company before having the benefit of such act shall within sixty days file with the secretary of state a certified copy of its articles of incorporation or charter, "and shall thereupon become a corporation of this state, anything in its articles of incorporation or charter to the contrary notwithstanding, and in all suits and proceedings instituted against such corporation process may be served" as in case of "corporations in this state organized and existing under the laws of this state." The railway company filed its copy of its articles of incorporation as required by the act of 1889, but was never otherwise incorporated in Arkansas. The railway company duly objected to the jurisdiction of the court, on the ground that the plaintiff and defendant were both citizens of Missouri, and that the requisite diversity of citizenship did not exist so as to give jurisdiction to the United States courts; the question was so raised, by exceptions to the ruling of the trial court, and assignments of error, as to be presented to the circuit court of appeals, by which four questions were certified to this court: 1. Under the act of 1889, by filing its articles of incorporation, and continuing to operate its road, did the railway company "become a corporation and citizen of Arkansas?" 2. Did it thus become a citizen of Arkansas so as to give to the United States Circuit Court, western district of Arkansas, jurisdiction of this action, in which complainant was a citizen of Missouri? 3. Did it so become a citizen of Arkansas as to give such court jurisdiction of such action, when complainant was a citizen of Missouri, and when the cause of action accrued there? 4. Under all the circumstances, did the said court have jurisdiction of the action?]

Mr. Justice Shiras. Etta James, as a citizen of the state of Missouri, and having a cause of action against the St. Louis and San Francisco Railway Company, a corporation of the state of Missouri, could, of course, sue the latter in the courts of that state, but equally, of course, could not sue such state corporation in the circuit court of the United States for the district of Missouri. Can she, as such citizen of the state of Missouri, lawfully assert her cause of action in the circuit court of the United States for the district of Arkansas against the St. Louis and San Francisco Railway Company by showing that the latter had availed itself of the rights and privileges conferred by the state of Arkansas on railroad corporations of other states coming within her borders and complying with the terms and conditions of her statutes?

Before addressing ourselves directly to this question, it must be con-

ceded that the plaintiff's cause of action, though arising in Missouri, is transitory in its nature, and that the St. Louis and San Francisco Railway Company, though denying the plaintiff's right to sue it in the circuit court of Arkansas, waives its statutory privilege of being sued only in the district in which it has its habitat.

It must be regarded, to begin with, as finally settled, by repeated decisions of this court, that, for the purpose of jurisdiction in the federal courts, a state corporation is deemed to be indisputably composed of citizens of such state. It is equally true that, without objection so far from the federal authority, whether legislative or judicial, it has become customary for a state, adjacent to the state creating a railroad corporation, to legislatively grant authority to such foreign corporation to enter its territory with its road—to make running arrangements with its own railroads—to buy or lease them, or to consolidate with the companies owning them. Sometimes, as in the present case, such foreign corporation is declared, upon its acceptance of prescribed terms and conditions, to become a domestic corporation of such adjacent state, and to be endowed with all the rights and privileges enjoyed by similar corporations created by such state.

We have already said that the rule that state corporations are indisputably composed of citizens of the states creating them is finally settled. But, in view of the question now before us, it may be well to briefly review some of the cases.

In the case of Bank of the United States v. Deveaux, 5 Cranch 61, 87, 88, where an action had been brought against citizens of the state of Georgia in the circuit court of the United States for the district of Georgia, by a petition of "the president, directors and company of the Bank of the United States," wherein it was alleged that the petitioners were citizens of the state of Pennsylvania, it was held that a corporation aggregate, composed of citizens of one state, may sue a citizen of another state in the circuit court of the United States, and Chief Justice Marshall, in giving the opinion of the court, said: "Substantially and essentially, the parties in such a case, where the members of the corporation are aliens or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals."

Before leaving this case it should be noted that the United States Bank was not a corporation of the state of Pennsylvania, but of the United States. The decision, therefore, was to the effect that where it appeared that a corporation plaintiff, regardless of its origin, was composed of aliens or of citizens of a different state from the defendant, the plaintiff, through suing in its corporate name, could make the averment that the individuals who composed the corporation were such aliens or citizens of a different state, and such averment, if not traversed, would sustain the jurisdiction. The principle of the case makes the individual corporators the real parties to the suit.

In Louisville, Cincinnati, etc., Railroad v. Letson, 2 How. 497, 555, an action was brought, in the circuit court of the United States for the district of South Carolina, by a citizen of the state of New

York against a corporation whose members were alleged to be citizens of South Carolina. A plea to the jurisdiction was set up that there were members of the defendant company who were not citizens of the state of South Carolina, but of another state than New York or South Carolina. In the opinion in this case, Bank of the United States v. Deveaux was said to have gone too far, and that consequences and inferences had been argumentatively drawn from it which ought not to be followed, and it was said that "a corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and, therefore, entitled, for the purpose of suing and being sued, to be deemed a citizen of that state," and accordingly the judgment of the circuit court, overruling the plea to its jurisdiction, was sustained. * * *

(Citing, and quoting from, as following the Letson case, Marshall v. B. & O. R. R., 16 How. 314, 329; Covington Drawbridge Co. v. Shepherd, 20 How. 227, 233.)

The previous cases were reviewed in Ohio and Mississippi Railroad v. Wheeler, 1 Black 286, 297. That was the case of an action brought in the circuit court of the United States for the district of Indiana against Wheeler, a citizen of that state, to recover the amount due on his subscription to stock of the Ohio and Mississippi Railroad Company. The declaration described the plaintiffs as the "president and directors of the Ohio and Mississippi Railroad Company, a corporation created by the laws of the states of Indiana and Ohio, and having its principal place of business in Cincinnati, in the state of Ohio, a citizen of the state of Ohio." The defendant pleaded to the jurisdiction by alleging that the plaintiff company, although a corporation of the state of Ohio in the first instance, had been incorporated by an act of assembly of the state of Indiana, and thus had become a body corporate of the same state whereof he was a citizen.

The question thus raised was on a certificate of a division of opinion between the judges of the circuit court, brought to this court, and was answered as follows: "This suit in the corporate name is, in contemplation of law, the suit of the individual persons who compose it, and must, therefore, be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of the last mentioned state. Such an action can not be maintained in a court of the United States, where jurisdiction of the case depends altogether on the citizenship of the parties. And, in such a suit, it can make no difference whether the plaintiffs sue in their own proper names or by the corporate name and style by which they are described. The averments in the declaration would seem to imply that the plaintiffs claim to have been created a corporate body, and to have been endued with the capacities and faculties it possesses by the co-operating legislation of the two states, and to be one and the same legal being in both states. If this were the case it would not affect the question of jurisdiction in this suit. But such a corporation can

have no legal existence upon the principles of the common law or under the decision of this court in the case of the Bank of Augusta v. Earle.[1] It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the states of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of those states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state, except by the law of the state. And neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists, by force of law, can have no existence beyond the limits of the state or sovereignty which brings it into life and endues it with its faculties and powers. The president and directors of the Ohio and Mississippi Railroad Company are, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they can not be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a circuit court of the United States. * * * And we shall certify to the circuit court that it has no jurisdiction of the case on the facts presented by the pleadings." * * *

(Citing and quoting from Memphis & Charleston R. R. v. Alabama, 107 U. S. 581, 585, and Railway Company v. Whitton, 13 Wall. 270.)

One phase of the subject was before the court in the case of the Pennsylvania Co. v. St. Louis, etc., Railroad, 118 U. S. 290, 295. A suit had been brought in the circuit court of the United States for the district of Indiana by the St. Louis, Alton and Terre Haute Railroad Company, alleging that it was a corporation organized under the laws of the state of Illinois, and a citizen of that state, against the Indianapolis and St. Louis Company, a corporation organized under the laws of the state of Indiana, and a citizen of that state, and against other corporations mentioned in the bill as citizens of Indiana, or of other states than Illinois. An objection to the jurisdiction was made on the ground that the St. Louis, Alton and Terre Haute Railroad Company was organized under laws of both Illinois and Indiana, and was, therefore, a citizen of the latter state. In treating this question this court said, by Mr. Justice Miller: "It does not seem to admit of question that a corporation of one state, owning property and business in another state by permission of the latter, does not become a citizen of this state also. And so a corporation of Illinois, authorized by its laws to build a railroad across the state from the Mississippi River to its eastern boundary, may by permission of the state of Indiana extend its road a few miles within the limits of the latter, or, indeed, through the entire state, * * * without thereby becoming a corporation or a citizen of the state of Indiana. Nor does it seem to us that an act of the legislature conferring upon this

[1] 13 Pet. 519.

corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the state of Indiana as have been conferred on it by the state which created it, constitutes it a corporation of the state of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence under laws of another state to exercise its functions in the state where it is so received. The latter class of laws are common in authorizing insurance companies, banking companies and others to do business in other states than those which have chartered them. To make such a company a corporation of another state, the language must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state, or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers."

So in Nashua Railroad v. Lowell Railroad, 136 U. S. 356, it was held that railroad corporations, created by two or more states, though joined in their interests, in the operation of their roads, in the issue of their stock and in the division of their profits, so as practically to be a single corporation, do not lose their identity; but each has its existence and its standing in the courts of the country only by virtue of the legislation of the state by which it was created, and the union of name, of officers, of business and property, does not change their distinctive character as separate corporations.

To fully reconcile all the expressions used in these cases would be no easy task, but we think the following propositions may be fairly deduced from them: There is an indisputable legal presumption that a state corporation, when sued or suing in a circuit court of the United States, is composed of citizens of the state which created it, and hence such a corporation is itself deemed to come within that provision of the constitution of the United States which confers jurisdiction upon the federal courts in "controversies between citizens of different states."

It is competent for a railroad corporation organized under the laws of one state, when authorized so to do by the consent of the state which created it, to accept authority from another state to extend its railroad into such state, and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second state. Such legislation on the part of two or more states is not, in the absence of inhibitory legislation by congress, regarded as within the constitutional prohibition of agreements or compacts between states.

Such corporations may be treated by each of the states whose legislative grants they accept as domestic corporations.

The presumption that a corporation is composed of citizens of the state which created it accompanies such corporation when it does busi-

ness in another state, and it may sue or be sued in the federal courts in such other state as a citizen of the state of its original creation.

We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one state, indisputably taken, for the purpose of federal jurisdiction, to be composed of citizens of such state, is authorized by the law of another state to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second state in such a sense as to confer jurisdiction on the federal courts at the suit of a citizen of the state of its original creation.

We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that state corporations were composed of citizens of the state which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it. * * *

(After reviewing the former Arkansas legislation relative to foreign corporations acquiring and operating railroads in the state, under which the road in question was acquired, and showing such former legislation did not attempt to make the foreign corporation an Arkansas corporation.)

It is true that by the subsequent act of 1889, by the proviso to the second section, it was provided that every railroad corporation of any other state, which had theretofore leased or purchased any railroad in Arkansas, should, within sixty days of the passage of the act, file a certified copy of its articles of incorporation or charter with the secretary of state, and shall thereupon become a corporation of Arkansas, anything in its articles of incorporation or charter to the contrary notwithstanding; and it appears that the defendant company did accordingly file a copy of its articles of incorporation with the secretary of the state. But whatever may be the effect of such legislation, in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we can not concede that it availed to create an Arkansas corporation out of a foreign corporation in such a sense as to make it a citizen of Arkansas within the meaning of the federal constitution so as to subject it as such to a suit by a citizen of the state of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that constitution, as construed by the decisions of this court, it would be necessary to create it out of natural persons, whose citizenship of the state creating it could be imputed to the corporation itself. But it is not pretended in the present case that natural persons, resident in and citizens of Arkansas, were by the legislation in question created a corporation, and

that, therefore, the citizenship of the individual corporators is imputable to the corporation. * * *

The result of these views is that we answer the second question put to us by the circuit court of appeals in the negative, and this renders it unnecessary to answer the other questions.

Mr. Justice HARLAN dissents.

Note. See note at end of next case; 1903, Southern Ry. Co. v. Allison, 190 U. S. 326.

Sec. 323. Same. In what district.

SHAW v. QUINCY MIN. CO.[1]

1892. IN THE SUPREME COURT OF THE UNITED STATES. 145 U. S. 444, 12 Sup. Ct. Rep. 935.

[This was a petition for a writ of *mandamus* to the judges of the circuit court of the United States for the southern district of New York to command them to take jurisdiction against the Quincy Mining Company upon a bill in equity filed in that court on September 3, 1891, by the petitioner, described in the bill as a citizen of Massachusetts, in behalf of himself and other stockholders of the Quincy Mining Company, against "the Quincy Mining Company, a corporation duly organized under the laws of the state of Michigan, and having a usual place of business in the city, county and state of New York." Upon that bill a subpena was issued, directed to the Quincy Mining Company, and was served upon it within the southern district of New York. The Quincy Mining Company appeared specially, and moved for an order to set aside the service.

At the hearing of the motion it appeared that the law of Michigan allowed, and its articles of association provided: "The business office of the company shall be in the city, county and state of New York, and another business office at the Quincy mine, in the county of Houghton and state of Michigan."

The order to set aside the service was granted by the court, upon the ground "that said Quincy Mining Company is a corporation created and existing under the laws of the state of Michigan, and is an inhabitant of the western district of Michigan, and not an inhabitant of the southern district of New York."]

MR. JUSTICE GRAY. The single question in this case is whether under the act of March 3, 1887, ch. 373, § 1, as corrected by the act of August 13, 1888, ch. 866 (the material parts of which are copied in the margin[2]), a corporation incorporated in one state of the union,

[1] Statement abridged and part of opinion omitted.

[2] "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which

and having a usual place of business in another state in which it has not been incorporated, may be sued, in a circuit court of the United States held in the latter state, by a citizen of a different state.

This question, upon which there has been a diversity of opinion in the circuit courts, can be best determined by a review of the acts of congress, and of the decisions of this court, regarding the original jurisdiction of the circuit courts of the United States over suits between citizens of different states.

In carrying out the provision of the constitution which declares that the judicial power of the United States shall extend to controversies "between citizens of different states," congress, by the judiciary act of September 24, 1789, ch. 20, § 11, conferred jurisdiction on the circuit court of suits of a civil nature, at common law or in equity, "between a citizen of the state where the suit is brought and a citizen of another state," and provided that "no civil suit shall be brought" "against an inhabitant of the United States," "in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." 1 St., pp. 78, 79.

The word "inhabitant," in that act, was apparently used, not in any larger meaning than "citizen," but to avoid the incongruity of speaking of a citizen of anything less than a state, when the intention was to cover not only a district which included a whole state, but also two districts in one state, like the districts of Maine and Massachusetts in the state of Massachusetts, and the districts of Virginia and Kentucky in the state of Virginia, established by section 2 of the same act. 1 St., p. 73. It was held by this court from the beginning that an averment that a party resided within the state or the district in which the suit was brought was not sufficient to support the jurisdiction, because in the common use of words a resident might not be a citizen, and, therefore, it was not stated expressly and beyond ambiguity that he was a citizen of the state, which was the fact on which the jurisdiction depended under the provisions of the constitution and of the judiciary act. Bingham v. Cabot, 3 Dall. 382; Turner v. Bank, 4 Dall. 8; Abercrombie v. Dupuis, 1 Cranch 343; Hodgson v. Bowerbank, 5 Cranch 303; Brown v. Keene, 8 Pet. 112, 115. The same rule has been maintained to the present day, and has been

shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 25 St., p. 434.

held to be unaffected by the fourteenth amendment of the constitution, declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Robertson v. Cease, 97 U. S. 646; Grace v. American Ins. Co., 109 U. S. 278, 3 Sup. Ct. Rep. 207; Timmons v. Land Co., 139 U. S. 378, 11 Sup. Ct. Rep. 585; Denny v. Pironi, 141 U. S. 121, 11 Sup. Ct. Rep. 966.

By the act of May 4, 1858, ch. 27, § 1, it was enacted that, in a state containing more than one district, actions not local should "be brought in the district in which the defendant resides," or, "if there be two or more defendants residing in different districts in the same state," then in either district. 11 St., p. 272. The whole purport and effect of that act was not to enlarge, but to restrict and distribute, jurisdiction. It applied only to a state containing two or more districts, and directed suits against citizens of such a state to be brought in that district thereof in which they or either of them resided. It did not subject defendants to any new liability to be sued out of the state of which they were citizens, but simply prescribed in which district of that state they might be sued.

These provisions of the acts of 1789 and 1858 were substantially re-enacted in sections 739 and 740 of the Revised Statutes.

The act of March 3, 1875, ch. 137, § 1, after giving the circuit courts jurisdiction of suits "in which there shall be a controversy between citizens of different states," and enlarging their jurisdiction in other respects, substantially re-enacted the corresponding provision of the act of 1789, by providing that no civil suit should be brought "against any person" "in any other district than that whereof he is an inhabitant, or in which he shall be found" at the time of service, with certain exceptions, not affecting the matter now under consideration. 18 St., p. 470.

The act of 1887, both in its original form and as corrected in 1888, re-enacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: "But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 24 St., p. 552; 25 St., p. 434. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit to be brought in any other district than that whereof the defendant is an inhabitant; and the effect is that, "where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides." McCormick Co. v. Walthers, 134 U. S. 41, 43, 10 Sup. Ct. Rep. 485. And the general object of this act, as appears upon its

face, and as has been often declared by this court, is to contract, not to enlarge, the jurisdiction of the circuit courts of the United States, Smith v. Lyon, 133 U. S. 315, 320, 10 Sup. Ct. Rep. 303; *In re* Pennsylvania Co., 137 U. S. 451, 454, 11 Sup. Ct. Rep. 141; Fisk v. Henarie, 142 U. S. 459, 467, 12 Sup. Ct. Rep. 207.

As to natural persons, therefore, it can not be doubted that the effect of this act, read in the light of earlier acts upon the same subject and of the judicial construction thereof, is that the phrase "district of the residence of" a person is equivalent to "district whereof he is an inhabitant," and can not be construed as giving jurisdiction, by reason of citizenship, to a circuit court held in a state of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the state of which he is a citizen; and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district "in which he shall be found," requires any suit, the jurisdiction of which is founded only on its being between citizens of different states, to be brought in the state of which one is a citizen, and in the district therein of which he is an inhabitant and resident.

In the case of a corporation, the reasons are, to say the least, quite as strong for holding that it can sue and be sued only in the state and district in which it has been incorporated, or in the state of which the other party is a citizen.

In Bank v. Earle, 13 Pet. 519, 588, Chief Justice Taney said: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and can not migrate to another sovereignty. But, although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another."

This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the state by which it was created, although it may do business in other states whose laws permit it. * * *

(Citing and quoting Insurance Co. v. French, 18 How. 404; Railroad Co. v. Koontz, 104 U. S. 5, 11, 12. See, also, Paul v. Virginia, 8 Wall. 168, 181; Railroad Company v. Harris, 12 Wall. 65, 81; St. Clair v. Cox, 106 U. S. 350, 354, 356; Railway Co. v. Gebhard, 109 U. S. 527, 537; Bank v. Deveaux, 5 Cranch 61; Insurance Co. v. Boardman, 5 Cranch 57; Sullivan v. Steamboat Co., 6 Wheat. 450; Breithaupt v. Bank, 1 Pet. 238; Bank v. Slocomb, 14 Pet. 60; Railroad Co. v. Letson, 2 How. 497, 558; Marshall v. Railroad Co., 16 How. 314, 328; Drawbridge Co. v. Shepherd, 20 How. 227, 233;

Railroad Co. v. Wheeler, 1 Black 286, 296; Muller v. Dows, 94 U. S. 444; Steamship Co. v. Tugman, 106 U. S. 118, 121; Railroad Co. v. Alabama, 107 U. S. 581, 585; Insurance Co. v. Francis, 11 Wall. 210, 216.)

In *Ex parte* Schollenberger, 96 U. S. 369, 377, Chief Justice Waite said: "A corporation can not change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its charter, or excluded by local laws." The jurisdiction of the circuit court in that case, as well as in Insurance Co. v. Woodworth, 111 U. S. 138, 146, 4 Sup. Ct. Rep. 364, was maintained upon the ground that the defendant corporation, though incorporated in another state, yet, by reason of doing business in the state in which the suit was brought, and having appointed an agent there as required by its laws, upon whom process against the company might be served, was found in that state, within the meaning of the act of March 3, 1875, ch. 137, § 1, then in force, and hereinbefore cited.

The statute now in question, as already observed, has repealed the permission to sue a defendant in a district in which he is found, and has peremptorily enacted that, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." In a case between natural persons, as has been seen, this clause does not allow the suit to be brought in a state of which neither is a citizen. If congress, in framing this clause, did not have corporations in mind, there is no reason for giving the clause a looser and broader construction as to artificial persons who were not contemplated than as to natural persons who were. If, as it is more reasonable to suppose, congress did have corporations in mind, it must be presumed also to have had in mind the law, as long and uniformly declared by this court, that, within the meaning of the previous acts of congress giving jurisdiction of suits between citizens of different states, a corporation could not be considered a citizen or a resident of a state in which it had not been incorporated. * * *

Under the existing act of congress a corporation incorporated in one state only, can not be compelled to answer, in a circuit court of the United States held in another state in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different state.

Writ of *mandamus* denied.

Mr. Justice HARLAN dissented.

Note. Residence of corporations for purposes of suits against them. Theories:

(a) In the state, county or district where the principal office is: 1850, Clarke v. Bank of Missisippi, 10 Ark. 516, 52 Am. Dec. 248; 1852, Central Bank v. Gibson, 11 Ga. 453; 1855, Conroe v. National Protec. Ins. Co., 10 How. Pr. 403; 1856, Thorn v. Central R., 2 Dutch. (N. J.) 121; 1858, Connecticut & P. R. Co. v. Cooper, 30 Vt. 476, 73 Am. Dec. 319; 1859, Crowley v. Panama R., 30 Barb. 99; 1861, Adams v. Great West. R. Co., 6 Hurls. & N. 404, 30 L. J. (N. S.)

Eq. 124; 1863, Jenkins v. California Stage Co., 22 Cal. 537; 1888, Holgate v. Oregon Pac. R. Co., 116 Ore. 123, 20 A. & E. Corp. Cas. 527; 1894, Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496; 1895, Ireland v. Globe Milling Co., 19 R. I. 180, 61 Am. St. Rep. 756; 1895, *In re* Keasbey, etc., 160 U. S. 221; 1896, Duke v. Taylor, 37 Fla. 64, 53 Am. St. Rep. 232; 1896, Crookston v. Centennial En. M. Co., 13 Utah 117, 4 A. & E. Corp. Cas. N. S. 30; 1898, Bergner, etc., Brewing Co. v. Dreyfus, 172 Mass. 154, 70 Am. St. Rep. 251; 1898, Turcott v. R., 101 Tenn. 102, 70 Am. St. Rep. 661; 1899, Louisville, N. A. & C. R. v. La. T. Co., 174 U. S. 552, 19 S. C. 819. See, also, note, p. 56, *supra*.

(b) Railroad and other companies, having improvements located in various counties, may be sued in any county in which their lines are, and where they do business: 1854, Bristol v. Chicago & Aurora R. Co., 15 Ill. 436; 1857, Baldwin v. Mississippi R. Co., 5 Clarke (Iowa) 518; 1857, Belden v. N. Y. & Harlem R. Co., 15 How. Pr. (N. Y.) 17; 1858, Connecticut & P. R. Co. v. Cooper, 30 Vt. 476, 73 Am. Dec. 319, *contra*; 1859, Richardson v. Burlington, etc., R. Co., 8 Clarke (Iowa) 260.

(c) Some cases hold that jurisdiction is not confined to locality of principal office, but extends throughout the territory of the state granting the charter: 1845, Cromwell v. Insurance, 2 Rich. Law (S. C.) 512; 1846, Glaize v. South Car. R. Co., 1 Strobh. Law (S. C.) 70; 1855, B. & O. R. Co. v. Gallahue's Admr., 12 Gratt. (Va.) 655, 65 Am. Dec. 254.

(d) A few cases held that corporations had no residence, but must be sued where one or more corporators reside: 1839, Wood v. Hartford Fire Ins. Co., 13 Conn. 202, 33 Am. Dec. 395; Bank of U. S. v. Deveaux, 5 Cranch (U. S.) 61; Cooper's Lessee v. Galbraith, 3 Wash. (C. C.) 546; 1867, City of St. Louis v. Wiggins Ferry Co., 40 Mo. 580, *contra*, and the many recent cases given in (a) above.

Sec. 324. Same. Alien corporation.

BARROW STEAMSHIP COMPANY v. KANE.[1]

1898. In the Supreme Court of the United States. 170 U. S. Rep. 100–113.

Mr. Justice Gray. This action was brought in the circuit court of the United States for the southern district of New York against the Barrow Steamship Company, by a passenger on one of its steamships on a voyage from Londonderry, in Ireland, to the city of New York, for an assault upon him by its agents in the port of Londonderry. The certificate of the circuit court of appeals shows that the plaintiff is a citizen and resident of the state of New Jersey; that the defendant is a corporation, organized and incorporated under the laws of the United Kingdom of Great Britain and Ireland, and a common carrier running a line of steamships from ports in that kingdom to the port of New York, and does business in the state of New York, through a mercantile firm, its regularly appointed agents, and upon whom the summons in this action was served.

It was contended, in behalf of the steamship company, that, being a foreign corporation, no suit could be maintained against it *in personam* in this country without its consent, express or implied; that by doing business in the state of New York it consented to be sued only as authorized by the statutes of the state; that the jurisdiction

[1] Statement except as given in the opinion omitted.

ot the courts of the United States held within the state depended on the authority given by those statutes; that the statutes of New York conferred no authority upon any court to issue process against a foreign corporation in an action by a non-resident, and for a cause not arising within the state, and, therefore, that the circuit court acquired no jurisdiction of this action brought against a British corporation by a citizen and resident of New Jersey.

The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them.

By the constitution of the United States the judicial power, so far as depending upon citizenship of parties, was declared to extend to controversies "between citizens of different states," and to those between "citizens" of a state and foreign "citizens or subjects." And congress, by the judiciary act of 1789, in defining the original jurisdiction of the circuit courts of the United States, described each party to such a controversy, either as "a citizen" of a state, or as "an alien." Act of September 24, 1789, § 11; 1 Stat., 78; Rev. Stat., § 629. Yet the words "citizens" and "aliens," in these provisions of the constitution and of the judiciary act, have always been held by this court to include corporations.

The jurisdiction of the circuit courts over suits between a citizen of one state and a corporation of another state was at first maintained upon the theory that the persons composing the corporation were suing or being sued in its name, and upon the presumption of fact that all those persons were citizens of the state by which the corporation had been created, but that this presumption might be rebutted, by plea and proof, and the jurisdiction thereby defeated. Bank of United States v. Deveaux, 5 Cranch 61, 87, 88; Hope Ins. Co. v. Boardman, 5 Cranch 57; Commercial Bank v. Slocomb, 14 Pet. 60.

But the earlier cases were afterwards overruled, and it has become the settled law of this court that, for the purposes of suing and being sued in the courts of the United States, a corporation created by and doing business in a state is, although an artificial person, to be considered as a citizen of the state as much as a natural person, and there is a conclusive presumption of law that the persons composing the corporation are citizens of the same state with the corporation. Louisville, etc., Railroad v. Letson, 2 How. 497, 558; Marshall v. Baltimore & Ohio Railroad, 16 How. 314, 329; Muller v. Dows, 94 U. S. 444; Steamship Co. v. Tugman, 106 U. S. 118; St. Louis & San Francisco Railway v. James, 161 U. S. 545, 555–559. * * *

(Quoting from Bank of Augusta v. Earle, 13 Pet. 519.)

The manifest injustice which would ensue, if a foreign corporation, permitted by a state to do business therein, and to bring suits in its courts, could not be sued in those courts, and thus, while allowed the benefits, be exempt from the burdens of the laws of the state, has induced many states to provide by statute that a foreign corporation making contracts within the state shall appoint an agent residing

therein, upon whom process may be served in actions upon such contracts. This court has often held that wherever such a statute exists service upon an agent so appointed is sufficient to support jurisdiction of an action against the foreign corporation, either in the courts of the state, or, when consistent with the acts of congress, in the courts of the United States held within the state, but it has never held the existence of such a statute to be essential to the jurisdiction of the circuit courts of the United States. Lafayette Ins. Co. v. French, 18 How. 404; *Ex parte* Schollenberger, 96 U. S. 369; New England Ins. Co. v. Woodworth, 111 U. S. 138, 146; Shaw v. Quincy Mining Co., 145 U. S. 444, 452. * * *

(Citing and quoting from Lafayette Ins. Co. v. French, 18 How. 408, 409; Railroad Co. v. Harris, 12 Wall. 65, 83, 84.)

In England the right of a foreign corporation doing business in England to sue in the English courts was long ago recognized, and its liability to be subjected to suit in those courts, by service made upon one of its principal officers residing and representing it within the realm, has been fully established by recent decisions. Newby v. Von Oppen, L. R. 7 Q. B. 293; Haggin v. Comptoir d'Escompte de Paris, 23 Q. B. D. 519.

In the courts of several states of the union the like view has prevailed. Libbey v. Hodgdon, 9 N. H. 394; March v. Eastern Railroad Co., 40 N. H. 548, 579; Day v. Essex County Bank, 13 Vt. 97; Moulin v. Trenton Ins. Co., 1 Dutcher (25 N. J. Law) 57; Bushel v. Commonwealth Ins. Co., 15 S. & R. 173; North Missouri Railroad v. Akers, 4 Kan. 453, 469; Council Bluffs Co. v. Omaha Co., 49 Neb. 537. The courts of New York and Massachusetts, indeed, have declined to take jurisdiction of suits against foreign corporations, except so far as it has been expressly conferred by statutes of the state. McQueen v. Middletown Manuf. Co., 16 Johns. 5; Robinson v. Oceanic Steam Navigation Co., 112 N. Y. 315; Desper v. Continental Water Meter Co., 137 Mass. 252. But the jurisdiction of the circuit courts of the United States is not created by, and does not depend upon, the statutes of the several states.

In the circuit courts of the United States there have been conflicting opinions, but the most satisfactory ones are those of Judge Drummond and Judge Lowell in favor of the liability of foreign corporations to be sued. Wilson Packing Co. v. Hunter, 8 Bissell 429; Hayden v. Androscoggin Mills, 1 Fed. Rep. 93. * * *

(Citing and quoting from Lafayette Ins. Co. v. French, 18 How. 407.)

The object of the provisions of the constitution and statutes of the United States, in conferring upon the circuit courts of the United States jurisdiction of controversies between citizens of different states of the union, or between citizens of one of the states and aliens, was to secure a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides.

The jurisdiction so conferred upon the national courts can not be abridged or impaired by any statute of a state. Hyde v. Stone, 20

How. 170, 175; Smyth v. Ames, 169 U. S. 466, 516. It has, therefore, been decided that a statute, which requires all actions against a county to be brought in the county court, does not prevent the circuit court of the United States from taking jurisdiction of such an action, Chief Justice Chase saying that "no statute limitation of suability can defeat a jurisdiction given by the constitution." Cowles v. Mercer County, 7 Wall. 118, 122; Lincoln County v. Luning, 133 U. S. 529; Chicot County v. Sherwood, 148 U. S. 529. So statutes requiring foreign corporations, as a condition of being permitted to do business within the state, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the state, have been adjudged to be unconstitutional and void. Home Ins. Co. v. Morse, 20 Wall. 445; Barron v. Burnside, 121 U. S. 186; Southern Pacific Co. v. Denton, 146 U. S. 202.

On the other hand, upon the fundamental principle that no one shall be condemned unheard, it is well settled that in a suit against a corporation of one state, brought in a court of the United States held within another state, in which the corporation neither does business, nor has authorized any person to represent it, service upon one of its officers or employes found within the state will not support the jurisdiction, notwithstanding that such service is recognized as sufficient by the statutes or the judicial decisions of the state. St. Clair v. Cox, 106 U. S. 350; Fitzgerald Co. v. Fitzgerald, 137 U. S. 98, 106; Goldey v. Morning News, 156 U. S. 518. See, also, Mexican Central Railway v. Pinkney, 149 U. S. 194.

By the existing act of congress defining the general jurisdiction of the circuit courts of the United States, those courts "shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, when the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars," "in which there shall be a controversy between citizens of different states," "or a controversy between citizens of a state and foreign states, citizens or subjects," and, as has been adjudged by this court, the subsequent provisions of the act, as to the district in which suits must be brought, have no application to a suit against an alien or a foreign corporation, but such a person or corporation may be sued by a citizen of a state of the union in any district in which valid service can be made upon the defendant. Act of March 3, 1887, ch. 373, § 1, as corrected by the act of August 13, 1888, ch. 866, § 1; 24 Stat., 552; 25 Stat., 434; Shaw v. Quincy Mining Co., 145 U. S. 444, 453; *In re* Hohorst, 150 U. S. 653; Galveston, etc., Railway v. Gonzales, 151 U. S. 496, 503; *In re* Keasbey & Mattison Co., 160 U. S. 221, 229, 230.

The present action was brought by a citizen and resident of the state of New Jersey, in a circuit court of the United States held within the state of New York, against a foreign corporation doing business in the latter state. It was for a personal tort committed abroad, such as would have been actionable if committed in the state of New York or elsewhere in this country, and an action for which

might be maintained in any circuit court of the United States which acquired jurisdiction of the defendant. Railroad Co. v. Harris, above cited; Dennick v. Railroad Co., 103 U. S. 11; Huntington v. Attrill, 146 U. S. 657, 670, 675; Stewart v. Baltimore & Ohio Railroad, 168 U. S. 445. The summons was duly served upon the regularly appointed agents of the corporation in New York. *In re* Hohorst, above cited. The action was within the general jurisdiction conferred by congress upon the circuit courts of the United States. The fact that the legislature of the state of New York has not seen fit to authorize like suits to be brought in its own courts by citizens and residents of other states can not deprive such citizens of their right to invoke the jurisdiction of the national courts under the constitution and laws of the United States.

The necessary conclusion is that the circuit court had jurisdiction to try the action and to render judgment therein against the defendant, and that the

Question certified must be answered in the affirmative.

Note. See, 1893, *In re* Hohorst, 150 U. S. 653; 1899, *In re* La Bourgoyne, 79 L. T. Rep. (N. S.) 331.

Sec. 325. In the state courts,—where found doing business.

ST. CLAIR v. COX.[1]

1882. In the Supreme Court of the United States. 106 U. S. Rep. 350–360.

[Error to United States Circuit Court, eastern district of Michigan. Action by Cox v. St. Clair to recover $5,000 on two notes made by St. Clair to the Winthrop Mining Company, an Illinois corporation, payable in Chicago, for ore and property sold by the mining company to the defendant. The defense was that plaintiff purchased the note after maturity, and after notice that defendant had obtained a judgment in the Michigan courts against the mining company to the amount of $10,000, which should properly be offset against the note. At the trial a certified copy of the judgment was offered in evidence, but on objection it was excluded, because it was not shown the state court had obtained jurisdiction of the parties. Exception was taken, but judgment was rendered for plaintiff for full amount. The exclusion of the judgment is assigned as error.]

Mr. Justice Field. * * * The judgment of the circuit court in Michigan was rendered in an action commenced by attachment. If the plaintiffs in that action were, at its commencement, residents of the state, of which some doubt is expressed by counsel, the jurisdiction of the court, under the writ, to dispose of the property attached,

[1] Statement abridged; part of opinion omitted.

can not be doubted, so far as was necessary to satisfy their demand. No question was raised as to the validity of the judgment to that extent. The objection to it was as evidence that the amount rendered was an existing obligation or debt against the company. If the court had not acquired jurisdiction over the company, the judgment established nothing as to its liability, beyond the amount which the proceeds of the property discharged. There was no appearance of the company in the action, and judgment against it was rendered for $6,450 by default. The officer, to whom the writ of attachment was issued, returned that, by virtue of it, he had seized and attached certain specified personal property of the defendant, and had also served a copy of the writ, with a copy of the inventory of the property attached, on the defendant, "by delivering the same to Henry J. Colwell, Esq., agent of the said Winthrop Mining Company, personally, in said county."

The laws of Michigan provide for attaching property of absconding, fraudulent and non-resident debtors and of foreign corporations. They require that the writ issued to the sheriff, or other officer by whom it is to be served, shall direct him to attach the property of the defendant, and to summon him if he be found within the county, and also to serve on him a copy of the attachment and of the inventory of the property attached. They also declare that where a copy of the writ of attachment has been personally served on the defendant, the same proceedings may be had thereon in the suit in all respects as upon the return of an original writ of summons personally served where suit is commenced by such summons. 2 Comp. Laws, 1871, sections 6397 and 6413.

They also provide, in the chapter regulating proceedings by and against corporations, that "suits against corporations may be commenced by original writ of summons, or by declaration, in the same manner that personal actions may be commenced against individuals, and such writ, or a copy of such declaration, in any suit against a corporation, may be served on the presiding officer, the cashier, the secretary or the treasurer thereof; or, if there be no such officer, or none can be found, such service may be made on such other officer or member of such corporation, or in such other manner as the court in which such suit is brought may direct;" and that "in suits commenced by attachment in favor of a resident of this state against any corporation created by or under the laws of any other state, government or country, if a copy of such attachment and of the inventory of property attached shall have been personally served on any officer, member, clerk or agent of such corporation within this state, the same proceedings shall be thereupon had, and with like effect, as in case of an attachment against a natural person, which shall have been returned served in like manner upon the defendant." 2 Comp. Laws, 1871, sections 6544 and 6550.

The courts of the United States only regard judgments of the state courts establishing personal demands as having validity or as importing verity where they have been rendered upon personal citation

of the party, or, what is the same thing, of those empowered to receive process for him, or upon his voluntary appearance.

In Pennoyer v. Neff we had occasion to consider at length the manner in which state courts can acquire jurisdiction to render a personal judgment against non-residents which would be received as evidence in the federal courts; and we held that personal service of citation on the party or his voluntary appearance was, with some exceptions, essential to the jurisdiction of the court. The exceptions related to those cases where proceedings are taken in a state to determine the status of one of its citizens toward a non-resident, or where a party has agreed to accept a notification to others or service on them as citation to himself. 95 U. S. 714.

The doctrine of that case applies, in all its force, to personal judgments of state courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: A corporation, being an artificial being, can act only through agents, and only through them can be reached, and process must, therefore, be served upon them. In the state where a corporation is formed it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the state will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the state is passed difficulties arise; it is not so easy to determine who represent the corporation there, and under what circumstances service on them will bind it.

Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the state by which it was chartered. * * *

(Quoting and citing McQueen v. Middleton Mfg. Co., 16 Johns. (N. Y.) 5; Peckham v. North Parish, 16 Pick. 274; Libbey v. Hodgdon, 9 N. H. 394; Moulin v. Trenton Ins. Co., 24 N. J. Law 222.)

This doctrine of the exemption of a corporation from suit in a state other than that of its creation was the cause of much inconvenience, and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one state, they carrry on the most extensive operations in other states. To meet and obviate this inconvenience and injustice, the legislatures of several states interposed, and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the state where it is created, was admitted,

it was perceived that when a foreign corporation sent its officers and agents into other states and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the state of its creation. As it was protected by the laws of those states, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.

All that there is in the legal residence of a corporation in the state of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the state. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the states for which they are respectively appointed when it is called to legal responsibility for their transactions.

The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents. Serving process on its agents in other states, for matters within the sphere of their agency, is, in effect, serving process on it as much so as if such agents resided in the state where it was created.

A corporation of one state can not do business in another state without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose. As said by this court in Lafayette Insurance Co. v. French: "These conditions must be deemed valid and effectual by other states and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." 18 How. 404, 407; Paul v. Virginia, 8 Wall. 168.

The state may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons especially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission, and the corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before

he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. The decision of this court in Lafayette Insurance Co. v. French, to which we have already referred, sustains these views. * * *

We do not, however, understand the laws of Michigan as authorizing the service of a copy of the writ, as a summons, upon an agent of a foreign corporation, unless the corporation be engaged in business in the state, and the agent be appointed to act there. We so construe the words "agent of such corporation within this state." They do not sanction service upon an officer or agent of the corporation who resides in another state, and is only casually in the state, and not charged with any business of the corporation there. * * *

(Citing and quoting to this effect Newell v. Great Western Ry. Co., 19 Mich. 344; Moulin v. Trenton Ins. Co., 24 N. J. Law 222, 234.)

Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statute—a member, for instance, of the foreign corporation, that is, a mere stockholder—is not a departure from the principle of natural justice mentioned in Lafayette Insurance Co. v. French, which forbids condemnation without citation, it is sufficient to observe that we are of opinion that when service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court—that the corporation was engaged in business in the state. The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employe, or to a particular transaction, or that his agency had ceased when the matter in suit arose.

In the record, a copy of which was offered in evidence in this case, there was nothing to show, so far as we can see, that the Winthrop Mining Company was engaged in business in the state when service was made on Colwell. The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the state court, gave no information on the subject. It did not, therefore, appear even *prima facie* that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation. The record was, therefore, properly excluded.

Judgment affirmed.

Note. Service of process.

1. Domestic corporations:

(a) At common law, on officers, was sufficient: 1819, McQueen v. Middleton Mfg. Co., 16 Johns. 5; 1837, Meriwether v. Bank of Hamburg, Dud. (S. C.) 36; 1846, Glaize v. South Car. R. Co., 1 Strobh. L. (S. C.) 70; 1869, Newell v. Great Western R. Co., 19 Mich. 336; 1871, Hartford City Fire Ins. Co. v. Carrugi, 41 Ga. 660; 1875, Barnett v. Chicago & L. H. R. Co., 4 Hun 114.

(b) By statutes, service may be made on general officers, such as president, secretary, cashier, general superintendent, managing officers, etc.: 1854, Chamberlin v. Mammoth Mining Co., 20 Mo. 96 (president); 1854, Willamette Falls Co. v. Williams, 1 Ore. 112; 1854, Commerce Bank v. Rutland & W. R., 10 How. Pr. 1 (general manager); 1865, Carr v. Commercial Bank of Racine, 19 Wis. 272; 1865, Gillig v. Independent G. & S. M. Co., 1 Nev. 247 (secretary); 1867, Adams Express Co. v. St. John, 17 Ohio St. 641 (general superintendent); 1872, Newby & Colts Pat. Fa. Co., L. R. 7 Ct. Q. B. 293; 1882, McMurtry v. Tuttle, 13 Neb. 232 (treasurer); 1893, Taylor v. Granite State, etc., Assn., 136 N. Y. 343, 32 Am. St. Rep. 749 (an attorney is not such officer).

But a ticket seller (1859, Doty v. Mich. C. R. Co., 8 Abb. Pr. 427; 1900, Denver, etc., R. Co. v. Roller, 100 Fed. Rep. 738); baggage master (1851, Flynn v. Hudson Riv. R. Co., 6 How. Pr. 308); ship captain (1862, Upper Miss. Trans. Co. v. Whittaker, 16 Wis. 220); or an attorney (1893, Taylor v. Granite State Assn., 136 N. Y. 343, 32 Am. St. Rep. 749), are not such officers as justify service unless specially provided for.

Yet generally it is now held that any agent authorized to contract the debt, or represent the corporation in the particular transaction, sufficiently represents the corporation in accepting service of summons in a mattter arising from such transaction: 1892, Klopp v. Creston City W. W. Co., 34 Neb. 808, 33 Am. St. Rep. 666; Am. Bell Tel. Co., 29 Fed. Rep. 17, 34; 1892, Reyer v. Odd Fellows', etc., Assn., 157 Mass. 367, 34 Am. St. Rep. 288; 1894, Foster v. Betcher Lumber Co., 5 S. D. 57, 49 Am. St. Rep. 859, 23 L. R. A. 490; 1895, Gude v. Dakota F. & M. Ins. Co., 7 S. D. 644, 58 Am. St. Rep. 860; 1896, Pollock v. Building & L. Assn., 48 S. C. 65, 59 Am. St. Rep. 695; 1898, Turcott v. Railroad Co., 101 Tenn. 102, 70 Am. St. Rep. 661; 1898, Conn. Mut. Ins. Co. v. Spratley, 172 U. S. 602.

2. Foreign corporations.

(a) At common law, not on an officer outside of the state creating the corporation: 1819, McQueen v. Middleton Mfg. Co., 16 Johns. 5; 1834, Peckham v. North Parish, 16 Pick. (Mass.) 274; 1875, Barnett v. Chicago & L. H. R. Co., 4 Hun 114.

But see, *contra*, 1871, Hartford Ins. Co. v. Carrugi, 41 Ga. 660; 1875, Bawknight v. Liverpool L. & G. Ins. Co., 55 Ga. 195.

(b) Under statutes, only when the statute allows, *i. e.*, by express statutory authority, and then generally only such as are doing business and have agents in the state: 1861, O. & M. R. Co. v. Wheeler, 1 Black (U. S.) 286, on 297; 1866, Camden Rolling M. Co. v. Swede Iron Co., 32 N. J. Law 15; 1868, Howell v. Chicago & N. W. R. Co., 51 Barb. (N. Y.) 378; 1873, Lathrop v. Union Pac. R. Co., 1 McAr. (D. C.) 234; 1875, Dallas v. Atlantic & M. R. Co., 2 McAr. (D. C.) 146; 1893, Aldrich v. Anchor Coal Co., 24 Ore. 32, 41 Am. St. Rep. 831; 1894, Foster v. Betcher Lumber Co., 5 S. D. 57, 49 Am. St. Rep. 859, 23 L. R. A. 490, note; 1898, Crook v. Girard Iron Co., 87 Md. 138, 67 Am. St. Rep. 325; 1898, Carstens v. Leidigh & L. Co., 18 Wash. 450, 63 Am. St. Rep. 906, 39 L. R. A. 548; 1898, Conn. Mut. Ins. Co. v. Spratley, 172 U. S. 602; 1899, Mecke v. Valleytown M. Co., 93 Fed. Rep. 697; 1900, Denver & R. G. R. Co. v. Roller, 100 Fed. Rep. 738; 1900, J. W. Thompson v. Whitehead, 185 Ill. 454; 1901, Abbeville Elec. L., etc., Co. v. Western El. Co., 61 S. C. 361, 85 Am. St. R. 890, note 905.

While it is held that only an officer named in the statute can accept service, 1895, First Nat'l Bk. v. Huntington Dis. Co., 41 W. Va. 530, 56 Am. St. Rep. 878, yet it would seem that any agent that is authorized to do the business is sufficient if he regularly represents the company in such business. See *supra*, Domestic corporations (b).

But service on agent temporarily in the state, is not generally sufficient (see cases above), though there are a few cases to the contrary: 1877, Hiller v. B. & M. R. Co., 70 N. Y. 223; 1887, Childs v. Harris Mfg. Co., 104 N. Y. 477; 1901, Abbeville Elec. L. Co. v. Western El. Co., 61 S. C. 361, 85 Am. St. R. 890, note 905.

Sec. 326. What is doing business so as to authorize service.

RYERSON v. WAYNE CIRCUIT JUDGE.[1]

1897. IN THE SUPREME COURT OF MICHIGAN. 114 Mich. Rep. 352–354.

[Mandamus by Ryerson to compel the circuit judge of Wayne county to vacate an order setting aside the service of summons against a foreign corporation.]

MOORE, J. March 11, 1897, relator, a resident of Detroit, commenced a suit by summons in the Wayne Circuit Court against the Beach & Clarridge Company, a Massachusetts corporation, for a cause of action accruing in Wayne county. The service was made upon H. L. Baker, who is said by relator to be the traveling agent of said corporation. Motion was made to set aside the service, because unauthorized. The service was set aside and the proceedings dismissed. It is sought to review that action here.

It is claimed the service was authorized by Act No. 61 of the Public Acts of 1895, which reads:

"Suits may be commenced at law or in equity in the circuit court for any county of this state where the plaintiff resides * * * against any corporation not organized under the laws of this state, in all cases where the cause of action accrues within the state of Michigan, by service * * * upon any officer or agent of the corporation," etc.

The record shows that Mr. Baker was a traveling salesman of the Massachusetts corporation. His business was the taking of orders for goods in this and a number of other states. He had no office in this state. He did not have charge of any men under him. His duties were those of the ordinary traveling agent, selling goods to retail dealers. * * *

It is the claim of the respondent that Mr. Baker was not such an agent as is meant by the statute, where it authorizes service upon an agent; citing Newell v. Railway Co., 19 Mich. 336; Watson v. Wayne Circuit Judge, 24 Mich. 38; Lake Shore, etc., R. Co. v. Hunt, 39 Mich. 469; Pettit v. Booming Co., 74 Mich. 214; Kirby Carpenter Co. v. Trombley, 101 Mich. 447. These cases do not throw much light upon the discussion, as the statute construed by them is quite different from the one to be construed here. In the last three cases the statute reads that service might be made on certain officers, and the "general or special agent, superintendent or other principal officer."

[1] Part of opinion omitted.

Counsel also cites Maxwell v. Railroad Co., 34 Fed Rep. 286. In this case Justice Brown held: "It does not appear to me that the law of this state with respect to suits against foreign corporations (2 How. Stat., § 8145) cuts any figure in the case, since it provides for service of process upon the agent of a foreign corporation only where the cause of action arises within this state," and he held that the cause of action did not arise in this state, and for that reason the court did not get jurisdiction. In the case of Fairbank & Co. v. Cincinnati, etc., R. Co., 4 C. C. A. 403, 54 Fed. Rep. 420, there was a dissenting opinion, which we think is more in harmony with the later decisions of this court, which we shall hereafter cite, than the prevailing opinion. In Gottschalk Co. v. Distilling, etc., Co., 50 Fed. Rep. 681, it was held that the person called a "distributing agent" was not an agent, but was a purchaser of the goods of defendant.

We think the record fairly discloses that the Massachusetts corporation was doing business in this state, and that it was done through the agency of Mr. Baker, its traveling agent, and that the case comes within the provisions of the statute. There can be no doubt of the right of this corporation to do business in this state, and of its right to sue its debtors in the courts of this state. When it undertakes to do business here, it must do so in compliance with our laws, which provide for the bringing of suits and the method of service. Vorheis v. People's Mut. Ben. Soc., 86 Mich. 31; Shafer Iron Co. v. Iron Circuit Judge, 88 Mich. 464; Turner v. Tunnel Co., 102 Mich. 574.

We think the service of process was good. The writ will issue as prayed.

The other justices concurred.

Note. See, 1894, Foster v. Betcher Lumber Co., 5 S. D. 57, 23 L. R. A. 490, note; 1895, Florsheim, etc., Dry Goods Co. v. Lester, 60 Ark. 120, 46 St. Rep. 162; 1896, Comm. Bank v. Sherman, 28 Ore. 573, 52 Am. St. Rep. 811; 1898, Crook v. Girard Iron Co., 87 Md. 138, 67 Am. St. Rep. 325; 1898, Conn. Mut. L. Ins. Co. v. Spratley, 172 U. S. 602; 1898, Mearshon v. Pottsville L. Co., 187 Pa. St. 12, 67 Am. St. Rep. 560; 1899, Wall v. Ches. & O. R. Co., 95 Fed. Rep. 398; 1899, *In re* La Bourgogne, 79 L. T. (N. S.) 331; 1901, Abbeville Elec. L. Co. v. Western El. Co., 61 S. C. 361, 55 L. R. A. 146, 85 Am. St. R. 890, note 905.

But see, 1895, State v. Bristol Sav. Bk., 108 Ala. 3, 54 Am. St. Rep. 141.

Sec. 327. Pleading.

Corporation plaintiff—need not allege corporate existence.

EXCHANGE NATIONAL BANK v. L. J. CAPPS ET AL.[1]

1891. IN THE SUPREME COURT OF NEBRASKA. 32 Nebraska Rep. 242–245, 29 Am. St. Rep. 433.

[Suit by the bank upon a promissory note made payable to the order of the Exchange National Bank. The petition read simply that "Plaintiff complains," etc., without alleging it was a corporation, or stating under what law it was organized. A demurrer to the petition was sustained, and this is the error assigned.]

[1] Statement abridged.

MAXWELL, J. * * * In Platte Valley Bank v. Harding, 1 Neb. 461, it was held that the maker of a note payable to a bank, in an action on the note, can not raise the question of the bank's incorporation. In Angell & Ames on Corporations, section 632, it is said: "It is, however, generally admitted that a corporation may declare in its corporate name, without setting forth in the declaration the act of incorporation or averring that it is a corporation if the act be private."

At common law it is not necessary to set forth in the declaration the act of incorporation when an action is brought in the corporate name. The code was designed to simplify procedure. There is no requirement of the statute that the act of incorporation shall be averred, and it seems to be sufficient to bring the action in the corporate name.

In Stanley v. R. & D. R. Co., 89 N. C. 331, it is said: "It is difficult to assign any sufficient reason why a corporation suing or sued should be designated by any further description than its corporate name, which does not apply with equal force to a natural person, the only purpose in either case being to point out the party to the action. The appearance and plea to the merits or answer is a concession of the sufficiency of the designation of the person, natural or artificial, and, if intended to be disputed, it should be under the present practice by answer."

So under the section of the Iowa code in regard to actions on written instruments, when "suit may be brought by or against any of the parties thereto, by the same name and description as those by which they are designated in such instrument." (Harris Mfg. Co. v. Marsh, 49 Iowa 11, 4 Am. & Eng. Ency. of Law 285.) There is no requirement of the code that authorizes a court to insist upon setting out the act of incorporation in an action brought in the corporate name. The common law prevails in this state in all matters where there is no statute to the contrary. The code has not changed the common law in this respect. It was, therefore, unnecessary to aver the act of incorporation.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

The other judges concur.

Note. See, also, 1860, Central Bank v. Knowlton, 12 Wis. 624, 78 Am. Dec. 769; 1867, Stein v. Ind. Bldg. & L. Assn., 18 Ind. 237, 81 Am. Dec. 353; 1894, Norfolk, etc., R. Co. v. Hoover, 79 Md. 253, 47 Am. St. Rep. 392; 1896, Shick v. Citizens' Enterprize Co., 15 Ind. App. 329, 57 Am. St. Rep. 230; 1897, Holden v. Great W. El. Co., 69 Minn. 527, 65 Am. St. Rep. 585; 1898, Emerson v. Nimocks, 88 Fed. Rep. 280; 1898, Parker v. Carolina Sav. Bk., 53 S. C. 583, 69 Am. St. Rep. 888; 1899, Wood v. Friendship Lodge, 20 Ky. L. Rep. 2002, 50 S. W. Rep. 836; 1899, Moynihan v. Drobaz, 124 Cal. 212, 71 Am. St. Rep. 46; 1901, Brady v. National Supply Co., 64 O. S. 267, 83 Am. St. Rep. 753, 60 N. E. 218.

See following case, *contra*.

Sec. 328. Same. *Contra*,—must allege corporate existence.

R. W. HOLLOWAY v. THE MEMPHIS, EL PASO AND PACIFIC R. R. CO.[1]

1859. IN THE SUPREME COURT OF TEXAS. 23 Texas Rep. 465–468, 76 Am. Dec. 68.

[Suit by the corporation (without alleging its corporate existence) against Holloway upon a written contract of subscription to the stock of the railroad company. The defendant demurred, the court overruled the demurrer, and this is the error assigned.]

WHEELER, C. J. It is the settled rule of the English law, and it is the rule in New York, Virginia and some of the other states, that where a body politic institutes legal proceedings, either on a contract or to recover property, it must, at the trial, under the general issue, prove the fact of incorporation. (Angell & Ames on Corp., § 632, 4th edit., and cases cited.) In the case of The Bank v. Simonton, 2 Texas Rep. 531, this court held that the plaintiffs must aver and prove that they were a body corporate, duly constituted by competent authority, to enable them to maintain this action. That was the case of a foreign corporation. But the principle of the decision applies equally to a domestic corporation, created by private act, of which the court can not judicially take notice.

In some of the states a different rule obtains, and it is held that, if in a suit by a corporation the defendant plead the general issue, it is an admission of the corporate existence of the plaintiffs, on the principle, it seems, that by pleading to the merits, the defendant admits the capacity of the plaintiffs to sue. (Angell & Ames on Corp., § 633.) Those courts, however, make an exception in the case of foreign corporations. (Angell & Ames on Corp., § 633.) But the reason for a distinction in this respect is not very clearly discoverable. A foreign corporation is required to prove its corporate legal existence, because the court can not judicially know the legal being of such a corporation. The court can not take notice, *ex officio*, of the foreign law, by which it is created a body corporate. The same reason applies to a domestic corporation, created by a private act. The court can not judicially take notice of a private statute, and there would seem to be the same reason for requiring the proof to be made in the one case as in the other.

The English rule seems most in consonance with principle. The merely naming themselves a company shows the fact of an association acting under a particular name, but not that they have the legal capacity to act, and prosecute suits by that name; nor can the court know that they have such capacity, unless they are constituted a body corporate by public law, or are recognized as such by a law, of which the court can judicially take notice. It would seem, therefore, on

[1] Statement abridged; arguments omitted.

principle, that a private domestic corporation, equally with a foreign corporation, must aver and prove the fact of incorporation.

The question raised by the demurrer is, whether it was necessary for the plaintiffs to aver that they are a corporation. In The Bank v. Simonton, it was held to be a necessary averment to enable the plaintiffs to maintain the action. We are of opinion that the present is not distinguishable from that case in principle, and that the petition wanting the averment is insufficient.

It is insisted that the defendant, by contracting with the plaintiffs in their corporate name, has admitted that they are duly constituted a body corporate under that name. This question was also considered in the case of The Bank v. Simonton, in reference to the authorities now cited by the plaintiffs' counsel, and the contrary was decided. The mere fact that in a contract with the company the defendant has designated it by a name which is appropriate to a corporate body, does not admit its corporate legal existence, unless it be distinctly stated in the contract that the company is an incorporated company. (7 Wend. 540; 8 Wend. 480; 15 Wend. 316.) It admits only the existence of an association acting under that name.

If it be an inconvenience and hardship to require a private corporation to prove its corporate existence in actions brought by it, it can easily be obviated by an act of the legislature declaring the act of incorporation a public law, or dispensing with the necessity of pleading the act in suits by the corporation.

We are of opinion that the court erred in overruling the exceptions to the petition, and that the judgment be reversed and the cause remanded for further proceedings.

Reversed and remanded.

Note. See, 1897, Citizens' Bank v. Corkings, 9 S. D. 614, 62 Am. St. Rep. 891; 1899, Pryse v. Three Forks, etc., Bank, 20 Ky. L. Rep. 1057, 48 S. W. Rep. 415.

See preceding case, *contra*.

Sec. 329. Pleading,—plaintiff need not allege that defendant is a corporation, if name implies it is not a natural person.

WOOLF v. THE CITY STEAMBOAT COMPANY.

1849. In the English Court of Common Pleas. 7 Man., Gr. & S. (62 Eng. C. L.) *103, *104.

Assumpsit. The declaration commenced thus: "The plaintiff complains of The City Steamboat Company, who have been summoned to answer the plaintiff," etc.

Special demurrer—assigning for causes, that the names of the defendants were not stated, that it did not appear whether they were sued as a corporation or a company completely registered, or by virtue of what act of Parliament they were entitled to be sued by the name of a company.

Hugh Hill, in support of the demurrer. The question in this case is, whether the plaintiff may, in his declaration, describe the defendants as a company, without showing whether or not they are a corporation or a registered company. In the doubtful state of the allegation the defendants could not safely plead *nul tiel* corporation. (Cresswell, J. Is not this the usual form of declaring against a corporation? It may be that the defendants are a chartered company; how does it appear that they are not?) In Thompson v. The Universal Salvage Company, 1 Exch. 694—which was an action against a registered company upon a promissory note—the declaration stated that the company had been duly registered under the statute 7 & 8 Vict., c. 110. (Maule, J. If the defendants in fact are a corporation, the declaration is correct; if they are not, they may traverse it.) In The Queen v. West, 1 Q. B. 826, a coroner's inquisition stating that certain goods and chattels were the goods and chattels of the proprietors of the Hull and Selby Railway, was held bad, because it did not show that there was any corporation so intituled. (Cresswell, J. That case would have been more to the purpose if the defendants here had been described as "the proprietors of the City Steamboats.") Since the statutes creating these registered corporations, it is essential that they should in all proceedings be described according to the truth. (Cresswell, J. How can the mode of describing them in pleading be affected by the statutes?) It is important that the true character in which a party sues or is sued should appear upon the record.

Hawkins, *contra*, was not called upon.

MAULE, J. The mode of pleading is governed either by positive rules or by a known course of precedents. There is no positive rule that I am aware of which requires such a mode of description as the defendant's counsel insists upon in this case, nor is the description which is given at all out of the usual form; it impliedly amounts to an allegation that the defendants are a corporate body. I think the plaintiff is entitled to judgment.

The rest of the court concurring. Judgment for the plaintiff.

Note. See to same effect, notes 29 Am. Dec. 375; 76 Am. Dec. 68; 35 Am. St. Rep. 291; 1893, Lake Erie & W. R. Co. v. Griffin, 8 Ind. App. 47, 52 Am. St. Rep. 463; 1897, Holden v. Great W. El. Co., 69 Minn. 527, 65 Am. St. Rep. 585; 1899, Moynihan v. Drobaz, 124 Cal. 212, 71 Am. St. Rep. 46.

See following case, *contra*.

Sec. 330. Same. Plaintiff suing a corporation should allege it is such.

STATE v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.[1]

1893. IN THE SUPREME COURT OF SOUTH DAKOTA. 4 S. D. Rep. 261–264, 46 Am. St. Rep. 783.

CORSON, J. This was an action by the state to enjoin the defendant from continuing an alleged nuisance. The defendant demurred

[1] Statement, except as in the opinion of the court, and part of the opinion omitted.

to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and the same was sustained by the court. From the order sustaining the demurrer the plaintiff appeals. The defendant specifies as the particular ground of objection, in the brief filed in this court, that there is no allegation in the complaint that the defendant is a corporation. The only indication of the character in which the defendant is sued is in the title. The learned counsel for the respondent contend that the defendant is sued by a name indicating that it is not a natural person, but a company of some kind, and that no facts are stated to show that it is an artificial being, capable of being sued.

It is true that by section 2908, Comp. Laws, it is provided that "in all civil actions brought by or against a corporation it shall not be necessary to prove on the trial of the cause the existence of such corporation, unless the defendant shall, in the answer, expressly aver that the plaintiff or defendant is not a corporation." But an allegation that the defendant is a corporation is, we think, still necessary, and the language of the section presupposes that the defendant is sued as a corporation. In what manner can a court be advised that the defendant is sued as a corporation, unless it is so alleged in the complaint? In the recent case of People v. Cent. Pac. R. Co., 83 Cal. 393, 23 Pac. Rep. 303 (decided in 1890), the supreme court of that state, in passing upon this question, says: "The defendant is sued by a name indicating that it is not a natural person, but a company of some kind; but there is no averment of the fact of incorporation, or of any fact to show that it is an artificial being, capable of being sued. Nor, if incorporated, is there any averment to show where, or under what law, so that the court may determine where the jurisdiction of its person lies. An averment of defendant's corporate existence is necessary in every count of a complaint against a corporation. Loup v. Railroad Co., 63 Cal. 97." Mechanics' Banking Association v. Spring Valley Shot and Lead Co., 13 How. Pr. 227. Judge Bliss, in his work on Code Pleading (section 258), says: "But a corporation is an artificial personality, not presumed to exist even, and the phrase may stand for such personality, or for a joint stock company, or for a partnership, or for a private person, or for nothing at all. The allegation, then, that the plaintiff is a corporation, even if permitted to be made in general terms, would seem to be essential to show its right to bring the suit." And in section 260 he says: "In regard to actions against corporations, the same general rule should prevail." We are of the opinion that the rule laid down by Judge Bliss and the supreme court of California is the safer and better rule, though there are courts holding a contrary rule. In the case of Express Co. v. Harris, 120 Ind. 73, 16 Am St. Rep. 315, 21 N. E. Rep. 340, decided by the supreme court of Indiana in 1889, that court says: 'The name of the defendant (Adams Express Company) imports that it is a corporation, and it was, therefore, not necessary to specifically aver that it was a corporation." But, with great respect for that court, we can not agree with its conclusions. As was said in the California case, the

name indicates "that it is not a natural person, but a company of some kind," but whether a corporation or an unincorporated association does not appear. We are not aware of any principle of law that will authorize a court to presume that it is a corporation any more than it would presume that it was an unincorporated association. A similar view as to the necessity of alleging in the complaint that the defendant is a corporation was taken by the supreme court of North Carolina in Stanley v. Railroad Co., 89 N. C. 331. * * *

Affirmed.

Note. See, 1892, Miller v. Pine M. Co., 2 Idaho 1206, 35 Am. St. Rep. 289 n. 291, 41 Am. & Eng. Corp. Cas., p. 1, and *note* p. 3.

See preceding case, *contra*.

Sec. 331. Pleading—general issue at law does not raise question of corporate existence; the rule is otherwise in equity.

BANK OF JAMAICA v. JEFFERSON.[1]

1893. In the Supreme Court of Tennessee. 92 Tenn. Rep. 537–542, 36 Am. St. Rep. 100.

[Suit in equity by the bank, alleging itself to be a corporation under the laws of New York, to recover upon a note.]

Wilkes, J. * * * Again it is assigned as error that complainant sues as a foreign corporation, and it is insisted that no recovery can be had unless that allegation is sustained by proof, and that no proof was offered on this point in the court below.

On the other hand, it is insisted that this allegation of the bill is not denied in the answer, that the character in which plaintiff sues is not put in issue by the answer, and that, under a general denial, or the general issue, proof of the character in which the suit is brought is not necessary to be made.

This latter contention is unquestionably correct in actions at law, in which actions, if the plaintiff alleges that it is a corporation, even though it be a foreign corporation, that fact need not be proven unless it is put in issue by a specific denial, and the general issue would not be sufficient, and pleading to the merits would be an admission of the character in which the plaintiff sues. 2 Beach on Private Corporations, 867–869; 4 Am. & Eng. Enc. of Law, 285–6, and notes; Union Cement Co. v. Noble, 15 Fed. Rep. 502; Harrison v. Martinsville Railroad Co., 16 Ind. 505, 79 Am. Dec. 447; Orono v. Wedgewood, 44 Me. 49, 69 Am. Dec. 81; West Winstead Asso. v. Ford, 27 Conn. 282, 71 Am. Dec. 66; Marble Co. v. Black, 89 Tenn. 118, 120, 121.

We do not think the cases of Jones v. State, 5 Sneed 346, 348; Owen v. State, 5 Sneed 493, 495, and Augusta Mfg. Co. v. Vertrees, 4 Lea 75, 78, are in conflict with this ruling. The cases of Jones v.

[1] Statement abridged, and part of opinion and other points omitted.

The State and Owen v. The State are criminal prosecutions, in which greater strictness of proof is required, and the case of Augusta Mfg. Co. v. Vertrees, was an action of ejectment, in which by statute (M. & V. Comp., 3963) it is provided that under the general plea of not guilty the defendant may avail himself of all legal defenses.

The rule is different in chancery cases. At law every fact alleged in the declaration, and not denied in the plea, is taken as true. Code, § 2910; M. & V., § 3620. But in chancery every allegation of fact *not admitted, whether denied or. not*, must be proved, the failure to admit or deny being equivalent to a denial. Hill v. Walker, 6 Cold. 429, 98 Am. Dec. 465; Hardeman v. Burge, 10 Yer. 202; Smith v. St. Louis Ins. Co., 2 Tenn. Ch. 602; Gibson's Suits in Chancery, section 457.

The fact that complainant is a foreign corporation is alleged in the bill, and it is a fact material to the right to recover. It is not admitted in the answer, and there is a general denial of all matters not admitted. It should, therefore, have been proven, and, for the failure to prove this, we are constrained to reverse the decree of the court below, and remand the cause for proof of the corporation and for further proceedings under the statute. Code, § 3170.

Note. See note, 41 Am. & Eng. Corp. Cas., p. 3; 1861, Harrison v. Railroad Co., 16 Ind. 505, 79 Am. Dec. 447, note 449; 1899, Wood v. Friendship Lodge, 20 Ky. L. Rep. 2002, 50 S. W. Rep. 836; 1899, Ludington v. Ludington, 119 Mich. 480, 78 N. W. Rep. 558; 1899, Moynihan v. Drobaz, 124 Cal. 212, 71 Am. St. Rep. 46.

Sec. 332. Same. *Contra*,—under general issue corporate existence must be proved.

SUTHERLAND, J., IN BANK OF UTICA v. SMALLEY.

1824. IN THE SUPREME COURT OF NEW YORK. 2 Cowen (N. Y.) Rep. 770, on 778, 14 Am. Dec. 526.

[Suit by the bank in its corporate name to recover of defendants as indorsers upon a note payable at the bank.]

It is contended that the judge erred in deciding that the plaintiffs were not bound to prove themselves a corporation upon the general issue pleaded.

This objection is well taken. When a corporation sues they need not set forth, by averment, in the declaration, how they were incorporated, but upon the general issue pleaded they must prove that they are a corporation. (Kyd on Corp., 292; Norris v. Staps, Hob. 211, Jackson, *ex dem.* Trustees of Union Academy, v. Plumbe, 8 Johns. 378; Dutchess Cotton Manufacturing Company v. Davis, 14 Johns. 238 on 245, opinion of Thompson, Ch. J.; Bank of Auburn v. Weed, 19 Johns. 300.)

Note. 1832, Welland Canal Co. v. Hathaway, 8 Wend. 480, 24 Am. Dec. 51, note 58; 1836, Harris v. Muskingum Mfg. Co., 4 Blackf. 267, 29 Am. Dec. 372 and note.

Sec. 333. Pleading—general denial under the code.

S. K. DAVIS ET AL. v. NEBRASKA NATIONAL BANK OF OMAHA.

1897. IN THE SUPREME COURT OF NEBRASKA. 51 N. E. Rep. 401–402, 6 Am. & Eng. Corp. Cas. (N. S.) 593.

IRVINE, C. The Nebraska National Bank of Omaha sued the plaintiffs in error on a promissory note alleged by the petition to have been made by the defendants below to the order of the Nebraska National Bank of Beatrice, and by the latter bank indorsed and transferred to the plaintiff. The plaintiff recovered judgment for the amount of the note. The petition alleged that the plaintiff was a corporation organized under the laws of the United States. The answer specifically denied plaintiff's corporate existence. No evidence was introduced on the subject. The instructions of the court entirely ignored the issue, and the court refused a peremptory instruction to find for the defendants, as well as a special instruction submitting to the jury for determination the corporate existence of the plaintiff.

It will be observed that there existed no privity of contract between the defendants and the plaintiff bank whereby the defendants were estopped to deny the corporate capacity of the plaintiff, nor are any other grounds of estoppel pleaded. The defense interposed was, therefore, a valid defense in this action. It has been several times held that a general denial does not present the issue, but that it must be raised by a specific denial in the nature of a plea in abatement. Insurance Co. v. Robinson, 8 Neb. 452; Dietrichs v. Railroad Co., 13 Neb. 43, 13 N. W. Rep. 3; Herron v. Cole Bros., 25 Neb. 692, 41 N. W. Rep. 765; Swift & Co. v. Crawford, 34 Neb. 450, 51 N. W. Rep. 1034. But a special denial of the character indicated is sufficient to present the defense (Sunapee v. Eastman, 32 N. H. 470; Greenwood v. Railroad Co., 10 Gray 375), and such a plea casts the burden of proof of corporate existence upon the plaintiff (see cases cited in 5 Enc. Pl. & Prac. 82). At the common law there existed some controversy as to whether *nul tiel* corporation should be pleaded in abatement or whether it might be pleaded in bar. The Nebraska cases cited intimate that this court has considered it to be in the nature of a plea in abatement. But this is immaterial, because under our code defenses of both characters may be presented in one answer. Hurlburt v. Palmer, 39 Neb. 158, 57 N. W. Rep. 1019; Association v. Peterson, 41 Neb. 897, 60 N. W. Rep. 373; Herbert v. Wortendyke (Neb.), 68 N. W. Rep. 350. It is probable, as suggested in the bank's brief, that this and other defenses were purely technical and devoid of merit. The plea was, however, one of which the defendants might legally avail themselves. The bank was notified by the special plea that it would be called upon to establish its corporate existence. It entirely failed to do so, and the judgment must for that reason be reversed.

Reversed and remanded.

Sec. 334. Proof of corporate existence—special charter.

UNITED STATES BANK v. STEARNS.[1]

1836. In the Supreme Court of New York. 15 Wend. (N. Y.) 314–317.

[Assumpsit by the bank to recover overpaid money.]

The cashier of the Buffalo Branch Bank testified that the plaintiffs had a banking house in Philadelphia, where they had carried on banking business for many years, under their charter. The defendant insisted that the plaintiffs were bound to prove themselves a corporation by the production of their charter. The judge decided that the charter need not be produced, because the act of incorporation of the Bank of the United States was a public act, which, for certain purposes, constituted the bank the financial agent of the general government, and gave the United States an interest in the stock, and because the presentation of the checks and the receipt of the money was an implied admission of the existence of the corporation. The jury found for the plaintiffs. The defendant asks for a new trial.

Savage, C. J. * * * The least proof which has been held sufficient is the production of an exemplification of the act incorporating the plaintiffs, and evidence of user, under their charter. 1 Wendell 555. In one case it was held that the act of incorporation might be read from the statute book, printed by the printer to the state. 9 Cowen 205–6. The evidence of user in this case was enough, but there was no evidence at all of the act of incorporation. No exemplification was produced, nor even the act read or produced in the statute book. One or the other is indispensable when the suit is brought by corporations created by our own statutes But when a suit is brought by a foreign corporation, as the plaintiffs must be considered in this court, I apprehend an exemplification should be produced, if required. The courts of the state of New York have no judicial knowledge of acts of congress creating corporations. When they are necessary, as evidence, they must be proved as the acts of our sister states must be proved. In my opinion the proof of the existence of the corporation was insufficient. The transaction of business by the defendant with the plaintiffs was probably an admission that they had capacity to transact business as a company, but not that they were an *incorporated* company. Many commercial companies not incorporated do business by officers and agents, and are capable of suing, but not otherwise than in their individual capacities. * * *

New trial granted.

Note. See next case, and Packard v. Old Colony R. Co., 168 Mass. 92; *supra*, § 142; also, President, Directors, etc., of Bank of U. S. v. Dandridge, 12 Wheat (U. S.), 64; *supra*, § 237.

[1] Statement abridged; only part of opinion given.

Sec. 335. Proof of corporate existence under general incorporation laws.

BALTIMORE AND POTOMAC R. R. CO. v. FIFTH BAPTIST CHURCH.[1]

1891. IN THE SUPREME COURT OF THE UNITED STATES. 137 U. S. Rep. 568–576.

[Action on the case by the church against the railroad company for damages for maintaining a continuous nuisance by noise and smoke to plaintiff's enjoyment of its property. Judgment below for the church.]

MR. JUSTICE GRAY. * * * The declaration was headed "The Fifth Baptist Church of Washington, D. C., by its Trustees, v. The Baltimore and Potomac Railroad Company," and alleged that the plaintiff was a body corporate in the District of Columbia, under and by virtue of the general corporation act of May 5, 1870, ch. 80, § 2; 16 Stat. 99, 100; Rev. Stat. D. C., §§ 533–544.

The defendant pleaded in bar: 1. "That the said plaintiff was not at the time of commencement of this suit, and never was, a body corporate or politic, as set forth and alleged in and by said declaration." 2. Not guilty. The plaintiff joined issue on these pleas.

The plaintiff, upon the issue presented by the first plea, and to prove its user of corporate rights, offered the following evidence, which was admitted against the defendant's objection and exception:

1. The original of the following certificate of incorporation, signed and sealed by the six persons named therein:

"We, C. C. Meador, George M. Kendall, John N. Henderson, Samuel M. Yeatman, James C. Deatley and Samuel S. Taylor, of Washington City, in the District of Columbia, do hereby certify that we have been duly elected 'Trustees of the Fifth Baptist Church of Washington City, D. C.' (commonly called 'the Island Baptist Church'), and that this certificate is made, signed and sealed for the purpose of obtaining corporate rights and privileges for the said 'Fifth Baptist Church,' a religious society worshipping at present in their church edifice on D street, south, between Four-and-a-half and Sixth streets, in said City of Washington, under the provisions of an act of congress approved May 5, 1870, entitled 'An act to provide for the creation of corporations in the District of Columbia by general law.'

"In testimony whereof, we hereunto set our hands and affix our seals this twenty-fourth day of August, in the year of our Lord one thousand eight hundred and seventy-one."

Annexed to this paper were a notary public's certificate of its acknowledgment on the same day by these six persons, an affidavit of one of them, dated May 1, 1885, that the statements in the certificate of incorporation were true, a memorandum of the recorder that the paper was recorded September 5, 1871, and another memorandum that it was recorded May 1, 1885.

[1] Statement abridged. Only the part of the opinion relating to proof of corporate existence is given.

2. A recorder's copy of the certificate of incorporation, acknowledgment and affidavit, as recorded May 1, 1885.

3. That in the year 1871 it became necessary for the plaintiff, in order to complete its church edifice, to borrow money upon a mortgage of its land, and that to promote this object, and upon the recommendation of its finance committee, a special meeting was called, and was held on July 2, 1871, at which the church (which had been known as the Island Baptist Church) resolved to become incorporated under the name stated in the above certificate of incorporation, and elected as its trustees the six persons named therein, and fixed their term of office at three years, and thereupon that certificate was prepared and signed by the trustees and recorded.

4. Three deeds, respectively dated September 26, 1871, September 18, 1872, and November 10, 1874, from the six persons named in the above certificate of incorporation, describing themselves as "trustees of the Fifth Baptist Church of Washington City, D. C.," reciting its incorporation under the general corporation act, and its resolution authorizing them to execute the deeds, and conveying the church building and land, in trust and by way of mortgage, to secure the payment of various sums of money.

5. Two deeds of release of the same building and land, dated November 9, 1874, from the grantees to the grantors in the first two of the trust deeds aforesaid.

6. The record of the judgment in the former action between these parties.

The plaintiff also introduced, without objection, evidence tending to show "that its present church edifice was begun about the year 1866, and was completed at a cost of about $22,000, exclusive of the ground; that the property is worth about $30,000, and has been occupied and used by the plaintiff's society or congregation since the year 1867 as its place of religious worship, and that during the period covered by this suit its actual church membership, consisting, as in all Baptist churches, of persons who have been baptized after a profession of faith, numbered about four hundred persons, exclusive of the persons attending services there as members of the congregation who were not members of the church."

It may be that, as held by the court below in 4 Mackey 43, at a former stage of one of these cases, the original certificate of incorporation, not stating the date of election or the term of office of the trustees, nor supported by affidavit, as required by statute, was not sufficient of itself to prove the plaintiff's existence as a corporation, either *de jure* or *de facto;* and that the adding of an affidavit to the certificate, and recording it anew, since the commencement of these actions, could not avail the plaintiff.

But the certificate of incorporation, as originally drawn up, taken in connection with the other evidence now introduced, and especially the record of the former action in which this plaintiff as a corporation recovered judgment against this defendant without any objection being taken to the plaintiff's capacity to sue, is clearly competent and suf-

ficient, as between these parties, to prove that the plaintiff had in good faith attempted to legally organize as a corporation, and had long acted as such, and was at least a corporation *de facto*, which is all that is necessary to enable it to maintain an action against any one, other than the state, who has contracted with the corporation, or who has done it a wrong. Bank of United States v. Dandridge, 12 Wheat. 64, 72; Conard v. Atlantic Ins. Co., 1 Pet. 386, 450; Chubb v. Upton, 95 U. S. 665; Williamsburg Ins. Co. v. Frothingham, 122 Mass. 391; Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315; Cincinnati, etc., Railroad v. Danville & Vincennes Railroad, 75 Ill. 113; Stockton & Linden Co. v. Stockton & Copperopolis Railroad, 45 Cal. 680.

It is objected that the evidence admitted, if sufficient to prove that the plaintiff was a corporation, did not prove that it was the corporation which brought this action, because the evidence was that the corporate name was "The Fifth Baptist Church of Washington, D. C.," whereas the action, as stated in the declaration, was brought by "The Fifth Baptist Church of Washington, D C., by its Trustees."

It may well be doubted whether the words "by its trustees," as here used, are part of the name of the plaintiff. They may have been inserted, like "by attorney" or "by next friend," to indicate by whose agency, and not in whose behalf, the action is brought. By the general corporation act, both the title in real estate, and the right to sue, are vested in the trustees "by the name and style assumed as aforesaid," that is to say, in the name and behalf of the corporation. Act of May 5, 1870, ch. 80, § 2; 16 Stat., 99, 100; Rev. Stat. D. C., §§ 534, 539, 540.

But if these words in the declaration can be taken as part of the plaintiff's name, the most that is shown is a mistake in that name. While *nul tiel corporation*, or that the plaintiff is not and never was a corporation, is a good plea in bar, because it goes to show that the plaintiff can never maintain any action whatever; yet *misnomer*, or mere mistake in the name of a corporation plaintiff, which does not affect its capacity to sue in the right name is pleadable in abatement only, and is waived by pleading to the merits. Bro. Ab. Misnomer, 73; Society for Propagating the Gospel v. Pawlet, 4 Pet. 480, 501; Christian Society v. Macomber, 3 Met. 235, 237; Gould Pl., ch. 5, § 79. * * *

Affirmed.

Note. See note preceding case. See 1900, Fish v. Smith, 73 Conn. 377, 86 Am. St. R. 161.

Sec. 336. Power to confess judgment.

SHUTE v. KEYSER.

1892. IN THE ARIZONA SUPREME COURT. 37 Am. & Eng. Corp. Cas. 61–63.

KIBBEY, J. * * * Appellants very earnestly contend that a corporation has no power to confess a valid judgment; that, therefore, the pretended judgment against the Old Dominion Copper Mining Company

is void, and plaintiff's title thereunder, and, consequently, his cause of action in this case must fail. Counsel do not cite us a case wherein the power of the corporation to confess a judgment is denied. We do not know, and are not informed by the record what were the powers of the Old Dominion Copper Mining Company. It was a corporation organized under the laws of the state of New York, whether by special charter or under general incorporation laws does not appear. That it is a private corporation fairly appears, for it is hardly conceivable that a public corporation, organized under the laws of New York, should be engaged in business in Arizona. It is admitted by the demurrer that it was engaged in transacting business in Arizona, necessarily, then, entering into contracts.

A domestic private corporation has the power to sue, is liable to be sued, and may appear in court and defend when it is sued; may, we suppose, of course, suffer default and judgment hereby; and we see no reason, in absence of proof to the contrary, to presume that the same attributes do not attach to a foreign private corporation. There are attributes so universally incident to private corporations in modern times that it would be totally at variance with the probabilities to presume otherwise. Indeed, it is said by the text writers that it is necessarily implied that a corporation, from the mere fact of its incorporation, may sue and be sued. Field Corp., § 360; Mor. Priv. Corp., § 356. Incident to the right to sue, and the liability to be sued, we think is unquestionably the right to confess judgment. In no case to which our attention has been called has the power of a corporation to confess judgment been doubted or called in question. In 12 How. Pr. ——, a case cited by appellant, a doubt of such power was not suggested. Black, in his recent work on Judgments, discusses the power of agents of a corporation to confess a judgment, but does not even intimate that to confess a judgment is *ultra vires* of a corporation. Indeed, while he does not in terms assert that power to exist, yet the inference is necessary from his statement that the corporation is bound by a confession of a judgment by its officer upon whom summons might have been served in a contested action. 1 Black Judgm., § 59; and see Freem. Judgm., § 545. Morawetz lays down the broad rule that the managing agents of a corporation have authority to confess judgment whenever they deem it to be to the interest of the corporation. Mor. Priv. Corp., § 430. In Miller v. Bank of British Columbia, 2 Ore. 291, wherein a judgment by confession against a corporation was under discussion, the question was whether the president had *virtute officii* the power to confess for his principal; that the confession was *ultra vires* the corporation was not even suggested. In McMurray v. St. Louis Oil Manufacturing Co., 33 Mo. 377, the questions were as to the power, *virtute officii*, of the president of a corporation to confess judgment, the sufficiency of the statutory statement required to accompany such confession, and the power of the corporation to create a lien by such a judgment, the statute prohibiting it from mortgaging their property or giving any lien thereon. In Joliet, etc., Co. v. Ingalls, 23 Ill. App. 45, a judgment against a cor-

poration by confession was under consideration. The question whether the corporation had the power to confess a judgment was not suggested. The matter considered was the authority of the particular officer who did confess the judgment to do so. And so in Stokes v. New Jersey Pottery Co., 46 N. J. Law 237, 6 Am. & Eng. Corp. Cas. 240; Thew v. Porcelain Manufacturing Co., 5 S. C. 415; White v. Crow, 17 Fed. Rep. 98. And in all these cases there was a direct attack upon the judgment, and not a collateral one, as in this case. We do not entertain a doubt of the general right of a private corporation to confess a judgment. * * *

Affirmed.

Note. See Stokes v. New Jersey Pottery Co., 46 N. J. Law 237, 6 A. & E. Corp. Cas. 240, note 246; 1898 Solomon v. C. M. Schneider & Co., 56 Neb. 680, 77 N. W. Rep. 65; 1898, Chicago Tp. & T. Co. v. Chicago Nat'l Bank, 176 Ill. 224.

Sec. 337. What may be taken on execution.

See The Louisville, N. A. & C. Ry. Co. v. Boney, 117 Ind. 501, *infra*, p. 1842.

ARTICLE VII. RIGHT TO HAVE AND USE A SEAL.

Sec. 338. 1. Necessity of a seal.
(a) At common law.

HORNE v. IVY.[1]

IN THE KING'S BENCH. 20 Car. 2 (1668), 1 Mod. 18.

Trespass for taking away a ship. The defendant justifies as servant under the patent whereby *The Canary Company* is incorporated, and whereby it is granted, "That none but such and such should trade thither, on pain of forfeiting their ships and goods," etc., and says, that the defendant [plaintiff] did trade thither, etc. The plaintiff demurs.

Pollexfen, for the plaintiff, contended that the defendant ought to have shown the deed whereby he was authorized by the company to seize the goods; though he agreed, that for ordinary employments and services a corporation may appoint a servant without deed, as a cook, a butler, etc. A corporation can not license a stranger to fell trees without deed. Nor can they make a disseisor without deed, nor deliver a letter of attorney without deed.

TWISDEN, Justice. For the first point, I think, they can not seize without deed, no more than they can enter for a condition broken without deed.

See note, 50 Am. St. R., p. 150.

[1] Part of argument and opinion of Kelynge, C. J., omitted.

Sec. 339. Same.

See President, etc., of Bank of the United States v. Dandridge, 12 Wheat. (25 U. S.) 64, *supra*, p. 854.

See notes to following cases.

Sec. 340. Same.

(b) Now generally unnecessary, except where required of a natural person also.

MUSCATINE WATER COMPANY, APPELLEE, v. MUSCATINE LUMBER COMPANY.[1]

1892. IN THE SUPREME COURT OF IOWA. 85 Iowa Rep. 112–119, 39 Am. St. Rep. 284.

[Action to recover damages for loss of a mill by fire alleged to be due to the failure of the water company to extend its water system to place where water could be had, in accordance with a contract entered into between the lumber and the water company, whereby the latter agreed to so extend its water system. Judgment for plaintiff, and defendant appeals.]

ROBINSON, C. J. * * * The appellant contends that the contract in suit is invalid for the reason that no seal of either corporation is attached to it. Section 2112 of the code contains the following: "The use of private seals in written contracts, except the seals of corporations, is abolished." It is argued from this that the use of private seals by corporations is governed by the rules of the common law, and that such seals must be affixed to all contracts not covering the scope of the ordinary, every-day functions of the corporations. That is not the law of this state. On the contrary, it was said in Merrick v. Plank Road Co., 11 Iowa 76, that "the doctrine is now well settled that corporations of all kinds may be bound by contracts not under their seal. They may make a binding contract in writing without using the seal, and so they may be held liable on verbal contracts; and as they may make, so they may ratify and adopt as their own, without the use of the seal, that which has been done by another or an officer out of the usual line of his duties." In 1 Morawetz on Private Corporations, section 338, this language is used: "It is now a rule well settled throughout the United States that a corporation may make a contract without the use of a seal in all cases in which this may be done by an individual." A corporation organized under the laws of this state may have a common seal, but it is not required to have one; and it is a matter of common knowledge that corporations in large numbers organize and do business in the state, making contracts and conveying property, without using or having a seal. There is nothing in this case to show any requirement on the

[1] Only the part of opinion relating to seal is given.

part of either party to the agreement in question that its contracts should be under seal, nor that either had a seal. There is no presumption, in the absence of evidence to that effect, that the agreement was invalid for want of a seal; and no presumption of that kind is raised by anything contained in the record. * * *

Affirmed.

Note. Seal is unnecessary, where not necessary in case of a natural person: 1813, Bank of Col. v. Patterson's Admr., 7 Cr. 299; 1823, Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; 1825, The Banks v. Poitiaux, 3 Rand (Va.) 136, 15 Am. Dec. 706; 1825, Fitzhugh v. Bank of Shepherdsville, 3 T. B. Mon. (Ky.) 126, 16 Am. Dec. 90; 1829, Barker v. Mechanics, etc., Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; 1831, Garrison v. Combs, 7 J. J. Marshall (Ky.) 84, 22 Am. Dec. 120; 1837, Everett v. United States, 6 Porter (Ala.) 166, 30 Am. Dec. 584; 1839, Lathrop v. Commercial Bank, 8 Dana (Ky.) 114, 33 Am. Dec. 481; 1840, Commercial Bank v. Newport Co., 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171; 1848, Ross v. City of Madison, 1 Ind. 281, 48 Am. Dec. 361; 1857, Goodwin v. Union Screw Co., 34 N. H. 378; 1862, Topping v. Bickford, 4 Allen 120; 1867, Pixley v. R. Co., 33 Cal. 183; 1867, Sherman v. Fitch, 98 Mass. 59; 1868, Racine, etc., R. Co. v. Farmers' L., etc., Co., 49 Ill. 331, 95 Am. Dec. 595; 1890, Duke v. Markham, 105 N. C. 131, 18 Am. St. R. 889; 1892, Roberts v. Deming Wood Working Co., 111 N. C. 432; 1895, Sarmiento v. Davis Boat, etc., Co., 105 Mich. 300, 55 Am. St. R. 446; 1895, B. S. Green Co. v. Blodgett, 159 Ill. 169, 50 Am. St. R. 146; 1896, Ford v. Hill, 92 Wis. 188, 53 Am. St. R. 902; 1899, Speirs v. Drop-Forge Co., 174 Mass. 175, 54 N. E. Rep. 497; 1899, State, *ex rel.* Grimm, v. Manhattan Rubber Co., 149 Mo. 181; 1900, Pullis v. Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. Rep. 1095. If seal is not present officer's authority must be shown: 1900, Fontana v. Pacific Can. Co., 129 Cal. 51, 61 Pac. Rep. 580.

See note next case. Also, notes 50 Am. St. R. 150, and 64 Am. St. R. 260; 1900, Garland Mfg. Co. v. Northumb. Paper Co., 31 Ont. 40.

Sec. 341. Same.

(c) In deeds conveying land, the corporate seal is required in some states.

GARRETT v. BELMONT LAND COMPANY.[1]

1895. In the Supreme Court of Tennessee. 94 Tenn. Rep. 459–485.

[Action of ejectment by Garrett against the land company. Both parties trace title to a common source, but the complainant's title was through a deed in which the "Second National Bank conveys, remises, and releases" and concludes "In testimony whereof, the Second National Bank hath hereunto set its hand, by its president, James McLaughlin, this 13th day," etc. "(Signed) James McLaughlin, president Second National Bank."

No seal, or any impression of one, though the bank had one, was

[1] Statement abridged; only that part of the opinion relating to the necessity of the seal to make a valid conveyance is given.

affixed to the instrument. It was shown that it was not the custom of the bank to seal deeds, or other instruments, except stock certificates. The defendant contends that this deed was insufficient to pass title to complainants. The court below held the deed sufficient, and this is one of the errors assigned.]

WILKES, J. * * * (After stating the facts, and holding with Combe's Case, 9 Co. 75, after an excellent review of the cases, that "When any one has authority as attorney to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place and to represent his person; and, therefore, the attorney can not do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority,"—and hence this was not the deed of the bank, proceeds as to the want of seal as follows:)

Prior to the adoption of the code of 1858, the seal of the grantor was necessary to the validity of any deed made by an individual or a corporation. The use of seals by individuals arose out of necessity, as, in former days, many persons of extensive estates were too illiterate to make their manual signatures. Its adoption and use by corporations, however, arose out of their nature and constitution, being invisible, intangible bodies, composed of an aggregation of individuals, who must speak, at least in weighty matters, through a common seal. It was accordingly held that the affixing of the seal, and that alone, united the several assents of the individuals who composed the corporation, and gave expression to the act as the assent of the whole, and that a corporation could enter into no contract of importance except under seal. The tendency of modern legislation and the trend of more recent decisions is toward the abolition of the strict rules formerly prevailing as to sealed instruments, and in many states statutes have been passed doing away, in whole or in part, with the distinction between sealed and unsealed instruments, and in most of the states the use of the seal is now regulated by statute. There is a difference kept up, however, in many of the states between the use of seals by corporations and by individuals. While it is laid down broadly that corporations may enter into contracts to the same extent as individuals without using a seal, this clearly has reference to other contracts than the conveyance of lands, and none of the cases to which we have been cited hold that the use of a seal is not required in conveyances of land. See Taylor on Corporations, section 248; Morawetz on Corporations (2d ed.), section 338; Waterman on Corporations, sections 89, 90; Mus. W. Co. v. Mus. L. Co., 37 Am. & Eng. Corp. Cases 119; Gottfield v. Miller, 104 U. S. 527; Merrick v. Burlington Plank-Road Co., 11 Iowa 74–76; Cary Holliday Lumber Co. v. Cain *et al.*, 13 So. Rep. 239.

These conveyances did not involve conveyances of real estate, and none of the citations are authority for the proposition that a corporation can execute a deed without using a seal. But we think the contrary is held, more or less directly, in the following, as well as other authorities: Spelling on Private Corporations, section 195; Beach on

Private Corporations, 376, and section 742 as to mortgages; Jones on Mortgages, section 128; 1 Waterman on Corporations, section 95, p. 303; Boone on Corporations, section 54; 3 Washburn on Real Estate, p. 288, section 7; Leggett v. N. J. M. & B. Co., 23 Am. Dec. 746, note; 4 Am. & Eng. Ency. of Law, p. 240; 2 Am. & Eng. Ency. of Law, p. 910; Osborne v. Temis, 23 N. J. Law 633, 658; Duke v. Markam, 18 Am. St. Rep. 889, note; Miner's Ditch Co. v. Zellerbach, 37 Cal. 543; Hutchins v. Byrnes, 9 Gray 367; Flint v. Clinton Co., 12 N. H. 430; Tenney v. East Warren Lumber Co., 43 N. H. 343; Hatch v. Barr, 1 Ohio 390; Savings Bank v. Davis, 8 Conn. 191; Isham v. Bennington Iron Co., 19 Vt. 230; Zoller v. Ide, 1 Neb. 439; Brinley v. Mann, 2 Cush. 337; Kochler v. Iron Co., 2 Black 715, 721.

By the code of Tennessee of 1858, it is provided (M. & V., § 2478) that "the use of private seals in written contracts, except the seals of corporations is abolished, and the addition of a private seal to an instrument of writing hereafter made shall not affect its character in any respect whatever."

Did the act change the rule as to conveyances by corporations in Tennessee so as to dispense with the necessity of a seal? There is certainly nothing in the act to so indicate, but the fact that seals of corporations are excepted by its provisions is an indication that the seal was to be used by corporations after the act was passed, as had been done before its passage, at least in some cases. Statutes similar to this have been passed in Alabama, Arkansas, Delaware, Florida, Kentucky, Iowa, Kansas, Maryland, Minnesota, Mississippi, Nebraska, North Carolina, Ohio, Indiana, Texas, Pennsylvania and West Virginia. Nevertheless, in most of these States corporations are still required to use their seals in making conveyances, as in Ohio, Indiana, Kentucky, Maryland, Minnesota, Mississippi, Pennsylvania, Nebraska, Kansas and Texas. See 3 Wash. on Real Prop., p. 288. And not only must the deed be sealed, but the seal must be affixed by some one authorized to affix it. 3 Wash. on Real Prop., p. 289.

The conveyance of real estate is one of the most solemn and important acts a corporation is called upon to perform, and if the seal is required for any purpose, it is difficult to conceive of any other act for which its use is more necessary. If it was intended to abolish the use of seals by corporations altogether, why was the saving or excepting clause inserted in the act? And if the seal is to be required in any case, in what case is it more important than in a conveyance of real estate, either absolutely or under mortgage?

Prior to the code, the use of an individual or private seal worked various effects, as for example; If not under seal, it was necessary to aver and prove a consideration in all contracts, oral or written, except in cases of bills and notes. Roper v. Stone, Cooke 499; Shelton v. Bruce, 9 Yer. 26; Read v. Wheeler, 2 Yer. 50; Brown v. Parks, 8 Hum. 297. The consideration of a sealed instrument could not be inquired into in an action of law. Nivens v. Merrick, 1 Tenn. 314; Coleman v. Sanderlin, 5 Hum. 563. And the statute of limitations

was different in cases of sealed and unsealed instruments. Anderson v. Settle, 5 Sneed 203; Thompson v. Thompson, 2 Head 407, and other cases. A release was required to be under seal. Evans v. Pigg, 3 Cold. 397, 398; Simpson v. Moore, 6 Bax. 373. A sealed contract merged one not under seal. Nunnelly v. Dunn, 1 Yer. 31; Bishop on Contracts, section 31. A person could not bind another by seal unless authorized by seal. Nunnelly v. Dougherty, 1 Yer. 27; Turbeville v. Ryan, 1 Hum. 113. Creditors under sealed instruments had certain preferences at common law in estates of deceased persons. Anson on Contracts, p. 48.

The application of this section of the code, No. 2478, finds ample scope in altering these rules derived from the common law in regard to contracts and conveyances by individuals, without extending it to the deeds and other solemn instruments to be executed by corporations, and, in view of the saving clause excepting corporation seals, we can not infer that the legislature intended to abolish the use and necessity for corporate seals altogether.

We are of opinion that this act, 2478 M. & V. Code, does not change the rule of the common law requiring corporations to use their seals in all conveyances of real estate, and a conveyance not under seal, made by a corporation, does not vest a legal title in the grantee, except, it may be, cases of corporations created under the act of 1875, and which have no common seal, in which case that act provides that, in such corporations, having no common seal, the signing of the name of the corporation, by any duly authorized agent, shall be legal and binding. See act 1875, ch. 142, section 5; M. & V., § 1704.

The corporation now in question was not created under the act of 1875, but under the acts of congress providing for national banks, and we are not called upon to say whether, under this act of 1875, a corporation may convey without seal in any case. That question is in no way involved in this case. We are of opinion that the deed in question in this case was not properly signed nor sealed, and hence did not vest the legal title to the lots in controversy in complainants, but only operated to create in them an equitable interest and title. Pomeroy's Eq. Juris., section 418; Devlin on Deeds, section 246; Beardsley v. Knight, 33 Am. Dec. 193; Frost v. Wolf, 19 Am. State Rep. 761, 764; Allis v. Jones, 45 Fed. Rep. 148; Brinkley v. Bethel, 9 Heis. 786. * * *

Reversed.

Note. See *Accord:* 1839, Kinzie v. Chicago, 2 Scammon (Ill.) 187, 33 Am. Dec. 443; 1855, Baltimore, etc., R. Co. v. Gallahue, 12 Gratt. (Va.) 655, 65 Am. Dec. 254; 1867, Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607; 1885, City of Tiffin v. Shawhan, 43 Ohio St. 178, 184; 1890, Shropshire v. Behrens & Castles *et al.*, 77 Texas 275; 1891, Danville Seminary v. Mott *et al.*, 136 Ill. 289; 1893, Brown v. Supply Co., 23 Ore. 541; 1897, Allen v. Brown, 6 Kan. App. 704, 50 Pac. Rep. 505.

But see, *contra*, 1868, Sandford v. Tremlett, 42 Mo. 384; 1900, Pullis v. Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. Rep. 1095.

An equitable title will pass if the corporate seal is not present: 1899, Precious Blood Society v. Elsythe, 102 Tenn. 40, 50 S. W. Rep. 759.

Sec. 342. Same.

(d) Signing in some way is now generally of more importance than sealing.

GLOBE ACCIDENT INSURANCE COMPANY v. REID.[1]

1898. In the Appellate Court of Indiana. 19 Ind. App. Rep. 203–222.

[Action by the widow of John Reid to recover on a policy of insurance on his life. There was a judgment by default; defendant claimed there was error by the court, upon application, in not setting aside service of summons, and also that the complaint was insufficient on its face, for the reason that it showed the policy was not *signed* by the insurance company.]

Black, J. * * * The objection urged against the complaint is, that the policy, as shown by the copy thereof made an exhibit, is not signed by the insurance company or by any person.

The policy so set forth commences as follows: "Globe Accident Insurance Company, Indianapolis, Indiana. * * * insures John A. Reid," etc. And the exhibit concludes as follows:

"In witness the Globe Accident Insurance Company affixes its corporate seal and signature of its president and secretary, 23 January, 1894."

[L. s.]

Thus the policy appears to have been sealed, the lettering or device of the seal not being indicated except as above, but the policy, as shown by the complaint, was not signed. The exhibit must be regarded as controlling the averments of the pleading. Something has been said in argument to the effect that parol contracts of insurance may be made when not prohibited by the charter of the insurance company, and that no special form of words is necessary; but the complaint before us is so plainly founded upon the written instrument, not embodied in the pleading, but filed with it as an exhibit, that no pretense to the contrary could have any plausible support. It is only as the foundation of the action that the court can take notice of the exhibit. Unless the policy has been executed in some valid manner, it can not be regarded as a written contract. By its language, in prescribing the form in which it is to be executed, it provides not only for the affixing of the corporate seal, but also for the signature of the president and secretary of the corporation. It can not be said to have been completely executed according to its own provisions. At common law, as is well known, a corporation spoke only by its common seal. Its contracts were valid only when its seal was affixed by a duly authorized agent, and a sealing was a sufficient execution of its deed without signing. Where a statute expressly provides that a corpora-

[1] Only that part of opinion relating to signing the policy is given.

tion may have and use a common seal, it is but declaratory of an incidental power which a duly organized corporation possessed formerly at common law and still possesses. But the old common law requirement of the use of a seal by a corporation has been discarded, and where a corporation is merely authorized by statute to have and use a common seal, it need not use it in the execution of its ordinary contracts. Unless its charter or some statute requires it, a corporation need not use a seal except where a natural person would be required to use one; and no particular efficacy attaches now to a seal affixed to a contract merely because it is the seal of a corporation. Where it is used it must be affixed by an authorized officer or agent, but it has no greater effect or higher virtue upon the contract of the corporation than has the seal of a natural person affixed to his contract.

Our statute, section 454, Burns' R. S. 1894 (450, Horner's R. S. 1897), provides that "there shall be no difference in evidence between sealed and unsealed writings; and every writing not sealed shall have the same force and effect that it would have if sealed."

The next section provides: "The execution of an instrument is the subscribing and delivering it, with or without affixing a seal."

In this state it is not required by any statute that a policy of insurance issued by a domestic corporation shall be sealed. The provisions of sections 454, 455, Burns' R. S. 1894, above quoted, are applicable to such a written instrument.

In Peoria, etc., Ins. Co. v. Walser, 22 Ind. 73, the action was founded on a policy of insurance which was exhibited with the complaint. The policy commenced thus: "The Peoria Marine and Fire Insurance Company do insure," etc.; and it concluded thus: "In witness whereof, the president of said insurance company has hereunto subscribed his name and caused the same to be attested by their secretary, at," etc. "But the same shall not be valid until countersigned by A. Andrews, agent at," etc. It was countersigned by said agent, but it was not signed by the president or attested by the secretary. The complaint was held insufficient on demurrer, because the policy was but partially executed, and was therefore invalid. In McMillen v. Terrell, 23 Ind. 163, it was said: "Ordinarily, written obligations are executed by signing the names of the parties to be bound thereby at the bottom or close of the instruments. But this mode of execution is not essential to the validity of the instrument. The law does not prescribe the particular place where the obligor's name must be placed; it may be at the beginning or in the body, at the close or perhaps on the margin of the instrument; but wherever placed, it must be done with the intention of thereby executing it as the obligation of the party so signing it. If the signature is placed at the close, at the ordinary place of signature, the inference is that it was so placed as the final execution of the instrument. This inference, however, does not necessarily arise when the name is found at the commencement or in the body. In such case there should be some evidence, either in the form of the instrument or the circumstances attending

the signature, showing that it was the intention of the party thereby to execute it."

In the Wild Cat Branch v. Ball, 45 Ind. 213, the action was upon a bond exhibited with the complaint, not sealed, containing the name of the principal in the body, and signed by the sureties, but not signed by the principal. It was held that the complaint was insufficient as against the principal on demurrer. The court held that under our statute a seal was not necessary to the execution or validity of the bond; and referring to the section of the statute quoted above as section 555 [455], Burns' R. S. 1894, said that this section answered the question as to what was necessary to the valid execution of the instrument,—that it is the subscribing and delivering it. The court was of the opinion that in construing the statute (which does not prescribe a signing, but requires a subscribing) it should be regarded as intending a writing under, at the bottom or at the end of the instrument, and that though the name of the principal in the beginning of the bond were written there by himself, this could not be regarded as a subscribing, and that he could not be held liable upon any supposition that he adopted the name at the beginning; that whatever may have been the rule previously, he was not, according to the statute, bound by the bond, because he did not subscribe it.

Without regard to this strict construction of the statute, we could not consider the name of the appellant in the beginning of the policy as the signature of the insurer. Aside from the fact that a corporation can not sign its own name, which can only be signed by an authorized agent, and aside from all other considerations pertinent to the subject, the policy at its conclusion indicates that its contemplated execution was to include signing by the president and secretary at the end of the instrument, and therefore the name at the beginning was not intended as the subscribing of the policy.

The statute prescribing what constitutes execution of an instrument can not be ignored. The seal, if not required by some other statute, is wholly immaterial. It does not constitute a subscribing, and without subscribing as well as delivery, the instrument is not fully executed. Prather v. Ross, 17 Ind. 495; Nicholson v. Combs, 90 Ind. 515; Crumrine v. Estate of Crumrine, 14 Ind. App. 641. * * *

Reversed.

Note. See, 1808, Jackson v. Walsh, 3 Johns. (N. Y.) 226; 1825, Decker v. Freeman, 3 Maine 338; 1836, Lovett v. Steam Saw Mill Ass'n, 6 Paige (N. Y.) 54; 1847, Isham v. Bennington Iron Co., 19 Vt. 230; 1857, Hutchins v. Byrnes, 9 Gray (Mass.) 367; 1862, Haven v. Adams, 4 Allen (Mass.) 80; 1873, N. W. Distilling Co. v. Brant, 69 Ill. 658, 18 Am. Rep. 631; 1902, St. Clair v. Rutledge, 115 Wis. 583, 95 Am. St. R. 964.

But if seal is not present officer's authority must be shown: 1900, Fontana v. Pacific Can. Co., 129 Cal. 51, 61 Pac. Rep. 580; and at common law *sealing* alone was sufficient without signing; 1858, Johnston v. Crawley, 25 Ga. 316, 71 Am. Dec. 173; and Cook, Corp., § 722, says the Equitable Life Insurance Co. now discharges mortgages by attaching its seal to the discharge without other signature.

As to the proper method of signing, see *supra*, p. 862, and IV Thomp. Corp., § 5090.

Sec. 343. 2. Sufficiency and effect of a seal.

(a) Presumptions.

JACKSONVILLE, MAYPORT, PABLO RY. & NAV. CO. v. HOOPER.[1]

1896. IN THE SUPREME COURT OF THE UNITED STATES. 160 U. S. Rep. 514–530.

[Action by Hooper to enforce covenants under a lease of a hotel to the railway company by plaintiffs. The declaration was in covenant, and an exhibit was attached purporting to be the lease sued upon, to which the signature of the company was as follows:

"Jacksonville, Mayport, Pablo Railway and Navigation
"Company. [Seal]
"By Alex. Wallace, President."

The defendant denied it had executed the lease, or that Wallace had authority to execute it. Decision below for the plaintiff, overruling defendant's demurrer. Error brought.]

MR. JUSTICE SHIRAS. * * * The defendant demurred on several grounds, one of which was as follows:

"That attached to the said declaration is a paper purporting to be the contract which is the basis of this suit, which paper is alleged to be a lease between the defendant company and the plaintiffs, and which paper is referred to in each and every count of said declaration, and asked and prayed and made a part of said declaration; that each and every count of same declares in covenant, and yet the same contains on the face thereof and the face of the paper made part thereof that the said cause of action will not lie because the said paper is not under seal; that there is no seal of the defendant company to said paper."

The theory of this demurrer appears to be that there should have been an averment on the face of the instrument that the seal attached, on behalf of the company, was its common or corporate seal. However, there was an averment that the parties had set their hands and seals to the paper, and the attesting clause alleged that the railroad company had signed, sealed and delivered in the presence of two witnesses, who signed their names thereto. On demurrer this was plainly sufficient.

But it is urged in the third and fourth assignments that it was error to permit to be put in evidence the certified copy of the lease, as likewise the duplicate lease, because they were not shown to be under the seal of the company, but appeared to be under the private seal of Alexander Wallace, the president of the company. But, in the absence of evidence to the contrary, the scroll or rectangle containing the word "seal" will be deemed to be the proper and common seal of the company. A seal is not necessarily of any particular form or figure.

[1] Only that part of opinion relating to seal is given.

In Pillow v. Roberts, 13 How. 472, 474, this court said, through Mr. Justice Grier, when discussing an objection that an instrument read was improperly admitted in evidence because the seal of the circuit court authenticating the acknowledgment was an impression stamped on paper and not "on wax, wafer, or any other adhesive or tenacious substance," said: "It is the seal which authenticates, and not the substance on which it is impressed; and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it. In Arkansas the presence of wax is not necessary to give validity to a seal; and the fact that the public officer in Wisconsin had not thought proper to use it, was sufficient to raise the presumption that such was the law or custom in Wisconsin, till the contrary was proved. It is time that such objections to the validity of seals should cease. The court did not err in overruling the objections to the deed offered by the plaintiff." Price v. Indseth, 106 U. S. 546, is to the same effect.

Whether an instrument is under seal or not is a question for the court upon inspection; whether a mark or character shall be held to be a seal depends upon the intention of the executant, as shown by the paper. Hacker's Appeal, 121 Pa. St. 192; Pillow v. Roberts, *ub. supra.*

The defendant did not produce the original in order that it might be compared in the particular objected to with the copy and duplicate offered. The defendant's attorney, Mr. Buckman, was called, and testified that he was one of the attesting witnesses to the instrument offered, and that he, as a notary public, took the acknowledgment thereto of Alexander Wallace, that he executed the same for and in behalf of the company, and that the said lease was the act and deed of the defendant company for the uses and purposes therein expressed.

Whether, therefore, the instrument put in evidence was merely a copy, in which event it would not be expected that a wax or stamped seal of the company would appear upon it, but merely a scroll, representing the original seal, or whether the so-called copy was really the original paper, as certified by one of defendant's witnesses, would not, in our opinion, be material. The presumption would be, if the paper were a copy, that the original was duly sealed, or, if it were the original, that the scroll was adopted and used by the company as its seal, for the purpose of executing the contract in question. * * *

Affirmed.

Note. As to the sufficiency of the seal, it seems that any device adopted by the corporation for the purpose will be sufficient: 1826, Perry v. Price, 1 Mo. 664, 14 Am. Dec. 316; 1839, Kinzie v. Chicago, 2 Scam. (Ill.) 187, 33 Am. Dec. 443; 1848, Brinley v. Mann, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; 1858, Johnson v. Crawley, 25 Ga. 316, 71 Am. Dec. 173; 1868, Royal Bank v. Grand Junc., etc., Co., 100 Mass. 444, 97 Am. Dec. 115; 1889, Penn. Nat. Gas Co. v. Cook, 123 Pa. St. 170; 1895, Sarmiento v. Davis Boat Co., 105 Mich. 300, 55 Am. St. Rep. 446; 1897, Thayer v. Nehalem Mill Co., 31 Ore. 437, 51 Pac. Rep. 202; 1899, Ellison v. Branstrator, 153 Ind. 146, 54 N. E. Rep. 433.

If the seal alone is present, it must be proved to be the corporate seal—it does not prove itself: 1800, Den v. Vreeland, 2 Halst. (N. J.) 352, 11 Am.

Dec. 551; 1820, Berks Turnpike Road v. Myers, 6 S. & R. 12, 9 Am. Dec. 402; 1826, Perry v. Price, 1 Mo. 664, 14 Am. Dec. 316.

But if the contract is shown to have been executed by the proper officers with authority, any seal present will be presumed to be the corporate seal: 1852, Susquehanna, etc., Co. v. General Co., 3 Md. 305, 56 Am. Dec. 740; 1855, Phillips v. Coffee, 17 Ill. 154, 63 Am. Dec. 357; 1867, Musser v. Johnson, 42 Mo. 74, 97 Am. Dec. 316; 1894, Benbow v. Cook, 115 N. C. 324, 44 Am. St. Rep. 454.

See next case and note.

Sec. 344. (b) As evidence of agents' or officers' authority.

LITTLE SAW MILL VALLEY TURNPIKE OR PLANK ROAD COMPANY v. FEDERAL STREET AND PLEASANT VALLEY PASSENGER RAILWAY CO.[1]

1899. IN THE SUPREME COURT OF PENNSYLVANIA. 194 Pa. St. Rep. 144, 75 Am. St. R. 690.

[Action by road company upon a contract made with it by the president of the railway company, whereby the latter guaranteed to pay annually to the road company any deficiency in its tolls, due to the change of the motive power of the railway company using the road, from horse power to electricity.]

BROWN, J. * * * It is insisted, however, that the railroad company was not bound by the contract, because it was made by the president without authority from the corporation or its board of directors. It is signed by the president. The corporate name attached was apparently in the handwriting of the secretary, and the common seal was affixed. Neither officer was called to deny authority to act, and the presumption was that it had been given. The maxim, *Omnia praesumuntur rite esse acta*, applies to acts done on behalf of corporations, and it can never be presumed that a corporate agent is acting wrongfully; or that an act which might have been a proper act to do on behalf of the corporation was done under circumstances rendering it improper: Taylor on Private Corporations, section 204. "Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." Merchants' Bank v. State Bank, 10 Wall. 644. "When the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, the courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority." Angell and Ames on Corporations, section 224. The second point submitted

[1] Statement abridged. Only the part relating to the effect of the corporate seal is given.

by defendant was properly refused. The second and third assignments of error are overruled and the judgment affirmed.

Note. The presence of the corporate seal is *prima facie* evidence of the agent's authority to act for the corporation, and to affix the seal, and also that the corporation has taken the necessary steps to authorize the contract to be entered into: 1820, Berk's Turnpike Road v. Myers, 6 Serg. & R. 12, 9 Am. Dec. 402; 1832, Leggett v. New Jersey, etc., Co., 1 Saxton Ch. (N. J.) 541, 23 Am. Dec. 728; 1833, Gordon v. Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75; 1839, Kinzie v. Chicago, etc., 2 Scam. (Ill.) 187, 33 Am. Dec. 443; 1840, Burrill v. Nahant Bank, 2 Met. 163, 35 Am. Dec. 395; 1859, St. Louis Pub. Schools v. Risley, 28 Mo. 415, 75 Am. Dec. 131; 1863, Koehler v. Black River Falls, etc., Co., 2 Black 715; 1867, Musser v. Johnson, 42 Mo. 74, 97 Am. Dec. 316; 1867, Sheehan v. Davis, 17 Ohio St. 571; 1869, Miner's Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; 1874, Central Nat'l Bank v. Charlotte, etc., R., 5 S. C. 156, 22 Am. Rep. 12; 1890, Sherman, etc., Co. v. Swigart, 43 Kan. 292, 19 Am. St. Rep. 137; 1891, Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 25 Am. St. Rep. 401; 1894, Benbow v. Cook, 115 N. C. 324, 44 Am. St. Rep. 454; 1895, B. S. Green Co. v. Blodgett, 159 Ill. 169, 50 Am. St. Rep. 146, *note* 150; 1899, Ellison v. Branstrator, 153 Ind. 146; 1900, *In re* West Jersey Tract. Co., 59 N. J. Eq. 63, 45 Atl. Rep. 282; *Contra*, 1898, Morrison v. Wilder Gas Co., 91 Maine 492, 64 Am. St. Rep. 257—but see note here, p. 260.

The corporation can be shown to have no authority to make the contract: 1832, Leggett v. New Jersey, etc., Co., 1 Saxton Ch. (N. J.) 541, 23 Am. Dec. 728; 1866, Conine v. Junction R. Co., 3 Houst. 288, 89 Am. Dec. 230.

So, too, the agent's authority may be questioned: 1845, Gibson v. Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592; 1876, Luse v. Isthmus, etc., Co., 6 Ore. 25 Am. Rep. 506.

Sec. 345. (c) As evidence of a consideration.

LORD CAMPBELL, C. J., IN THE MAYOR, ETC., OF NORWICH v. THE NORFOLK RAILWAY COMPANY.

1855. IN THE QUEEN'S BENCH. 82 Eng. C. L. (4 El. & Bl.) Rep. *367, on *443-6.

[Action against the railway company on a covenant under their seal to pay £1,000 in case certain works were not completed, whether a certain act of parliament should be obtained or not, as agreed under seal. It was averred that the works were not completed, though plaintiff had performed all conditions precedent.]

Although the agreement be under seal, we may examine to see whether there was any, and what consideration for the contract to pay money, when we are to determine whether the contract was or was not *ultra vires*. The mere circumstance of a covenant by directors in the name of the company being *ultra vires*, as between them and the shareholders, does not necessarily disentitle the covenantee to sue upon it. For example, if the directors of a railway company were to enter into a contract under the seal of the company for the purchase of a large quantity of iron rails and to pay for them at a fixed price, as the vendor had reasonable ground for supposing that the rails were wanted for the purpose of the railroad, it would be no defense to an

action for the price, or for not accepting them, that the rails were illegally purchased on speculation, to be resold by the directors for their own profit. But suppose that the directors of a railway company should purchase a thousand gross of green spectacles, as a speculation, and should put the seal of the company to a deed covenanting to pay for these goods, here would be a clear excess of authority on the part of the directors; this excess of authority would necessarily be known to the covenantee; and, he being in *pari delicto*, I conceive that the maxim would apply *potior est conditio possidentis*. This would be an illegal contract to misapply the funds of the company; and the illegality might be set up as a defense. So, if, without any consideration whatever, the directors of a railway company were to put the company's seal to a deed covenanting to pay a mere stranger £1,000, this would be *ultra vires*, to the knowledge of the covenantee, and he could not maintain an action to recover the £1,000 from the funds of the company in fraud of the shareholders. When the excess of authority, with the knowledge of both parties, is shown by plea, this joint violation of the law, I apprehend, is a bar to the action.

It has been contended, I am aware, that the deeds of such companies are to be treated like the deeds of individuals or of common partnerships. But there seems to be an essential distinction between them. The individual may do what he likes with his own, and he may bind himself by a deed disposing of his property, however capriciously, and without any consideration, so that no fraud has been practiced upon him. In such a case, want of consideration is immaterial; no one is injured, and there is no illegality to be pleaded. "To look upon a railway company," says Lord Langdale, in Coleman v. Eastern Counties Railway Company, 10 Beav. 1, 14, "in the light of a common partnership, and as subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise of interference, not only with the public, but with the private rights of all individuals in this realm. We are to look to these powers as given to them, in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public;" "and I am clearly of opinion, that the powers which are given by an act of parliament like that now in question, extend no farther than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned." The same learned judge, in answer to an argument that the directors may apply the funds of the company as they please, so that their object is to increase the traffic upon the railway, and thereby to increase the profits of the shareholders, exclaims, "surely that has nowhere been stated; there is no authority for saying anything of that kind." "Unless acts so done can be proved to be in conformity with the powers given by the statutes under which those acts are done, they furnish no authority whatever."

The equity reports abound with cases in which injunctions have been granted against the application of the funds of such companies to purposes not authorized by the acts of parliament creating them, although professedly for the benefit of the shareholders: and I apprehend that a contract, against the performance of which an injunction would be granted in equity, must be considered illegal and void at law, on proof that, to the knowledge of both parties, it is beyond the power of the directors, and leads to a misapplication of the funds of the company. On this principle proceeded the solemn decision of the court of common pleas in The East Anglian Railways Company v. The Eastern Counties Railway Company, 11 Com. B. 775 (E. C. L. R., vol. 73), where a railway company having, by a deed under their seal, covenanted with another railway company to take a lease of their railway, and to pay the expenses incurred by them in soliciting certain bills in parliament, which were then pending, whether these bills should pass into law or not, and the bills not having been obtained, the covenantees sought to recover the amount of these costs. It was decided that the covenantors had a limited authority, and were a corporation only for making and maintaining the railway sanctioned by their act, and that the funds of the company could only be applied to these purposes; so that, as the contract sued upon was not justified by the act of parliament, it was consequently void, and could not be made the foundation of an action.

Note. See *contra*, 1868, Royal Bank of Liverpool v. Grand Junc., etc., Co., 100 Mass. 444, 97 Am. Dec. 115; and compare, 1879, Best v. Thiel, 79 N. Y. 15; 1895, Taft v. Church, 162 Mass. 527.

Sec. 346. (d) Upon a negotiable instrument.

CHASE NATIONAL BANK, RESPONDENT, v. B. C. FAUROT, APPELLANT.[1]

1896. IN THE COURT OF APPEALS OF NEW YORK. 149 N. Y. Rep. 532–539, 35 L. R. A. 605.

BARTLETT, J. The plaintiff seeks to recover of defendant as indorser of a promissory note for $16,787.02, signed "New York Construction Company, by T. P. Graf, secretary."

Impressed upon the face of the note were the words "New York Construction Company, seal." The note did not recite a seal and no effort was made at the trial to prove the seal, or that it was affixed by authority of the "New York Construction Company," save reading the note in evidence. The note was executed and payable in the state of Ohio and the contract of indorsement was made in the state of New York. The facts upon this appeal are undisputed, and the plaintiff's counsel insists that the seal on the note in suit was not proved within the rule laid down by this court in Weeks v. Esler

[1] Part of opinion on another point omitted.

(143 N. Y. 374); that a note is negotiable, and having been purchased in good faith and before maturity, as found by the jury, the recovery below must be sustained.

The defendant's counsel, while admitting that the rule in Weeks v. Esler is opposed to certain of his contentions on this appeal, urges with much earnestness and ability that this court should reconsider the doctrines of that case; he also argues that even assuming the note to be negotiable in form, it never had a legal inception, and defendant is not liable as indorser.

We held in Weeks v. Esler that the presumption attaching ordinarily to seals of corporations when affixed to deeds or other instruments did not exist as to the promissory notes of a corporation, and that in the absence of any recital that the seal of the corporation was affixed and of any evidence to show the fact of sealing, or that the corporate seal was impressed, or that it was the corporate seal, the notes could not be regarded as sealed instruments.

We think this rule a reasonable one in view of the vast business transactions of corporations, and see no occasion to reconsider it.

In the case at bar we shall assume for the purposes of this appeal that the note in suit was a sealed instrument, and will place our decision on broader grounds than those laid down in Weeks v. Esler.

In view of the law as settled by this court and the courts of other jurisdictions as to what instruments are negotiable, we hold that the commercial paper of a corporation negotiable in form does not lose the quality of negotiability by having attached thereto the corporate seal.

The following are a few of the cases showing the evolution of the modern doctrine that a seal does not deprive corporate obligations of negotiability:

Bank of Rome v. Village of Rome (19 N. Y. 20). The village had issued bonds under its corporate seal in aid of a railroad company, and the latter sold certain of them to a *bona fide* holder, and the question was whether the purchaser was subject to a defense available against the railroad company.

Comstock, J., said: "The bonds were payable to bearer, and although under the corporate seal of the village, they were negotiable instruments in such a sense as would exempt them, in the hands of a *bona fide* holder, from a defense which might be available against the railroad company." (Citing State of Illinois v. Delafield, 8 Paige 527; State of Illinois v. Delafield on appeal, 2 Hill 159, 177; Mechanics' Bank v. N. Y. & N. H. R. R. Co., 13 N. Y. 625, 627; Morris Canal & B. Co. v. Fisher, 3 Am. L. Reg. 423.)

Brainerd v. New York & Harlem Railroad Company (25 N. Y. 496). It was held that the bond of a railroad corporation, payable to an individual or his assigns, is in the nature of commercial paper, negotiable by delivery under an assignment in blank, and not a specialty subject to equities between the corporation and the person named in the bond as the primary payee.

Denio, Ch. J., said: "The questions of law which the appeal

presents are, whether these instruments are commercial paper, so as to be negotiable, and whether they were legally negotiated by delivery under the blank assignment. These might have been very grave questions in this state a few years ago. But they have been settled against the defendant in this state by a series of decisions which it is impossible at this day to depart from. * * * The point of objection, when it is sought to bring such securities within the law of commercial paper, is that, being under seal, they are deeds, and commercial instruments are simple contracts. But when such obligations are issued to secure the payment of money upon time, and contain on their face an expression showing that they are expected to pass from one person to another, and thus to perform the office of bills and notes or of money, as the words 'bearer,' or 'assigns,' or 'holder,' or the like, the courts of this country, with a single exception, and those of this state, without any exception, have concurred in attaching to them the attributes of commercial paper." (See cases cited in this opinion.)

This case also laid down the rule that no distinction could be made between private corporations and those which are created for governmental or municipal purposes.

Dinsmore v. Duncan (57 N. Y. 573). It was held that the negotiability of a United States treasury note is not strained or affected by the fact that it is under the treasury seal.

Dwight, C., said: "There are several objections urged to the negotiability of this instrument. One is, that it is under the seal of the United States treasury. There are, no doubt, decisions that an instrument under seal is not negotiable. These cases refer to private obligations between individuals. (Clark v. Farmers' Woolen Manufacturing Co., 15 Wend. 256; Steele v. Oswego Cotton Manufacturing Company, 15 Wend. 265.) They are not to be extended to the case of public securities like those issued by the government, and intended to seek for a market throughout the civilized world. The seal was not placed there to restrain their negotiability, but rather to stamp them as genuine, wherever they might be in circulation."

Evertson v. National Bank of Newport (66 N. Y. 14) holds interest coupons of railroad bonds payable to bearer at a specified time and place are negotiable promises for the payment of money. (See cases there cited.)

Marine, etc., Mfg. Co. v. Bradley (105 U. S. 175) was the case of an instrument issued by a South Carolina corporation under seal agreeing to pay a certain sum of money, and by an indorsement under seal the company agreed, in consideration of forbearance, to pay a higher rate of interest on the money to bearer.

Mr. Justice Matthews, passing upon the validity of the indorsement, said: "It is a negotiable note within the meaning of the law merchant, according to the law of the place of the contract, notwithstanding it is an instrument under seal" (p. 180).

In Mercer County v. Hacket (1 Wall. 83), the United States supreme court held county bonds under seal to be negotiable instru-

ments. Mr. Justice Grier said, in speaking of the bonds issued under seal: "But there is nothing immoral or contrary to good policy in making them negotiable if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law can not prohibit the commercial world from inventing or issuing any species of security not known in the last century."

The following authorities further illustrate the point under discussion: Mason v. Frick (105 Pa. St. 162 and cases cited); Barrett v. Schuyler Co. (44 Mo. 197); Morris Canal, etc., Co. v. Fisher (9 N. J. Eq. 699); Haven v. Grand Junc. R. R. & D. Co. (109 Mass. 88); Murray v. Lardner (2 Wall. 110); National Exchange Bank v. Hartford, P. & F. R. R. Co. (8 R. I. 375); Daniel on Neg. Inst., §§ 1500 and 1501 and cases cited; Morawetz on Corp., § 341; Tiedman on Com. Pap., § 117.

In Blewitt v. Boorum (142 N. Y. 357) Judge Peckham, in a learned and interesting opinion, reviews the history of seals upon instruments and points out their immateriality on contracts which do not require them in order to be valid.

The note in suit being negotiable under the law of this state, and the contract of indorsement having been made here, it is unnecessary to consider many of the points argued by appellant under the assumption that the defendant had indorsed a non-negotiable instrument. * * *

Affirmed.

Note. See cases cited in note to § 238, *supra*, p. 864; and 1895, Am. Nat'l Bank v. Am. Wood Paper Co., 19 R. I. 149.

ARTICLE VIII. POWER TO MAKE BY-LAWS.

Sec. 347. 1. Definition and purpose, differs from regulation.

STATE v. ISAAC S. OVERTON.[1]

1854. In the Supreme Court of Judicature of New Jersey. 24 N. J. Law (4 Zabriskie) Rep. 435–443, 61 Am. Dec. 671.

Overton, a conductor on the Morris & Essex R. R., forcibly ejected a passenger from one of the trains, and was convicted of an assault and battery therefor. A motion for new trial on account of misdirection of the court was overruled. This was assigned as error. The passenger had purchased a ticket from N. to M. At a way station between these stations he left the train, having first obtained a conductor's check printed "Conductor's check to M." About an hour afterward he took the train of Overton, to complete his journey to M.

[1] Statement abridged. Only that part of opinion relating to one point is given.

Overton refused to recognize the conductor's check, demanded the fare, and upon refusal to pay, put the passenger off without unnecessary violence. Some years before the company had adopted a rule, and given public notice of it that conductor's checks were not transferrable from one train to another. This action of the company was submitted to the jury as if it were a by-law or regulation of the company affecting the rights of passengers, upon the *reasonableness* and *validity* of which the jury were to decide. This was assigned as error.

GREEN, C. J. * * * In this the court erred. Here was no evidence of any by-law, or of any regulation made by the company affecting the rights of passengers upon the reasonableness, or validity of which either court or jury were called upon to decide. The right of the passenger rested upon his contract. The notice given by the company was in strict conformity with his rights under the contract. Upon the evidence in the cause, if no proof had been offered of the notice given by the company, that conductors' checks were not transferable, the defendant would have been entitled to a verdict. Proof of that notice certainly placed him in no worse position. The company have an unquestionable right, under their charter, independent of any by-law or regulation, to charge different rates by different trains, or a higher price for traveling over the road as a way-passenger, by different journeys, than for a through passenger. This was in reality all that was involved in the evidence of the action by the company, as proved upon the trial. The case does not fall within the operation of the principle, by which it was held to be controlled.

Assuming at the bar, as was done upon the trial, that the guilt or innocence of the defendant depended upon the validity of a regulation made by the company, affecting the rights of passengers, the question was elaborately argued whether the validity of such regulation can in any case be submitted as a question of fact to be decided by a jury, and the broad principle was assumed that the validity of every regulation made by a railroad company, regulating the concerns and affecting the rights of the road, is a question of law, to be decided by the court, and never can be submitted to a jury; that the company is bound to make regulations for the comfort and convenience of passengers; that the power is regulated by their charter; that what is lawful is reasonable, and that, therefore, every regulation is reasonable which is not unlawful.

The validity of the by-law of a corporation is purely a question of law. Whether the by-law be in conflict with the law or with the charter of the company, or be in a legal sense unreasonable, and therefore unlawful, is a question for the court and not for the jury. Commonwealth v. Worcester, 3 Pickering 462; Paxon v. Sweet, 1 Green 196; Ang. and Ames on Corps., 357. But the *by-laws* of a private corporation bind the *members only* by virtue of their assent, and do not affect third persons. All regulations of a company affecting its business, which do not operate upon third persons, nor in any way affect their rights, are properly denominated by-laws of the company, and

may come within the operation of the principle. Within this limit it is the peculiar and exclusive office of the court to decide upon the validity of the regulation.

But there is another class of regulations, made by corporations, as well as by individuals, who are common carriers of passengers, which operate upon, and affect the rights of others which are not, properly speaking, by-laws of the corporation, and which do not fall within the operation of the principle. Of this character are all regulations touching the comfort and convenience of travelers, or prescribing rules for their conduct to secure the just rights of the company. It is not perceivable of this class of regulations, that they are never unreasonable unless they are unlawful. On the contrary, they are unlawful because they are unreasonable, or an unnecessary infringement of the rights and liberty of the passengers. The reasonableness and validity of a regulation, that passengers by railroad or steamboat should exhibit their tickets when reasonably requested; that they should not smoke or indulge in other filthy, or offensive practices; that male passengers should not enter a car or a saloon, especially appropriated to females, might be conceded, and the right of the company to enforce them, even by excluding, in case of necessity, the offending passenger from the train. But it would scarcely be contended that a regulation requiring passengers continually, or as often as the caprice or malice of a conductor might require it, to exhibit their tickets; forbidding them to speak, or change their seats from one part of a car or saloon to another, when the right of no other passenger was affected, was a regulation lawful in itself or which might safely be enforced. This latter class of regulations are no more in violation of the charter of the company, or of any particular statute, than the former. But they would be held unlawful, because they are unreasonable, and an unnecessary infringement of the rights and liberty of travelers. The distinction between such regulations as are necessary, and conducive to the comfort and convenience of travelers, or to protect the rights of the company, must from its very nature be a question of fact rather than of law. The reasonableness and unreasonableness of the regulation is properly for the consideration, not of the court, but of the jury. * * *

But there was in reality no such question involved in the present case. The right to transfer conductors' checks, resulted upon a contract which the company had a clear and unquestionable legal right to enforce. The question was improperly submitted to the jury, and the verdict is against law, and contrary to the evidence. * * *

New trial granted.

Note. See note 85 Am. Dec. 617, *et seq*; 1886, L. S. & M. S. R. Co. v. Rosenzoweig, 113 Pa. St. 519; 1892, Am. Liv. St. Co. v. Chicago L. S. Ex., 143 Ill. 210, 36 Am. St. Rep. 385; 1899, Northport, etc., Ass'n v. Perkins, 93 Maine 235, 74 Am. St. Rep. 342.

Sec. 348. 2. Power to make.

(a) Incidental.

HOBART, J., IN NORRIS v. STAPS.

c. 1625, Hobart's Rep. 211 a.

"I am of the opinion that though power to make laws is given by special clause in all incorporations, yet it is needless; for I hold it to be included, by law, in the very act of incorporating, as is also the power to sue, to purchase, and the like. For as reason is given to the natural body for the governing of it, so the body corporate must have laws, as a politic reason to govern it; but those laws must ever be subject to the general law of the realm, as subordinate to it. And therefore, though there be no proviso for that purpose the law supplies it."

Note. See 1613, Sutton's Hospital, 10 Co. 23a., *supra*, 264, on 266; 1815, St. Luke's Church v. Mathews, 4 Dessaus. (S. C.) 578, 6 Am. Dec. 619; 1819, Commw. v. Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628; 1832, Leggett v. N. J. M. & B. Co., 1 Saxton Ch. (N. J.) 541, 23 Am. Dec. 728; 1834, Taylor v. Griswold, 2 Green Law (N. J.) 222, 27 Am. Dec. 33; 1895, Engelhardt v. Fifth Ward, etc., Ass'n, 148 N. Y. 281, 35 L. R. A. 289; 1899, Bailey v. Association of Master Plumbers, 103 Tenn. 99, 46 L. R. A. 561.
Note, 85 Am. Dec. 618.

Sec. 349. Same.

(b) This power resides in the shareholders or members, unless otherwise provided.

THE MORTON GRAVEL ROAD CO. v. WYSONG.[1]

1875. IN THE SUPREME COURT OF INDIANA. 51 Ind. Rep. 4.

[Action to recover a penalty for violating a by-law regulating tolls. Judgment below for plaintiff. The by-law was adopted by the directors, and not by the corporation at large. The statute provided: "Such company may * * * make, enact, and publish any and all ordinances and by-laws," etc.]

DOWNEY, J. This is in conformity to the statute on the subject, entitled "An act establishing general provisions respecting corporations," 1 G. & H. 267, section 2 of which provides that "corporations shall, where no other provision is specially made, be capable, in their corporate name, * * * to make necessary by-laws," etc.

The power to make by-laws resides in the members of the corporation at large, where there is no law or valid usage to the contrary.

[1] Statement abridged. Only that part of opinion relating to the one point is given.

In Angell & Ames on Corp., section 327, it is said: "Unless by the charter, or some general statute to which the charter is made subject, or by immemorial usage, this power is delegated to particular officers or members of the corporation, like every other incidental power, it resides in the members of the corporation at large, to be exercised by them in the same manner in which the charter may direct them to exercise other powers or transact their general business, and if the charter contain no such direction, to be exercised according to the rules of the common law," etc. We must, therefore, treat the by-law in question as invalid, and as having nothing to do with the question to be decided. * * *

Judgment reversed.

Note. See, also, 1827, Union Bank v. Ridgley, 1 Har. & G. (Md.) 324; 1868, Stevens v. Davison, 18 Gratt. (Va.) 819, 98 Am. Dec. 692; 1873, People v. Crossley, 69 Ill. 195; 1880, Carroll v. Mullanphy Sav. Bank, 8 Mo. App. 249; 1887, State Savings Assn. v. N. J. P. Co., 25 Mo. App. 642; 1893, Brinkerhoff-Farris, etc., Co. v. Lumber Co., 118 Mo. 447, *infra*, p. 1162; 1899, North Milwaukee T. S. Co. v. Bishop, 103 Wis. 492, 45 L. R. A. 174; note 85 Am. Dec. 618.

But the shareholders may delegate authority to make by-laws to the directors, or the statute or charter may authorize them to do so: 1845, Cahill v. K. M. I. Co., 2 Douglass (Miss.) 124, 43 Am. Dec. 457; 1875, Spurlock v. Pacific R., 61 Mo. 326.

Sec. 350. (c) Limits on power to make.

1. Forfeitures.

In the Matter of the Election of DIRECTORS OF THE LONG ISLAND R. R. CO.[1]

1837. In the Supreme Court of New York. 19 Wendell's (N. Y.) Rep. 37–45, 32 Am. D. 429.

[Motion to set aside an election, for refusing to permit Edwin Lord vote 1200 shares of stock, for the reason "that the stock had already been declared forfeited for default in payment of the calls." If these shares had been voted the result of the election might have been changed. The forfeiture was declared under a *by-law* enacted for that purpose.]

Nelson, C. J. * * * The corporation possess the power to make by-laws *not inconsistent with any existing law*, for the management of its property, the regulation of its affairs, and for the transfer of stock. (2 R. S. 602, § 1, *sub.* 6. This is the broadest general power conferred upon it; but it is not new, and would have existed as incidental. When taken as incidental it must be exercised in conformity to the general law of the land, that being the rule to regulate the proceedings of *artificial bodies*, as well as the conduct of *natural persons*, independently of express provisions of the charters of those

[1] Only so much of opinion as relates to the one point is given.

companies to the contrary. This general law has ascertained the rights of person and of property of the citizen, and established modes of proceeding in case of a violation of them; and *corporate bodies* must conform to them, in seeking redress, the same as individuals. The former can no more take the remedy into their own hands than can the latter. So strict has this salutary principle of subjection been held in England, that even a by-law in pursuance of an express power in a charter granted by the king, is void, if contrary to the common law or act of parliament. (1 Kyd on Corp., 109; Willcock on Corp., 95; Angel & Ames, 186; 8 Co. 125, *a*, 127, *b*; 2 Inst. 47; 1 T. R. 118.) Thus a by-law imposing a forfeiture of goods is void, though the letters patent authorized it; and a power granted to a corporation of dyers to search, and if they found cloth dyed with logwood, to seize it as forfeited, was adjudged void as contrary to *magna charta*.

On the same principle, by-laws in restraint of trade are adjudged void. (11 Co. 53; 1 Burr. 12; 4 Burr. 1951; 7 Dowl. & Ryl. 601; 1 Bacon's Abr. 547; Angel & Ames, 184; Willcock, 142.) So a by-law that may be lawful can not be enforced by an extraordinary penalty, such as imprisonment or forfeiture of goods, or by distress and sale of goods, for, by the general law of the kingdom, no man is to be imprisoned, or dispossessed of his goods and chattels *nisi per legale judicium parium suorum, vel per legem terræ:* and if such penalties were allowed, corporations would be enabled to set up private particular laws in contradiction to the laws of the land, which is against the nature and essence of a by-law. (Clark's Case, 5 Co. 64; 3 Salk. 76; Willcock, 98; 1 Bacon's Abr. 551.) Even an act of parliament does not by *implication* invest the corporation with any extraordinary authority; and if it is intended to be given, it must be by *express words* to that effect. In Kirk v. Nowill (1 T. R. 118), which was an action of trespass for seizing and taking a quantity of forks, the defendant justified under an act of parliament incorporating the inhabitants of the Liberty of H. into a company of cutlers, and under a by-law of the company. The act authorized the adoption of such by-laws as appertained to good regulation and workmanship in the manufacturing of cutlery wares, with power to impose reasonable pains, penalties and punishment, by fine or amercement, in case of violation, and which was to be levied to the use of the corporation for the benefit of the poor. The company ordained that the searchers (officers recognized in the act) should search for unworkmanlike wares, and seize, carry away and destroy the same. The property was seized under and by virtue of this by-law.

Lord Mansfield observed that a corporation in the definition of it, is a creature of the crown, created by letters patent; that such a corporation, with the power of making by-laws, can not make any such law to incur a forfeiture; that those corporations which are created by act of parliament have no other additional powers incident to them than those have which are created by charters, *unless they be expressly given*, and that no such extraordinary power of making by-laws to incur a forfeiture, appearing upon the plea to have been conferred, it

was impossible for the court to say that the by-law in that case could be supported by the act. Buller, J., remarked, that taking it generally as a by-law creating a forfeiture, the act of parliament not having given the corporation the power to make such a by-law, it was bad on that ground. In all the cases where his power to declare a forfeiture of stock as expressly given by the charter has been incidentally noticed by the courts, it has been regarded as a new and cumulative remedy to the one existing at common law. (1 Caines' Cas. in Error, 85; 1 Caines, 389, Radcliff, J.; 9 Johns. R. 218; 6 Mass. R. 40; 2 Bibb, 576.) This has also been the understanding of the legislature, for, on examination, it will be found that the power has been usually conferred by an express provision in the charters, from the earliest period down to the present time. Upon the whole, I am entirely satisfied the directors possessed no authority under the charter to declare a forfeiture of the stock; that their acts in this respect were wholly void, and left the rights of the stockholders in full force, and that the sales which were made, and attempted transfers of the supposed forfeited shares, passed no title to or interest in them to the purchasers. * * *

Election set aside.

Note. 1887, Budd v. Multnomah St. R. Co., 15 Ore. 413, 3 Am. St. Rep. 169, *infra*, p. 1569; 1892, Gemmel v. Davis, 75 Md. 546, 32 Am. St. Rep. 412; 1894, Morris v. Mettalline L. Co., 164 Pa. St. 326, 44 Am. St. Rep. 614; 1897, Elizabeth City Cotton Mills v. Dunstan, 121 N. C. 12, 61 Am. St. Rep. 654, holding that "a corporation may be empowered to provide by its by-laws for forfeiture of shares for non-payment, and if reasonable, it will be enforced."

See notes, 68 Am. Dec. 88; 43 Am. St. Rep. 156; 61 Am. St. Rep. 656.

On the general subject of forfeiture, and sale of stock for non-payment, see, 1821, Franklin Glass Co. v. Alexander, 2 N. H. 380, 9 Am. Dec. 92, note 97; 1843, Selma & Tenn. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; 1850, Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; 1855, New Hampshire R. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300, n. 308; 1860, Leevey's Island R. Co. v. Bolton, 48 Maine 451, 77 Am. Dec. 236; 1869, Germantown, etc., R. Co. v. Fitler, 60 Pa. St. Rep. 124, 100 Am. Dec. 546, and note; 1893, Carpenter v. Am. Bldg. Ass'n, 54 Minn. 403, 40 Am. St. Rep. 345, note 348.

Sec. 351. Same.

2. Transfers.

THE VICTOR G. BLOEDE CO v. VICTOR G. BLOEDE.[1]

1896. IN THE COURT OF APPEALS OF MARYLAND. 84 Md. Rep. 129–142, 57 Am. St. R. 373.

Appeal by the company from a decree ordering it to transfer nine shares of stock to appellee, plaintiff below, standing in name of Y.

A by-law of the defendant corporation provided that if any stockholder should desire to dispose of his stock, he shall, before a trans-

[1] Statement of facts taken from syllabus. Only that part of opinion given relating to validity of by-law.

fer, notify the president of his intention to sell and of the price he can obtain, which notice shall be communicated to the other stockholders, who shall have the option to purchase the stock at the price named, in *pro rata* amounts, and the corporation shall have the right to take any such stock not taken by the shareholders. A large number of shares were originally issued to plaintiff for value. He afterwards caused some of the shares to be transferred to other parties, including a certificate for nine shares made out in the name of Y. Plaintiff alleged that the certificate was so made out in order to give Y. an opportunity to purchase them if he wished, while defendant alleged that it was done in pursuance of an agreement between plaintiff and the other chief owner of the stock that neither of them should own a majority of the shares. This allegation of the defendant was held not to be established by proof. Y. refused to accept or pay for the shares made out in his name, and assigned the certificate to the plaintiff, who demanded a transfer of the same back to himself. The defendant refused to make the transfer.

McSHERRY, C. J. * * * But the by-law itself can, when invoked by the company, interpose no obstacle to the transfer of these shares for the reason that it is invalid. It is an unreasonable and a palpable restraint upon the alienation of property. As a general rule stockholders indisputably have the right to sell their shares at pleasure. Trisconi v. Winship, 43 La. Ann. 45. That the power to regulate transfers of stock does not include authority to control its transferability by prescribing to whom the owner may sell and to whom not, or upon what terms; and that the mere power to regulate transfers does not authorize a refusal to allow a transfer of shares to even an insolvent is decided in Chouteau Spring Co. v. Harris, 20 Mo. 383. And so a by-law prohibiting the alienation of shares of stock or imposing any restrictions on its exercise is declared to be in restraint of trade and against public policy and void in Moore v. Bank of Commerce, 52 Mo. 377; Re Klaus, 67 Wis. 401; Brinkerhoff Farris Trust & Sav. Co. v. Home Lumber Co., 118 Mo. 447; Feckheimer v. Nat. Ex. Bk. of Norfolk, 79 Va. 80. And in Am. Nat. Bk. v. Oriental Mills, 17 R. I. 551, in considering a similar by-law it was held, without passing on its validity, that no one but the stockholders could take advantage of the non-compliance with the by-law, and that they had the power to waive it. And in Ireland v. Globe Milling and Reducing Co., 19 R. I. 100, 25 L. R. A. 429, it was decided that a by-law giving the corporation the first right to purchase stock which is for sale by any of its members, is not valid under a statute specifying several subjects upon which by-laws may be enacted, but making no reference to the question of stock-transfers. See, also, Farmers' Bk. v. Wasson, 48 Iowa 339; Sargent v. Franklin Ins. Co., 8 Pick. 90.

The cases in 36 Md. 491, and 48 Md. 473, and others cited are distinguishable, for there the invalidity relied on by the stockholders was invoked to defeat the claim of a *creditor*.

As we shall affirm the decree appealed from, we have not thought it worth while to consider the motion made to dismiss the appeal.

Decree affirmed with costs above and below.

Note. See, 1829, Sargent v. Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306; 1878, Farmers', etc., Bank v. Wasson, 48 Iowa 336, 30 Am. Rep. 398; 1893, Bank of Atchison v. Durfee, 118 Mo. 431, 40 Am. St. Rep. 396; 1893, Trust and Savings Co. v. Home Lumber Co., 118 Mo. 447; 1894, New England Trust Co. v. Abbott, 162 Mass. 148, 27 L. R. A. 271, and note; 1895, Ireland v. Globe Milling, etc., Co., 19 R. I. 180, 61 Am. St. Rep. 756, 29 L. R. A. 429; 1897, McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203; 1898, Ireland v. Globe Milling Co., 20 R. I. 192, 38 L. R. A. 299, 8 A. & E. C. C. N. S. 136, n. p. 141. See note, p. 1654, *infra*.

See note to Brinkerhoff-Farris Trust, etc., Co. v. Lumber Co., 118 Mo. 447, *infra*, p. 1162, and note, 57 Am. St. Rep. 379, 384.

Sec. 352. Same.

3. Liens.

CHILD versus HUDSON'S BAY COMPANY.[1]

1723. In the High Court of Chancery. 2 Peere Williams Reports 207–209.

Sir *Stephen Evans* was one of the proprietors of the stock of the *Hudson's Bay Company*, which company are made a corporation by charter, and are thereby empowered to make by-laws for the better government of the company, and for the management and direction of their trade to *Hudson's Bay*.

Accordingly they made a by-law, that if any of their members should be indebted to the company, his stock in the company should be in the first place liable to the debts which such member should owe the company, and that the company might seize and detain the said stock for the debts due to them.

[Evans became bankrupt, and his assignees brought a bill against the company asking for an accounting of the profits and dividends on Evans's stock; the company insisted that Evans was indebted to them, and that his stock ought to be liable to pay the debt. It was argued for the plaintiffs that the stock or its proceeds should not be made specially liable to pay any one debt, but should be applied to all, and that no by-law could be made in this way to the prejudice of any third person. The debt of Evans was not direct to the company, but to *J. S.* in trust for the company, upon an insurance project of that company.]

Macclesfield, L. C. This is a good by-law, for the legal interest of all the stock is in the company, who are trustees for the several members, and may order that the dividends to be made shall be under particular restrictions, or terms; and by the same reason that this by-law is objected to, the common by-laws of companies, to deduct the

[1] Statement of facts abridged.

calls out of the stocks of the members refusing to pay their calls, may be said to be void.

As to the other part of the by-law, empowering the company to detain and seize the stock of such member, that is also good; but then there ought to be some acts done by the company, to order or declare, that the stock of such member is seized for the debt due to the said company; but this being a by-law, to the prejudice of other creditors, it shall be taken strictly, and not to extend to such debt as the member does not owe in law, but only in equity, and in the present case this is in law a debt due to *J. S.*

A corporation has an implied power to make by-laws; but where the charter gives the company a power to make by-laws, they can only make them in such cases as they are enabled to do by the charter, for such power given by the charter implies a negative, that they shall not make by-laws in any other cases.

Thus, where the company, in the principal case, have a power given them by the charter to make by-laws for the management of their trade to *Hudson's Bay*, this power implies a negative, that they can not make any other by-laws; *a fortiori* they can not make by-laws in relation to projects and insurances, which by act of parliament are declared to be illegal.

Note. See note next case.

Sec. 353. Same.

BRINKERHOFF-FARRIS TRUST AND SAVINGS CO. v. HOME LUMBER COMPANY, APPELLANT.[1]

1893. IN THE SUPREME COURT OF MISSOURI. 118 Missouri Rep. 447–463.

[In 1888 the Trust Company loaned Cleland $13,000, and accepted as collateral security two certificates of stock of par value of $5,000 each in the lumber company, transferable only on the books of the company upon surrender of the certificates. Cleland having made default, the trust company sold the stock, and through its president became purchaser, and afterward presented the certificates for transfer on the books of the lumber company; this was refused because Cleland was indebted to the lumber company and it, by virtue of its by-laws, claimed a lien on the stock. The trust company claimed it had no notice of such by-law, and it was therefore void as to it. The by-law provided "any transfer of stock shall be subject to the lien of the company thereon for any indebtedness due the company from the holder."]

GANTT, P. J. * * * The court found the issue in favor of the plaintiff and assessed the damages at the par value of the stock and interest from date of demand. Motions for a new trial and in arrest were duly made and overruled and exceptions were duly taken to the admission and exclusion of evidence and giving and refusing instructions, and the case is brought to this court by appeal.

[1] Statement abridged. Arguments omitted. Only part of opinion given.

1. The defendant is a business corporation organized and existing under the provisions of article 8, chapter 21, of Revised Statutes of 1879, and the general provision of article 1, of said chapter 21, so far as applicable.

By section 709, Revised Statutes 1879, the directors of a corporation like this are only empowered to make "by-laws to direct the manner of taking the votes of stockholders on the question of increasing or diminishing the number of directors or trustees, or of changing the corporate name." The power to make all other needful or necessary by-laws is conferred upon the corporation itself, and can only be exercised by the stockholders. Rex v. Westwood, 7 Bing. 1; Bank v. Bank, 17 Mass. 33; Carroll v. Bank, 8 Mo. App. 249; State Savings Association v. Printing Co., 25 Mo. App. 642; Albers v. Merchants' Exchange, 39 Mo. App. 583.

It was very clearly pointed out by Judge Hayden in Carroll v. Bank, *supra*, that in the cases of Mechanics' Bank v. Merchants' Bank, 45 Mo. 513, and Ins. Co. v. Goodfellow, 9 Mo. 149, and Spurlock v. Railroad, 61 Mo. 326, the directors in each case received their authority to make the by-laws in question in those cases directly from the legislature.

It is very clear that the attempt of the directors of the defendant company to adopt the by-laws, restricting the rights of its stockholders to convey their stock to any one until the said directors had refused to purchase it or while indebted to the corporation, was without warrant or authority of law, and as such is not binding, either on the stockholders or those purchasing from them. The company itself had no right to pass such a by-law. Moore v. Bank, 52 Mo. 377.

But it is claimed by appellant that the so-called by-law and the resolution, although not valid as a by-law, is nevertheless binding as a valid agreement on all who were parties to it, and that, as Mr. Cleland was then the president of defendant and a director, he was bound by it, and that plaintiff, as a purchaser from Cleland, took only an equity, and was chargeable with notice of this lien, asserted by defendant, and that all [as] the certificates of stock are not negotiable papers, plaintiff can not occupy the position of an innocent purchaser for value and without notice. * * *

The spirit of all modern legislation is opposed to secret liens. At common law a corporation has no lien on the stock of its stockholders for any indebtedness to it. Accordingly, when such a lien is asserted, it should clearly appear to be authorized by public law, or by a duly adopted by-law, or valid agreement, of which the purchasers of the stock have notice. None of these conditions existed as to the stock in suit when it was transferred as security for plaintiff's loan, and consequently plaintiff took it without being bound by so-called by-law and resolution.

By section 739, Revised Statutes 1879, this stock was expressly declared to be personal estate and transferable in the manner prescribed by the by-laws, and no shares should be transfered until all previous calls thereon should be fully paid. The only restriction on

the transfer by this section is upon the stock which was not fully paid up; a restriction not applicable here, because this stock was fully paid up in the beginning. The purpose of permitting the company to require a transfer on the books was clearly to advise the company of the change of ownership in order that only the owners of the stock should participate in the corporate election, and to enable the corporation to pay dividends without risk, or make assessments upon the holders of its stock, but certainly it was not intended that under this power to regulate transfers, the company should create or reserve a secret lien upon the stock. Without reference to its *quasi*-negotiable character, the pledge or sale of this stock was simply a pledge or sale of personal property, and the pledgee or vendee, without notice of the lien, took it discharged therefrom. He did not purchase a mere equity in paper, but he purchased personal property. If that property was bound by a lien of which he had lawful notice, he took subject to it, and if he had no such notice he took it discharged therefrom. The mere recital that "it was only transferable on the books of the company" was not notice, either of a restriction on sale, or of a lien thereon. * * *

[Upon the question of value, the court held the measure of damages for conversion is its actual value, which, if it has no market value, is presumptively its face value, but may be established by proof of its dividend-earning capacity (though an expert's opinion on this point is not competent), or by value of corporate assets, or by individual sales not under compulsion.]

Affirmed.

Note. By the weight of authority valid liens upon shares can not be created by by-law alone, so as to prevent the transfer of the shares, divested of the lien, to persons having no notice of such lien: 1825, Fitzhugh v. Bank, 3 T. B. Mon. (Ky.) 126, 16 Am. Dec. 90, *note;* 1829, Sargent v. Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306; 1878, Farmers', etc., Bank v. Wasson, 48 Iowa 336, 30 Am. R. 398; 1880, Bank of Holly Springs v. Pinson, 58 Miss. 421, 38 Am. R. 330; 1892, Gemmel v. Davis, 75 Md. 546, 32 Am. St. R. 412, note; 1893, Bank of Atchison Co. v. Durfee, 118 Mo. 431, 40 Am. St. R. 396; 1896, Bloede Co. v. Bloede, 84 Md. 129, 57 Am. St. R. 373, note 379, *supra*, p. 1159; 1897, Boyd v. Redd, 120 N. C. 335, 58 Am. St. R. 792; 1898, Dorr v. Life, 71 Minn. 38, 70 Am. St. R. 309. See also *notes* 11 Am. Dec. 581, 85 Am. Dec. 619, 57 Am. St. R. 379; Compare 1903, People's Bank v. Exchange Bk., 116 Ga. 820, 94 Am. St. R. 144, 43 S. E. 269.

Contra, 1822, Morgan v. Bank, 8 Serg. & R. 73, 11 Am. Dec. 575; 1870, Mechanics' Bank v. Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388. See also cases given in *notes* 11 Am. Dec. 581, and 85 Am. Dec. 619.

Such valid lien, however, may be created by express statutory or charter provision or authority. 1859, Reese v. Bank, 14 Md. 271, 74 Am. Dec. 536; 1896, Bloede Co. v. Bloede, 84 Md. 129, 57 Am. St. R. 373, note 379; 1898, Dorr v. Life, 71 Minn. 38, 70 Am. St. R. 309.

Or by contract contained in the certificate of stock: 1899, Stafford v. Produce Exchange Banking Co., 61 O. S. 160, 76 Am. St. Rep. 371.

Sec. 354. Same.

4. Expulsion of members.

EVANS v. THE PHILADELPHIA CLUB.[1]

1865. IN THE SUPREME COURT OF PENNSYLVANIA. 50 Pa. St. Rep. 107–127.

Certificate from the court at *Nisi Prius*. Evans petitioned for *mandamus* to be restored to membership in the club, claiming to have been expelled for an insufficient cause. The decision of the court at *Nisi Prius* was delivered by WOODWARD, C. J., as follows:

"This case touches the power of a private corporation to disfranchise one of its members, and it will be necessary and proper to examine, somewhat minutely, the authorities of the law bearing upon the point.

"The leading case upon this branch of law is that of James Bagg, decided in the reign of James I (A. D. 1616), and reported in Coke's Reports, part xi, p. 93. Bagg was one of twelve chief burgesses of the borough of Plymouth, in England, and having been guilty of the most scandalous and disorderly speeches to the mayor and his fellow burgesses, was expelled, but the King's Bench restored him by *mandamus*. Among other things it was resolved, 'That no freeman of any corporation can be disfranchised by the corporation, unless they have authority to do it, either by the express words of the charter or by prescription; but if they have not authority, neither by charter nor prescription, then he ought to be convicted by course of law before he can be removed.' And in support of this, Lord Coke quotes that famous clause of Magna Charta, beginning '*Nullus liber homo*,' etc.

"Though much was said about disfranchisement in Bagg's case, it was really a case of amotion, and not of disfranchisement. Bagg was removed from the office of burgess, and not expelled from the borough by the action of the corporation. Mr. Willcock, in his excellent treatise on Corporations, page 270, defines amotion as applicable only to officers, and says it causes a cessation of the particular offices from which they are amoved, but in no manner affects their right to the freedom of the municipality; whilst disfranchisement is applicable only to the freedom, and cuts off the corporator from all rights and privileges of the corporation. It appears, he says, that there is *not* an incidental right in corporations to disfranchise their members, but it must be claimed by prescription or express grant of the charter. For this he refers himself to Bagg's case, which, he says, has never been expressly overruled; the cases in which it has been questioned having been cases of amotion. He then goes on to make some general observations on the subject, all of which are so excellent, and some of which are so pertinent to the case in hand, that I am tempted to transcribe them. He says: 'At the time when James

[1] Statement of facts abridged. Arguments and part of opinion omitted.

Bagg's case was before the court, their attention had been rarely attracted to the consideration of corporate causes, and the distinction between the right to the offices and the right to the freedom of a municipality had been little considered. The particular case was of amotion from office; the arguments were in general more applicable to disfranchisement. But there is a material difference in principle. The enjoyment of office is not for the private benefit of the corporator, but an honorable distinction which he holds for the welfare of the corporation, and therefore, though it be an office of a freehold nature, it is entirely conditional. * * * But the franchise of a freeman is wholly for his own benefit, and a private right; a right in the municipality similar to that of a natural subject in the state, of which he ought not to be deprived for any minor offense against his corporate fealty, any more than that for which, as a subject, he ought to be deprived of his franchise as a liegeman. For this reason, all minor corporate offenses, *such as improper behavior to his fellow-corporators*, where not punishable by the general law of the land, as well as violations of his corporate duties, ought to be punished by penalties imposed by the ordinances of the municipality, and not by disfranchisement. But such offenses against the general law as occasion a forfeiture of all civil rights, import in themselves a forfeiture of the corporate franchise; and offenses against the corporation which tend to its destruction, such as defacing the charters, altering the corporate records so as to destroy the evidence of their title to privileges, or that of the title of his fellow-corporators to their franchises, are of course causes of disfranchisement.'

"These observations relate to municipal corporations; but why are they not equally applicable to private corporations? The interest or 'freedom' which a member has in a private corporation is as truly a 'franchise' as that which any of the burgesses mentioned in Bagg's case had in the borough of Plymouth, and may often be a much more valuable franchise. Where it has been obtained by the payment of a pecuniary consideration, and property is held in connection with it, it is a vested estate, and certainly ought not to be sacrificed on account of minor offenses, which would not be permitted to forfeit individual interests in a municipal corporation. And if a power to disfranchise in a municipal corporation does not exist unless expressly granted, it is very safe to conclude that it is not inherent in a private corporation, and must have an express grant to support it.

"The extent to which Bagg's case has been overruled is clearly indicated in Lord Bruce's Case, 2 Strange 819, which was a case of amotion, not disfranchisement, and where it was said 'the modern opinion has been that a *power of amotion* is incident to the corporation, though Bagg's case seems contrary.' Richardson's Case, 1 Burr. 517, was amotion from a municipal office—that of portman of the borough of Ipswich. Lord Mansfield went very fully into the law of corporations, and whilst the amotion was not sustained, he sanctioned, very distinctly, the 'modern opinion' referred to in Lord Bruce's case.

and stated three sorts of offenses for which an officer or a corporator may be discharged:

"'1. Such as have no immediate relation to his office; but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise.

"'2. Such as are only against his oath and the duty of his office as a corporator, and amount to breaches of the tacit condition annexed to his franchise or office.

"'3. Such as are of a mixed nature, as being an offense not only against the duty of his office, but also a matter indictable at common law.'

"Of these distinctions, limited originally to municipal corporations, I shall have something to say hereafter, when I come to speak of them in connection with private corporations.

"In Earle's Case, Carthew 173, it was held that a member of a corporation can not be disfranchised except for that which works to the destruction of the body corporate, or of the liberties and privileges thereof, *and not for any personal offense of one member to another.*

"Tidderly's Case, 1 Siderfin 14, was a question of restoring a municipal officer who had voluntarily resigned, and Chief Justice Hale held that every corporation had power to receive a resignation, and might, for good cause, amove.

"These cases are sufficient to reflect the opinion of the English courts on Bagg's case. A more full reference to the authorities will be found in the notes to Willcock's chapter on disfranchisement, in his work on Corporations. The result seems to be that the resolution I quoted from Bagg's case has been so far modified that the power of *amotion* is inherent in the nature of corporations and not dependent upon prescription or charter, but the authorities do not establish the point that corporations have inherent power to *disfranchise* a private member. But Bagg's case is an authority against the power of disfranchisement no farther than the reasonings therein are entitled to respect, for the point of the case had not reference either to private corporations or the power of disfranchisement. Whilst, therefore, the *very point* of the case may be regarded as overruled, the reasonings, as expounded by Mr. Willcock, are such as to commend them to universal acceptance. Where corporations are founded upon private capital, the modern English cases are very unanimous in holding that no stockholder can be disfranchised, and thereby deprived of his interest in the property of the corporation, without an express authority for the purpose in the charter.

"In Pennsylvania, The Commonwealth, *ex rel.* John Binns, v. The St. Patrick Benevolent Society, 2 Binn. 441, is the leading case. The society, under a power conferred by its charter, made a by-law that vilifying a member by another member should be punished as a crime against the society, by removal from office, fine, or expulsion. Binns having been convicted of grossly vilifying a fellow-member, was expelled therefor under this by-law. The supreme court restored him upon *mandamus*, mainly on the ground that the by-law was not

necessary for the good government and support of the affairs of the corporation—that it subjected the rights of membership to the uncertain will of a majority—that 'the offense of vilifying a member, on a private quarrel, is totally unconnected with the affairs of the society, and therefore its punishment can not be necessary for the good government of the corporation.' Chief Justice Tilghman, delivering the opinion of the court, quoted Lord Mansfield's three sorts of offenses as laid down in Richardson's case, and said Binn's offense did not come within either of them, and he concluded by declaring that 'without an express power in the charter, no man can be disfranchised unless he has been guilty of some offense which either affects the interest or good government of the corporation, or is indictable by the law of the land.'

"In Fuller v. The Trustees of the Plainfield Academy, 6 Conn. 532, Judge Dagget alluded to the doctrine that a power of amotion is incidental to corporations, but seemed to doubt whether it was applicable to any but municipal corporations, and quoted Judge Story as saying in the Dartmouth College case that there could be no amotion of the trustees of that institution, and he restored the trustee of the Plainfield Academy, who had been expelled for disrespectful and contemptuous language towards his associates, and for neglect of duty as a trustee. 'The court,' he said, 'can not justify expulsion from office on such charges. What the trustee might have done to one of their number who had committed a crime which would banish him from society, it is not necessary to decide.' Another principle was asserted in this case, that the place of a trustee in an eleemosynary corporation, though no emoluments are attached to it, is a franchise of such a nature that a person improperly dispossessed of it is entitled to redress by *mandamus*. See also Dartmouth College v. Woodward, 4 Wheat. 676.

"In the case of Gray v. The Medical Society of Erie, 24 Barb. 570, a physician was asking to be restored to a society from which he had been expelled for violating a by-law that prescribed a tariff of fees for medical services. The supreme court of New York went very fully into the authorities upon corporate powers, and held that the power given to medical societies by statute to make by-laws and regulations relative to the admission and expulsion of members, was not an arbitrary or unlimited power, and that a by-law must be reasonable, and adapted to the purposes of the corporation.

"In the case of The Commonwealth v. Philanthropic Society, 5 Binn. 486, we have in our own courts what is very rare in the authorities, an instance of expulsion that was sustained. A member made a demand upon the society for relief agreeably to the rules of the institution, and presented a physician's bill which he had altered from $4 to $40, and which he claimed to have paid. Upon the ground that this was a scandalous crime, amounting almost, if not quite, to technical forgery, and that it was directly injurious to the society, his expulsion was supported.

"In The Commonwealth v. The Franklin Beneficial Association.

10 Barr 357, a member was restored who had been expelled for enlisting in a violation of a by-law of the society.

"In The Commonwealth v. The German Society, 3 Harris 251, a society for 'mutual support and assistance,' the cause of disfranchisement was that the member had assisted, as president of the society, in defrauding it out of fifty cents, and had defamed and injured the society in public taverns. It was held not to be a sufficient cause, and he was restored.

"When the charter of the Butchers' Beneficial Association was presented to our supreme court, it was rejected on the ground, among others, that it allowed the association to expel members who should be 'guilty of actions which may injure the association.' This, said the chief justice, we can not approve; for it gives the association an entirely indefinite power over its members. For any action which may injure them they may expel, and therefore they may expel a member for becoming insolvent. It is totally incompatible with the whole spirit of our institutions, to clothe anybody with such indefinite power over its members; for it is equivalent to socialism, and is a rejection of all individual rights within the association. It is common in such charters to found the right of expulsion on the fact that the member has been found guilty of some crime on a trial in court, and this is quite proper. 11 Harris 151.

"In the case of The Beneficial Association of Brotherly Unity, 2 Wright 299, a charter was rejected because it gave a majority the power to expel any member 'guilty of an offense against the law'—the court holding that a constitution that puts all power over rights in the hands of a majority is no constitution at all.

"Gathering now, into one group, the principles of decision that lie scattered through the authorities, they may be stated thus:

"1. That the power of amotion for adequate cause, is an inherent incident of all corporations, whether municipal or private, except, perhaps, such as are literary or eleemosynary, but the exercise of this power does not affect the private rights of the corporator in the franchise.

"2. That the power of disfranchisement which does destroy the member's franchise, must, in general, be conferred by statute, and is never sustained as an incidental power, without statute grant, except in two cases—first, on conviction of the member in a court of justice of an infamous offense; and second, where he has committed some act *against the society* which tends to its destruction or injury.

"3. That the power to make by-laws is incidental to corporations, and generally expressly conferred by statute; but by-laws which vest in a majority the power of expulsion for minor offenses, are, in so far, void, and courts of justice will not sustain expulsion made under them.

"4. In joint stock companies, 'or, indeed, in any corporation owning property' (Angell & Ames on Corporations, § 410), no power

of expulsion can be exercised unless expressly conferred by the charter. * * *

"The 65th, 66th and 67th by-laws enact that 'if the conduct of a member be disorderly, or injurious to the interest of the club, or contrary to its by-laws, he shall be requested to resign, and if the request be disregarded, the board shall refer the matter to the next stated meeting of the club, and at such meeting the circumstances of the case shall be considered, and the member may be expelled.'

"The relator became a member of the club in 1848, and it is not alleged that he has failed to pay any of his dues, or perform any of his duties to the club, but the return alleges that on 'the evening of the 24th of February, 1863, the defendant was guilty of breaking the 65th by-law by having an altercation within the walls of the club-house with Samuel B. Thomas, and by striking him a blow.' For this he was expelled. * * *

"It is not alleged that the relator is a quarrelsome person or habitually disorderly. On the contrary, it was admitted in argument that he is a respectable gentleman, and it is shown that when the offense occurred he was sitting in the bar-room of the club-house in quiet and friendly conversation with another person, when Thomas entered and uttered defamatory words which the relator understood to be applied to himself. It was therefore an assault upon Thomas, provoked by himself. It was not an interruption of any deliberations or proceedings of the club in a state of organization—it occurred not in a reading-room, or an eating-room, nor at a card or billiard table, but in what is called the office or bar-room of the house.

"I look upon the occurrence as disorderly and injurious to the interest of the club, within the meaning of the 65th by-law, but as one of those 'minor offenses,' of which Mr. Willcock speaks, and for which a majority have no power, even under the by-laws, to disfranchise a member. And upon the doctrine of the cases I have referred to, I hold the by-law void so far as it inflicts this extreme penalty for such an offense. I would be very sorry to say that anything short of a statute could confer on a majority of the members of any corporation power to expel a fellow-member for merely disorderly conduct. * * *

"But what is conclusive of this case is, that the corporation possesses property, real and personal, and is at liberty to accumulate more, until an annual revenue of $3,000 comes to be enjoyed: and the relator has purchased and paid for the right to participate in that franchise. It is not a joint stock company at present, for under its by-laws no pecuniary profits are divisible among the members, but it may become so, and whether it does or not, the relator has a vested interest in its estate, and can not be deprived of it by the proceedings that were had against him. On this point the authorities are clear, and without conflict. Nothing but an express power in the charter can authorize a money corporation to throw overboard one of its members. I have shown that the act of incorporation contained no such power. On the contrary, it excluded it, for the proviso reads 'that nothing herein contained shall be so construed as to authorize

said Philadelphia Association and Reading-Room to do *any other act or acts* in their corporate capacity than are herein expressed.'

"For these reasons a peremptory *mandamus* must be awarded."

Affirmed by an equal division of the court in banc.

Note. As to right to provide by by-laws for expulsion of members, see, 1810, Commonwealth v. St. Patrick's Soc., 2 Binney (Pa.) 441, 4 Am. Dec. 453; 1821, Delacy v. Neuse River Nav. Co., 1 Hawks (N. C.) 274, 9 Am. Dec. 636; 1836, *In re* Phil. Sav. Inst., 1 Whart. (Pa.) 461, 30 Am. Dec. 226; 1836, Black, etc., Soc. v. Vandyke, 2 Whart. 312, 30 Am. Dec. 263; 1857, Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665, *note* 671; 1866, Society, etc., v. Commonwealth, 52 Pa. St. 125, 91 Am. Dec. 139; 1869, State v. Georgia Med. Soc., 38 Ga. 608, 95 Am. Dec. 408, *supra*, p. 136, *note* 140; 1871, Dickenson v. Chamber of Com., 29 Wis. 45, 9 Am. Rep. 544; 1872, Gregg v. Massachusetts M. Soc., 111 Mass. 185, 15 Am. Rep. 24, *note* 27; 1888, Otto v. Journeyman, etc., Union, 75 Cal. 308, 7 Am. St. Rep. 156, *note* 160; 1890, Connelly v. Masonic, etc., Ben. Ass'n, 58 Conn. 552, 18 Am. St. Rep. 296; 1890, Commonwealth v. Union League, 135 Pa. St. 301, 20 Am. St. Rep. 870; 1891, Huston v. Reutlinger, 91 Ky. 333, 34 Am. St. Rep. 225; 1892, Am. Live Stock Co. v. Chicago L. S. Ex., 143 Ill. 210, 36 Am. St. Rep. 385, *supra*, p. 682; 1895, Ryan v. Cudahy, 157 Ill. 108, 48 Am. St. Rep. 305; 1896, Jackson v. South Omaha L. S. Ex., 49 Neb. 687; 1896, Board of Trade of Chicago v. Nelson, 162 Ill. 431, 53 Am. St. Rep. 312; 1897, Robinson v. Templar Lodge, 117 Cal. 370, 59 Am. St. Rep. 193, *note* 201; 1899, Weiss v. Musical, etc., Union, 189 Pa. St. 446, 69 Am. St. Rep. 820.

Mandamus is the proper remedy to reinstate: 1821, Delacy v. Neuse Riv. Nav. Co., 1 Hawks (N. C.) 274, 9 Am. Dec. 636; 1836, Black, etc., Soc. v. Vandyke, 2 Whart. (Pa.) 312, 30 Am. Dec. 263; 1869, State v. Georgia Med. Soc., 38 Ga. 608, 95 Am. Dec. 408, *supra*, 136; 1888, Otto v. Journeyman Tailors', etc., Union, 75 Cal. 308, 7 Am. St. Rep. 156; 1897, Robinson v. Templar Lodge, 117 Cal. 370, 59 Am. St. Rep. 193, *note* 201; 1899, Weiss v. Musical, etc., Union, 189 Pa. St. 446, 69 Am. St. Rep. 820.

The courts, however, will not generally interfere, unless there are property rights involved, or for the purpose, and to the extent only, of ascertaining that the proceedings were according to the rules and regulations, carried on in good faith, and not in violation of the law of the land: 1857, Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665, *note* 671; 1877, Illinois, etc., Soc. v. Baldwin, 86 Ill. 479; 1888, Otto v. Journeyman Tailors' Union, 75 Cal. 308, 7 Am. St. Rep. 156, *note* 160; 1890, Lewis v. Wilson, 121 N. Y. 284; 1890, Connelly v. Masonic M. B. Ass'n, 58 Conn. 552, 18 Am. St. Rep. 296, *note* 201; 1895, Ryan v. Cudahy, 157 Ill. 108, 48 Am. St. Rep. 305; 1896, People v. N. Y., etc., Exch., 149 N. Y. 401.

Sec. 355. 3. Validity of by-laws in general.

THE PEOPLE v. THE CHICAGO LIVE STOCK EXCHANGE.[1]

1897. In the Supreme Court of Illinois. 170 Ill. 556–571, 62 Am. St. Rep. 404.

[Petition for leave to file information in nature of *quo warranto* against the Live Stock Exchange, for assuming to enact and attempting to enforce without authority, a by-law prohibiting members from employing trade solicitors not members of the association, limiting

[1] Statement of facts abridged. Arguments and part of opinion omitted.

the number of solicitors which may be employed by members in certain states, and providing that such solicitors must be paid a fixed salary, and not allowed to work on commission. It was claimed the by-law was in restraint of trade, and interfered with the legal rights of the members. The lower court held it valid, and denied the application. Appeal was taken from this judgment.]

PHILLIPS, C. J. * * * The common law refused to recognize restrictions upon trade and business among the citizens of a common country. Under this rule of the common law the right of the laborer to dispose of his skill and industry, and to contract in reference to the same with whom he pleased and at such contract rates as might be agreed on, was recognized and not allowed to be trammeled with restrictions which interfered with individual action and liberty. Combinations and associations of men have no right to place restrictions upon the right of an individual to contract and engage in business, employing such means and agencies as are not prohibited by law. The natural flow of trade and commerce must be unrestricted, and men engaged therein may accelerate its current by all means not unlawful. To this end men engaged in trade and commerce may advertise, employ men to solicit business and offer rewards and inducements to secure trade without violating the law of the land, and in so doing are exercising a right which is in the interest of the public, because competition can not be hostile to public interests. Efforts to prevent competition and to restrict individual efforts and freedom of action in trade and commerce are restrictions hostile to the public welfare, not consonant with the spirit of our institutions and in violation of law. * * *

In Rex v. Wardens of the Coopers' Co., 7 T. R. 543, it was held that a by-law limiting the number of apprentices which any member of the company might take was void. In the case of Tailors of Ipswich, 11 Coke 53, a corporation known as the Tailors of Ipswich enacted a by-law to prohibit any tailor from exercising his trade until he had presented himself before the corporation and proved that he had served seven years as an apprentice. This by-law was held void, as being in restraint of trade. See, also, Gunmakers' Society v. Fell, Willes 384. Sustaining the same propositions are Stanton v. Allen, 5 Denio 434; People v. Fisher, 14 Wend. 9; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; People, *ex rel.*, v. Medical Society of Erie, 24 Barb. 570.

A case similar to that now under consideration was before the court of appeals of Kentucky in Huston v. Reutlinger, 15 S. W. Rep. 857. There the Louisville Board of Underwriters passed a by-law which, among other things, prohibited local companies from employing more than one solicitor, and regulated the manner in which the salary of such solicitor was to be paid. For a violation of this by-law the offending member of the board would forfeit all rights as a member of the association. A local company which had employed more than one solicitor sought to enjoin the enforcement of the forfeiture on the ground that the association had no authority to control the members in the employment of solicitors, etc. A decree was en-

tered in accordance with the prayer of the bill, which, on appeal, was affirmed, the court saying: "The majority of the members, under the guise of producing harmony in this business association, have taken from their individual members the right to determine how many men they shall employ in their private business, and then only such as the association may think fit for the position. Nor can they employ a solicitor for a less period than six months, or offer a solicitor employment within twelve months after the solicitor has severed his connection with any member; are compelled to discharge those in their employ if they have more than one; and, if these by-laws are enforced, have placed their business under the control of the majority vote of the association—a power the exercise of which was not given by the fundamental law of the order, and doubtless not contemplated when the association was formed. * * * The common law rule, recognized and adopted when business relations were not so multiplied and extensive as now and when less necessity existed for enforcing it, condemned all such restrictions upon trade and business intercourse with men as is found to exist in this case. The right of one to control his own property as he pleases, and to employ those necessary to aid him in his business upon such terms as may be agreed upon, when not in violation of the law of the land, is the rule of the common law, and the right of the laborer to dispose of his skill and industry to whom he pleases and for the price agreed on is embraced within the same rule. In all classes of business the employer and employee should be allowed to contract with each other unrestrained by others who may demand that the one shall give more or the other receive less, and, as a general rule, when restrictions are placed upon their rights by combinations or associations of men, they will be regarded as in violation of law, and void."

When a corporation is created there goes with it the power to enact by-laws for its government and guidance as well as for the guidance and government of its members. This power is necessary to enable a corporation to accomplish the purpose of its creation. *But by-laws must be reasonable and for a corporate purpose, and always within charter limits. They must always be strictly subordinate to the constitution and the general law of the land. They must not infringe the policy of the state nor be hostile to public welfare. The by-law in this case is a restriction on freedom of trade and business. It trammels competition and prohibits an individual from contracting and engaging in business, and from using such agencies and means he may desire not hostile to general law.* It is not required for corporate purposes, nor is it included within the purposes declared in the certificate of incorporation. It is, therefore, unlawful, as this corporation had no right to exercise this power of enacting it under its franchise. * * *

Petition should have been granted.

Reversed and remanded.

Note. Validity of by-laws in general: They must be reasonable, not violate charter, statute or common law rules, operate uniformly and not be in re-

straint of trade: 1837, Matter of L. I. R., 19 Wend. 37, 32 Am. Dec. 429; 1848, Palmetto Lodge v. Hubbell, 2 Strob. (S. C.) 457, 49 Am. Dec. 604; 1854, State v. Overton, 4 Zabr. (N. J.) 435, 61 Am. Dec. 671; 1863, Sayre v. Louisville Benev. Assn., 1 Duvall (Ky.) 143, 85 Am. Dec. 613, *note* 617; 1887, Budd v. Multnomah St. R. Co., 15 Ore. 413, 3 Am. St. Rep. 169, *infra*, p. 1569; 1892, Am. Live Stock Co. v. Chicago L. S. Ex., 143 Ill. 210, 36 Am. St. Rep. 385; 1895, Durkee v. People, 155 Ill. 354, 46 Am. St. Rep. 340; 1897, McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203; 1897, People v. Chicago, etc., Exchange, 170 Ill. 556, 62 Am. St. Rep. 404, *supra*, p. 1171; 1897, Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162; 1897, King v. Internat'l Bldg. Union, 170 Ill. 135, 7 Am. & E. C. C. (N. S.) 526; 1899, Northport, etc., Assn. v. Perkins, 93 Maine 235, 74 Am. St. Rep. 342; 1899, Herring v. Ruskin Co-op. Assn., — Tenn. Ch. App.——, 52 S. W. Rep. 327; 1899, Bailey v. Assn. of Master Plumbers, 103 Tenn. 99, 46 L. R. A. 561.

But if they are authorized by the charter, the courts can not set them aside as unreasonable: 1899, Burden v. Burden, 159 N. Y. 287.

By-laws can not modify vested rights arising under contracts, change terms as to dividends, increase or decrease liability of shareholders, or enlarge corporate powers: 1868, Flint v. Pierce, 99 Mass. 68, 96 Am. Dec. 691, *infra*, p. 1174; 1887, Hazeltine v. Belfast R. Co., 79 Maine 411, 1 Am. St. Rep. 330; 1897, Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162; 1899, Steiner v. Steiner L. & L. Co., 120 Ala. 128, 26 So. Rep. 494; 1899, State v. Citizens' Bank, 51 La. Ann. 426, 25 So. Rep. 318; 1902, Wuerfler v. Trustees, etc., 116 Wis. 19, 96 Am. St. R. 940.

Sec. 356. 4. Effect of by-laws.

SAMUEL FLINT v. JAMES PIERCE.[1]

1868. In the Supreme Judicial Court of Massachusetts. 99 Mass. Rep. 68–71, 96 Am. Dec. 691.

[Suit by Flint against Pierce for balance of a loan due on a note given in 1862 by a corporation of which Pierce was a member, and had signed a by-law providing that "The members of this association pledge themselves, in their individual as well as collective capacity, to be responsible for all moneys loaned to this association."]

Wells, J. The note upon which this action is based is the contract of the corporation. The defendant is not a party to that contract; and the plaintiff does not seek, by this suit, to charge him upon any statute liability as a stockholder. Responsibility for the amount of the note is sought to be established through a by-law of the corporation, to which the defendant had attached his signature. This by-law, with others, was adopted in 1831. To become a member of the association it was requisite to subscribe the by-laws. It does not appear that the defendant's signature was attached for any other purpose than to constitute him a member of the corporation. It does not appear, and is not alleged, that the plaintiff lent his money upon the faith or credit of the individual pledge contained in the by-law; nor that the by-law was in any manner made known to him, or to the public, as the basis of such credit.

[1] Statement abridged. Arguments and part of opinion omitted.

The office of a by-law is to regulate the conduct and define the duties of the members towards the corporation and between themselves. So far as its provisions are in the nature of contract, the parties thereto are the members of the association, as between themselves; or the corporation upon the one side and its individual members upon the other. The right of any third party, stranger to the association, to establish a legal claim through such a by-law, must depend upon the general principles applicable to express contracts, as laid down in Mellen v. Whipple, 1 Gray 317, and the subsequent decisions in Field v. Crawford, 6 Gray 116, and Dow v. Clark, 7 Gray 198. No action can be maintained by such third party unless he can bring his case within some of the recognized exceptions to that general rule. A pledge like the one in question, if made for the purpose of enabling the corporation to obtain a loan upon the faith of it, and used for that purpose, may perhaps give a right of action against the subscribers in favor of a party who has been induced to advance money upon its credit. This seems to be implied strongly by the decision in the case of Trustees of Free Schools in Andover v. Flint, 13 Met. 543, inasmuch as the plaintiff in that case appears to have failed to recover upon a similar claim merely for the reason that the defendant had not signed the by-law. But no such facts are shown to exist in the present case. The plaintiff not only is no party to the contract contained in the by-law, but he fails to show any privity between himself and the defendant in relation to the subject-matter, or to the consideration, of his demand. Judgment must be rendered accordingly for the defendant.

Note. Effect of by-laws.

(a) *As to members*, they are generally held to be charged with notice of the provisions of the by-laws, and be bound by them, if valid: 1854, Came v. Brigham, 39 Maine 35; 1859, Anacosta Tribe v. Murbach, 13 Md. 91, 71 Am. Dec. 625; 1884, Wetherly v. Med. & Sur. Soc., 76 Ala. 567; 1887, Mutual Life Ins. Co. v. McSherry, 68 Md. 41; 1888, Supreme Lodge K. of P. v. Knight, 117 Ind. 489, 3 L. R. A. 409; 1888, Miller v. Hillsboro Mut. F. Assn., 44 N. J. Eq. 224; 1889, Pfister v. Gerwig, 122 Ind. 567; 1893, Matthews v. Assoc. Press, 136 N. Y. 333; 1894, Mandel v. Swan, L. & C. Co., 51 Ill. App. 204.

But see, 1891, Pearsall v. W. U. Tel. Co., 124 N. Y. 256, 21 Am. St. Rep. 662; 1891, Rudd v. Robinson, 126 N. Y. 113, 22 Am. St. Rep. 816; 1894, People's Home Sav. Bk. v. Sup. Ct., 104 Cal. 649, 43 Am. St. Rep. 147, *note* 152.

(b) *As to third parties*, those having no notice of by-laws are not affected by their provisions: 1856, Worcester v. Essex Merrimac B. Co., 7 Gray (Mass.) 457; 1869, Samuel v. Holladay, Fed. Cas. 12288; 1892, Am. Liv. St. Co. v. Chicago L. S. Ex., 143 Ill. 210, 36 Am. St. Rep. 385; 1893, Metropole B. & T. B. Co. v. Garden City, etc., 50 Ill. App. 681; 1898, Barnes v. Black D. Coal Co., 101 Tenn. 354, 47 S. W. Rep. 498; 1898, Ireland v. Globe Milling Co., 21 R. I. 9, 41 Atl. Rep. 258; 1899, Northport, etc., Assn. v. Perkins, 93 Maine 235, Rep. 74 Am. St. Rep. 342.

But see, *contra*, 1857, Cummings v. Webster, 43 Maine 192; 1885, Haden v. Farmers' & M. F. Assn., 80 Va. 683.

ARTICLE IX. DISFRANCHISEMENT OF MEMBERS.

See State v. Georgia Med. Soc., 38 Ga. 608, 95 Am. Dec. 408, *supra*, p. 136, note 140; White v. Brownell, 2 Daly 329, *supra*, p. 187; Belton v. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495, *supra*, p. 178; American Live Stock Co. v. Chicago L. S. Ex., 143 Ill. 210, 36 Am. St. Rep. 241, *supra*, p. 682; Evans v. The Philadelphia Club, 50 Pa. St. 107, *supra*, p. 1165, and note, p. 1171.

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